UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

DOE,

Plaintiff,

v.

HOOD, *et al*,

Defendants.

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

Oral Argument Requested

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6445

LAW OFFICE OF ROBERT MCDUFF
767 North Congress Street
Jackson, MS 39202
(601) 969-0802

LAW OFFICE OF MATTHEW STRUGAR
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299

Attorneys for Plaintiff

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PRELIMINARY STATEMENT

Relying on unproven allegations and a misreading of Fourteenth Amendment precedent, Defendants move for Summary Judgment against Arthur Doe on his due process and equal protection claims. Their motion must be rejected, and Arthur Doe, whose sole conviction for a sex offense is for an Unnatural Intercourse conviction in 1978, must be removed from Mississippi's Sex Offender Registry ("MSOR").

First, Defendants argue that the Supreme Court's landmark decision in *Lawrence v. Texas*, which struck down statutes criminalizing oral and anal sex, contains a carve-out for a broad range of conduct that must be examined in addition to the conviction. This argument, based exclusively in dictum, goes against the great weight of authority, which makes clear that *Lawrence* invalidated such statutes on their face, rendering any enforcement of such convictions through sex offender registration requirements unlawful. Moreover, there is no dispute that the only trigger for sex offender registration under Mississippi law is a conviction. Thus third-party, unproven allegations for which Arthur Doe was never charged, much less convicted, are immaterial to his case. Defendants essentially argue that this Court may re-imagine the Unnatural Intercourse statute to require elements of force or other non-private, non-commercial, non-consensual conduct so that the State can continue to register Mr. Doe. Such judicial rewriting of a statute to conform to constitutional requirements is impermissible, and indeed, if accepted, would swallow almost the entirety of *Lawrence*'s holding. The Unnatural Intercourse statute was rendered invalid by *Lawrence*, and it cannot be rewritten to include additional elements or otherwise used to require registration of those convicted.

Second, Defendants argue that Plaintiff's equal protection claim must fail because he is not similarly situated to those convicted under Mississippi's Prostitution statute, and because the

state has a rational basis for classifying those convicted of the statutes differently. As with their position on *Lawrence*, Defendants rely on unproven, unsworn, hearsay allegations in Arthur Doe's file to assert that the comparison between a conviction for oral or anal sex and a conviction for oral or anal sex for money is not "relevant." But again, the only trigger for registration is a conviction, and in fact Mississippi has until very recently treated individuals with Louisiana solicitation convictions as registrable. It is clear that the state has viewed Unnatural Intercourse as comparable at least to Louisiana's Crimes Against Nature by Solicitation law. Defendants' argument that the State has a rational basis to classify Unnatural Intercourse or out-of-state convictions differently because some registrants may have committed "egregious" acts is similarly wrong. Such an argument again requires looking behind the conviction to look at underlying conduct that is in most cases merely alleged and not proven. Moreover, for several individuals required to register, there is no evidence at all – much less admissible evidence or proof – that they have committed any coercive, harmful, or otherwise unlawful acts. Given the wide range of conduct covered by the Unnatural Intercourse statute, the differential classification of those convicted under the Prostitution statute has no rational basis.

Defendants' attempt to defeat Plaintiff's procedural due process claim must also be rejected. Although both the Fifth Circuit and Mississippi's registration law itself require criminal defendants to receive notice and opportunity to be heard if their convictions might trigger sex offender registration, Mr. Doe has never received any process of any kind. His 1978 conviction predated the establishment of the Mississippi Sex Offender Registration Law by 17 years and the *Lawrence* ruling by 25. There is no factual dispute that the State never provided Mr. Doe with notice and opportunity to be heard, and summary judgment cannot be granted on this claim.

Finally, Defendants' argument that Plaintiff's claims are barred by *Heck v. Humphrey* is meritless. Plaintiff does not seek to have his conviction invalidated or overturned – he asks that the Court order Mississippi to cease requiring him to register as a sex offender given the invalidity of the Unnatural Intercourse statute under *Lawrence*. Even if the Court were to find that a ruling striking down the Unnatural Intercourse statute cannot be reconciled with *Heck*'s mandate, *Heck* imposes no barrier to a finding that Defendants have violated Plaintiff's equal protection and procedural due process claims, as relief for these claims would not invalidate the Unnatural Intercourse statute. Defendants' motion must be denied.

