UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ARTHUR DOE, *et al*.,

Plaintiffs,

v.

JIM HOOD, Attorney General of the State of Mississippi, *et al*,

Defendants.

Case No. 3:16-cv-00789-CWR-FKB

CLASS ACTION

Oral Argument Requested

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants' opposition to Plaintiffs' Motion for Summary Judgment is notable for what it does not say. Defendants fail to address or even mention Plaintiffs' claims that Mississippi's classification of those with Unnatural Intercourse convictions violates equal protection principles, and they fail to confront the plain language of *Lawrence v. Texas* invalidating state sodomy statutes as well as subsequent federal appellate court reasoning. These omissions are fatal to Defendants' opposition.

There is no dispute of material fact that by continuing to require that they register as sex offenders, Mississippi is violating Plaintiffs' rights to equal protection and due process under the Fourteenth Amendment. Plaintiffs are entitled to summary judgment as a matter of law, and the Court should enjoin Defendants from requiring them to comply with the MSOR, strike down the "crime against nature with mankind" portion of the Unnatural Intercourse Act, and expunge Plaintiffs' names from all relevant state records.

ARGUMENT

Plaintiffs have convictions under Mississippi's Unnatural Intercourse statute or under out-of-state statutes that Mississippi considers equivalent to the Unnatural Intercourse statute, which prohibits "crimes against nature committed with mankind," defined in the case law as oral or anal sex. Miss. Code. Ann. 97-29-59; *State v. Davis*, 79 So. 2d 452 (Miss. 1955); *Haymond v. State*, 478 So. 2d 297, 299 (Miss. 1985)). The Unnatural Intercourse statute does not include any element of force, age, public activity, or commercial transactions: all it requires for a conviction is engagement in specific sexual acts. The existence and enforcement of this statute through the Mississippi Sex Offender Registry (MSOR) violates both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. All that is required to evaluate the

constitutionality of the relevant statutes and Mississippi's classification of Plaintiffs as sex offenders is an analysis of the statutory text.

Defendants fail to directly confront the actual holding of *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated all sodomy statutes whose only element was the prohibition of oral or anal sex. And more notably still, Defendants make no mention at all of Plaintiffs' Equal Protection claims, failing to oppose Plaintiffs' argument that the classification of those with Unnatural Intercourse convictions or out-of-state "equivalents" as sex offenders, in contrast to those with convictions under the Prostitution statute, is arbitrary and unrelated to any legitimate state interest. *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("MSJ"), Dkt. #16, at 17-24.

I. Defendants Have Failed To Oppose Plaintiffs' Argument that Their Classification as Sex Offenders Violates the Equal Protection Clause.

Defendants present no legal arguments or specify any material facts to address Plaintiffs' arguments that their classification as sex offenders violates the Equal Protection Clause as a matter of law. They simply do not respond to Plaintiffs' argument that Mississippi has created an impermissible classification by requiring those with Unnatural Intercourse or purportedly equivalent out-of-state convictions to register as sex offenders. Plaintiffs' arguments in support of their motion for summary judgment on the equal protection claim are thus unopposed.

As Plaintiffs have argued, Mississippi has created a classification by requiring individuals convicted of Unnatural Intercourse or purportedly-equivalent out-of-state statutes to register as sex offenders for a minimum of twenty-five years, Miss. Code Ann. § 45-33-47(2)(c)(i)(2), where no such requirement exists for individuals convicted under Mississippi's

Prostitution statute, Miss. Code. Ann. § 97-29-49, which prohibits identical conduct.[1] *See* MSJ at 18-20. The differential consequences imposed for convictions under these analytically-indistinct statutes are stark. Moreover, this classification bears no rational relation to a legitimate state interest. *Id*. at 20-22. Where the State is targeting precisely the same conduct under different statutes – that is, where the targeted "evil, as perceived by the state, [is] identical" – it must do so equally, otherwise its actions are arbitrary and offend the Equal Protection Clause. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (invalidating the criminalization of contraceptive distribution to unmarried persons, but not to married persons).. Defendants have not addressed this argument, and nor have they provided any defense for the state's decision to classify individuals with convictions under Louisiana's Crime Against Nature by Solicitation ("CANS") as sex offenders, even though they are not required to register in Louisiana, and would not have been required to register in Mississippi had they been convicted under Mississippi's Prostitution statute, which prohibit identical activity. *See A.W. v. Peterson*, No. 8:14CV256, 2016 U.S. Dist. LEXIS 36077 (D. Ne. Mar. 21, 2016) ("It … makes no sense to believe that the Nebraska statutes were intended to be more punitive to juveniles adjudicated out of state [by requiring them to register as sex offenders] as compared to juveniles adjudicated in Nebraska").