FACTS

Plaintiff Arthur Doe relies on the facts presented in the Statement of Undisputed Material Facts ("SUMF") submitted with his Motion for Summary Judgment. (ECF Nos. 99, 110). In addition, a number of facts presented by Defendants throughout their Memorandum in support of their Motion for Summary Judgment ("Defs. Mem."), bear clarification and supplementation.

I. Arthur Doe Was Never Charged With or Convicted of Force.

As Defendants' supporting documentation makes clear, at no time did the State of Mississippi ever charge, indict, or convict Mr. Doe of any sexual offense except for anal sex ("sodomy"). Mr. Doe's 1978 indictment for Sodomy under the Unnatural Intercourse statute states only that [redacted] Defs. Ex. 1, Bates No. MSOR 010810. The indictment does not reflect or mention rape or force. The only support for Defendants' argument that this conduct was forcible is a "criminal history report," consisting of

third-party notes rather than a sworn statement, that [REDACTED] Defs. Mem. at 6, citing Defs. Ex. 1, Bates Nos. MSOR 000375, 000404. Those same notes indicated that Mr. Doe had stated that he had engaged in a consensual sex act. Defs. Ex. 1, Bates No. MSOR 000375. Third-party notes of an accusation against Mr. Doe are inadmissible evidence that do not substitute for or approximate proof of rape, especially given that the other male, like Mr. Doe, could also have faced indictment or conviction of Unnatural Intercourse, which requires only commission of oral or anal sex. Mr. Doe's sentence for his plea to Unnatural Intercourse was served [REDACTED] SUMF ¶ 25, citing Schwarz Decl. Ex. 5, MSOR 00372.

II. Other Individuals Required to Register for Unnatural Intercourse Demonstrate that Mississippi Is Registering Individuals for Convictions for Consensual Conduct with Parties Above the Age of Consent.

Defendants' description of the offenses and conduct of "Offenders A-D" are immaterial to their Motion for Summary Judgment. Following settlement of the claims of Brenda Doe, Carol Doe, Diana Doe, and Elizabeth Doe, as well as approximately two dozen other registrants with convictions under Louisiana's Crimes Against Nature by Solicitation statute, ECF No. 105, Plaintiff no longer seeks class certification. Defendants argue that the relief Plaintiff Arthur Doe seeks could allow other individuals required to register for convictions under the Unnatural Intercourse statute or for out-of-state offenses Mississippi deems equivalent to seek similar relief. To the extent that this is so, there is no dispute between the parties that such relief would not affect Offenders A-D, who were convicted under out-of-state statutes that included elements of force or involvement with minors, not statutes that criminalize oral or anal sex without any other element. *See* Defs. Mem. at 19-21, citing Defs. Ex. 4 at 4 (noting that Plaintiffs' discovery responses stated clearly that any potential class would include only those individuals who were

convicted of Unnatural Intercourse in Mississippi or "out-of-state convictions for offenses Mississippi deems the equivalent of Unnatural Intercourse and that cannot be classified as another registrable offense"). Because Offenders A-D were convicted under statutes that are materially distinct from Mississippi's Unnatural Intercourse statute, facts related to Offenders A-D are wholly irrelevant to Defendants' motion. Similarly, Plaintiff's claims do have any bearing on the registration status of an individual convicted of sexual battery or of bestiality under the Unnatural Intercourse statute. Evidence related to such registrants is immaterial and should not be considered.[1]

The undisputed facts underlying the convictions of several other Registrants who could be affected by the relief sought by Plaintiff Doe, however, are material. For example, Registrant No. 36[2] was convicted in 1966 under the California sodomy statute, California Penal Code § 286. *See* Supplemental Declaration of Ghita Schwarz ("Supp. Schwarz Decl.") Ex. 10, MSOR MSOR.004093-MSOR.004134. From 1952 to 1975, section 286 stated: "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the State Prison not less than one year nor more than twenty years." Cal. Pen. Code § 286 (1952). In discovery, the Department of Public Safety provided no information about the offense save for a document containing markings that the purported "victim" was a [redacted] man and that the crime did not involve force. MSOR 004099 ("Use of Force Against the Victim: [] Yes [X] No").

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[1] In responding to discovery requests regarding individuals that Plaintiffs believed would belong to a putative class, Plaintiffs mistakenly included an individual convicted of sexual battery, Miss. Miss. Code Ann. § 97-3-95, and an individual convicted of bestiality but not of "crimes against nature with mankind" under Miss. Code Ann. § 97-29-59. *See* Defs. Mem. at 22 (summarizing records of "Offender No. 13" and "Offender No. 17"). These individuals were included in error.

[2] Consistent with Defendants' numbering, Registrant numbers are taken from Plaintiffs' responses to Defendants' discovery requests related to the identities of individuals who Plaintiffs believed would belong to a class. *See* Defs. Mem. at 22 n.4; Defs. Ex. 4 at 4-6.

Similarly, Registrant No. 7 was convicted in Louisiana in 2000—three years before the *Lawrence* decision—of a "Crime Against Nature," La. R.S. § 14:89. *See* Supp. Schwarz Decl. Ex. 11, MSOR 005400-5530. Like Mississippi's Unnatural Intercourse law, the Louisiana "Crime Against Nature" criminalizes oral and anal sex with no additional elements. *Id*. The Registrant was 25 at the time of the supposed crime, and the State's registration file reflects only that he had oral sex and that no force was involved; nor is there any indication of involvement with minors. MSOR.005416, MSOR.005529. The State charged Registrant No. 7 with failing to re-register as a sex offender [redacted] [redacted] years after *Lawrence v. Texas* was decided, and sentenced him to [redacted] prison. *See* MSOR.005410; MSOR.005427.

Registrant No. 22 was convicted in Virginia of engaging in oral or anal sex with a woman when he was 19 and she 17 years old. Supp. Schwarz Decl. Ex. 12, MSOR.006252-MSOR.006317. There is no evidence in the record of any force involved, and in fact documents provided by the Department of Public Safety in discovery indicate that no force was involved. MSOR.006253. Had a 19-year-old engaged in vaginal sex with a 17-year-old, the offender would not only have avoided registration, but also would not have even committed a crime in Mississippi.

III. Documents Used by Mississippi to Demonstrate Purported Underlying Conduct of Non-Plaintiffs Were Created by Third Parties After Conviction and Are Rife with Error.

Defendants attempt to bolster their motion with references to the underlying conduct of several non-plaintiffs convicted of Unnatural Intercourse. But much of the evidence on which they rely, without any foundation, consists of unsworn, third-party documents, created in some cases years after the conviction. For example, in a summary of the file of Registrant No. 8, who was convicted of Unnatural Intercourse, Defendants refer to a document indicating that the

offense was committed with an individual aged 17 (above the age of consent) and note that the "[n]ature of the crime was described as sexual assault when the offender registered." Defs. Mem. at 22, citing Defs. Ex. 5, MSOR 004576, 004588, 004632. But there is no undisputed fact, much less proof, that any sexual assault was even alleged. Registrant No. 8 pled to just one count of sodomy under the Unnatural Intercourse statute in [redacted] 1990. *See* Defs. Ex 5, MSOR 004650-51. Yet his file contains three completed forms, one of which, dated 2011, notes his conviction as Unnatural Intercourse with a 17-year-old female (MSOR 004576); another, dated 2008, which describes this same conviction as "sexual assault" of a 17-year-old male (MSOR 004588); and still another, dated 2010, that falsely describes this conviction as sexual battery under Miss. Code Ann. § 97-3-95 (MSOR 004632). Similar forms contained in other non-plaintiff files are likewise rife with error. *See, e.g.*, Defs. Mem. at 22, describing errors in files of "Offender No. 13" and "Offender No. 17." These errors and inconsistencies are unsurprising, given that the forms are created by the Department of Public Safety and filled out, often years after the conviction, not by individual registrants or the courts in which registrants were convicted, but by employees of local sheriff's offices. *See* Supp. Schwarz Decl. Ex. 13 (Excerpts of the Deposition of Lori Jones, at 20:11-22:24 and Deposition Exhibit 3, MSOR 010598). They cannot be used as proof of forcible conduct or as undisputed material facts for the purpose of summary judgment.