Analyzing an identical classification under Louisiana's statutory scheme, a federal district court in *Doe v. Jindal*, 851 F. Supp. 2d 995, 1009 (E.D. La. 2012), found the state to violate the Equal Protection Clause as a matter of law, requiring no factual discovery beyond a demonstration that plaintiffs had been convicted under the CANS statute and consequently classified as sex offenders. Performing the same analysis for the plaintiff class – which included

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[1] The Prostitution statute prohibits sexual conduct for money, specifying "cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object or body part of the genital or anal opening of another." Miss. Code. Ann. §97-29-49. The Mississippi Sex Offender Registration Law does not include Prostitution as a registrable offense. Miss. Code. Ann. §45-33-23(h).

four individual plaintiffs in the instant case – the Court held that Louisiana's sex offender registry law, "which mandates sex offender registration by individuals convicted of violating the State's Crime Against Nature by Solicitation statute, but not those convicted for the identical sexual conduct under the Prostitution statute, deprived individuals of Equal Protection of the laws[.]" *Doe v. Caldwell*, 913 F. Supp. 2d 262, 265 (E.D. La. 2012).

Defendants have provided no argument that the Mississippi's treatment of Unnatural Intercourse and purported out-of-state equivalent convictions is any different from the Louisiana scheme found unconstitutional in *Doe v. Jindal*. Plaintiffs are entitled to summary judgment on their equal protection claim.

II. Defendants Fail to Address *Lawrence*'s Clear Mandate Invalidating Sodomy Statutes Whose Only Element is Commission of Oral or Anal Intercourse, and the Court Should Adopt the Fourth Circuit's Position that Enforcement of the Statute through the Sex Offender Registry Violates the Due Process Clause.

Lawrence v. Texas turned on "*the validity of a Texas statute* making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." 539 U.S. at 562 (emphasis added). It explicitly rendered unconstitutional "the *laws* involved in *Bowers*" and the "power of the State to enforce these views [targeting sodomy] on the whole society through operation of the criminal law." *Id*. at 567, 571 (emphasis added). *See also Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) ("*Lawrence* invalidated *laws* that made same-sex intimacy a criminal act." (emphasis added).

Nowhere in their brief do Defendants confront this language in *Lawrence*, which holds that statutes like the Texas statute barring same-sex sexual conduct or the Georgia law at issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which targeted oral or anal intercourse regardless of gender, could no longer be enforced. Instead, Defendants rely on *Lawrence*'s discussion of hypothetical facts not before the Court to argue that the Supreme Court intended to strike down

sodomy prohibitions only "as applied" to specific conduct. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment ("Defs. Memo"), Dkt. #32, at 2. Thus, Defendants argue, the Court must look behind the fact of plaintiffs' convictions here to evaluate whether plaintiffs' rights under the Due Process Clause have been violated.[2]

This argument cannot be squared with *Lawrence*'s holding. As explained by the Fourth Circuit – the only federal appellate court to have ruled on the interpretation of Lawrence – "the anti-sodomy provision is unconstitutional when applied to any person." *MacDonald v. Moose*, 710 F.3d 154, 162 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 200 (2013). Indeed, as *amici curiae* point out, the Supreme Court's discussion of hypothetical facts involving minors, coercion, prostitution or public conduct "is better interpreted as leaving room for legislatures to enact future targeted legislation that might cover some amount of the same conduct prohibited under traditional sodomy laws." Brief of *Amici Curiae* ("Amicus Brief"), Dkt. #22-1 at 12 (citing *MacDonald*, 710 F.3d at 165). Such hypotheticals cannot undermine the plain holding of *Lawrence* that "prohibiting sodomy between two persons without any qualification is facially unconstitutional." *Macdonald*, 710 F.3d at 166.

As the Fourth Circuit Court of Appeals explained, "the *Lawrence* Court . . . struck down a specific statute as unconstitutional while reserving judgment on more carefully crafted enactments yet to be challenged." Virginia's statute, materially indistinguishable from Mississippi's, applied "without limits" to all oral and anal intercourse, and "judicial reformation of the anti-sodomy provision" to account for *Lawrence* "requires a drastic action that runs afoul"

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[2] In fact, the MSOR hangs the requirement to register entirely on the potential registrant's conviction, not the facts behind the indictment or the evidence at trial. An individual who is convicted of or pleads guilty to rape, Miss. Code Ann. § 97-3-65, must register. Miss. Code Ann. §§ 45-33-23(h)(ii). An individual with who is indicted for the same charge on similar or even worse facts, but who accepts a plea to aggravated assault, Miss. Code. Ann. § 97-3-7(2), is not required to register. *See* Miss. Code Ann. §§ 45-33-23(h). The statute under which guilt is rendered is the *only* factor that the MSOR deems worthy of consideration.

of Supreme Court precedent. *Id*. at 165-66 (citing *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006)). Indeed, as the *MacDonald* court points out, *Ayotte* specifically counsels courts that "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied. This would, to some extent, substitute the judicial for the legislative department of the government." *Id*. at 166, quoting *Ayotte*, 546 U.S. at 329-30.

Defendants cast aside *MacDonald*'s detailed discussion of the federal courts' role in interpreting criminal statutes, stating only that it contains "flawed analysis," and relying instead on a 2004 decision from the U.S. Court of Appeals for the Armed Forces and two court cases in Virginia and Washington. Defs. Mem. at 2-3. These cases, only one of which mentions *MacDonald* or the principles of statutory interpretation it analyzes, cannot overcome the logic articulated by the Fourth Circuit.

In *United States v. Macum*, 60 M.J. 198 (U.S. Ct. App. Arm. For. 2004), decided while the military's "Don't Ask Don't Tell" policy was still in effect, the military court noted that while Supreme Court decisions "generally" apply to the armed forces, "military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life." *Id*. at 206. Indeed, the court upheld Macum's conviction for private, adult, non-commercial "non-forcible sodomy," exactly the conduct the Defendants concede is protected by *Lawrence* – because the right "to engage in certain intimate sexual conduct… must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy." *Id*. at 208. This case can have no relevance to a state law targeting civilians.

Nor do the two out-of-state court cases cited by Defendants help their case. While *Toghill v. Commonwealth*, 289 Va. 220, 768 S.E..2d 674 (2015), acknowledges *MacDonald* and its discussion of *Ayotte*, its conclusion is at odds with the *Ayotte* Court's warning to "restrain [courts] from rewriting state law to conform it to constitutional requirements," 546 U.S. at 329, and it should be rejected. Moreover, the *Toghill* Court notes that the Virginia General Assembly has amended the statute to "remove[] certain anti-sodomy language," presumably in acknowledgment that the previous sodomy statute was constitutionally infirm. 289 Va. at 234. As for *State v. Music*, 193 Wn. App. 1039, 2016 U.S. Dist. LEXIS (Apr. 28, 2016), *pet. for review continued*, 380 P.3d 484, that case, still pending *en banc* review, makes no mention of *MacDonald* at all.[3]

Mississippi's Unnatural Intercourse statute is simple, direct and broad: it prohibits any "crime against nature committed with mankind," and Mississippi's Supreme Court held the statute to apply in cases that make no mention of minors, coercion, prostitution or public conduct. *Davis*, 79 So. 2d 452; *Haymond*, 478 So. 2d 297. Federal courts "have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court." *City of Chicago v. Morales,* 527 U.S. 41, 61 (1999). This is particularly so where the state urges a court "not merely to strike out words, but to insert words that are not now in the statute." *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (citation omitted). Only the legislature, not the courts, can rewrite the Unnatural Intercourse statute to fit the interpretation urged by Defendants. This Court should grant Plaintiffs their motion for summary judgment,

[3] In their opposition to Plaintiffs' motion to proceed under pseudonyms, but curiously not in their opposition to Plaintiffs' motion for summary judgment, Defendants also mention *Marsh v. United States*, NO. 3:13-CV-15, 2015 U.S. Dist. LEXIS 124176 (N.D. W. Va. Sept. 17, 2015), which views *Lawrence* as an as-applied case. *See* Defs. Opp. Mem. to Pseudo., Dkt #28, at 11-12. *Marsh* dismissed a habeas petition primarily because petitioner had waived of the right to collaterally attack his conviction. Like *State v. Music*, it makes no mention of *MacDonald*.

strike down the statute, and enjoin its enforcement through the Mississippi Sex Offender Registry.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment, declare the "crime against nature with mankind" portion of the Unnatural Intercourse statute and its enforcement unconstitutional and order all just and necessary relief as set forth in Plaintiffs' Prayer for Relief and Proposed Order.

Dated: December 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Ghita Schwarz, Counsel for Plaintiffs, electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notice of such filing to the following:

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