ARGUMENT

I. Defendants' Misreading of *Lawrence v. Texas* Must be Rejected, and Enforcement of the Unnatural Intercourse Statute through Mississippi's Sex Offender Registration Law Violates the Due Process Clause.

A. *Lawrence v. Texas* Struck Down Statutes Criminalizing Oral and Anal Sex on Their Face.

The Unnatural Intercourse law, Miss. Code Ann. § 97-29-59, is facially unconstitutional under the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). As explained in detail in Plaintiff's Memorandum in Support of His Motion for Summary Judgment (ECF Nos. 98, 109 at 9-21), in holding that Texas's sodomy law violated the Due Process Clause, *Lawrence* specifically declined to decide the case on equal protection grounds because to do so might lead some erroneously to understand that the "prohibition would be valid if drawn differently." *Id*. at 575. The Court did not save any part or application of the statute that might have been valid. Indeed, it expressly held that its earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), upholding the constitutionality of Georgia's sodomy statute, which, like Mississippi's Unnatural Intercourse statute, applied to all couples regardless of sex, was "not correct when it was decided and it is not correct today." *Lawrence*, 539 U.S. at 578.[3]

Lawrence made clear the unconstitutionality of all remaining sodomy laws similarly reaching private intimate conduct. The opinion noted that "[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13 [including

[3] This repudiation of the majority in *Bowers* was unusually strong. In its place, *Lawrence* adopted the rationale presented by Justice Stevens' dissent in *Bowers*, which specifically rejected the idea that a State may "totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction." *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting). Further, selective application of such a law "presumably reflects the belief that *all sodomy* is immoral and unacceptable." *Id*. at 219 (emphasis in original). *Lawrence* expressly adopts the reasoning of Justice Stevens' dissent. 539 U.S. at 577-78.

As they do with *Lawrence*, Defendants attempt to rewrite history and turn *Bowers* into another as-applied challenge that did not call the validity of the entire statute into question. Defs. Mem. at 11-12. But the scope of the issue in *Bowers* is clear from the final sentence of the majority opinion, where it recognized that it was being called upon to invalidate all sodomy laws throughout the nation: "We do not agree [that majority sentiments about homosexuality are inadequate to justify criminal sodomy laws], and are unpersuaded that *the sodomy laws of some 25 States should be invalidated on this basis.*" 478 U.S. at 196 (emphasis added). Justice Powell's concurrence in *Bowers* similarly frames the issue as "a suit for declaratory judgment brought by respondents challenging *the validity of the statute*." *Id*. at 198 n.2 (Powell, J., concurring) (emphasis added).

Mississippi], of which 4 enforce their laws only against homosexual conduct." 539 U.S. at 573. The Court explicitly chose to decide the case on due process rather than equal protection grounds because otherwise "some might question whether a prohibition would be valid if drawn differently . . . to prohibit the conduct both between same-sex and different-sex participants." 539 U.S. at 575. The Court emphasized that its due process ruling reached not just same-sex sodomy prohibitions, which were vulnerable on equal protection grounds, but sodomy prohibitions generally: "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id.*

The Court's election to decide the case on due process rather than equal protection grounds thus voided all consensual sodomy statutes and precluded the very real harms of leaving any such laws in force. *Lawrence* cannot be read to permit continued enforcement of sodomy-only statutes given the Court's evident aim, set forth in unusually candid and explicit language, to remove these laws from the books and ameliorate their stigma. Thus, the Court issued a broad, facial ruling effectively invalidating all sodomy-only laws.

Notwithstanding *Lawrence*'s broad sweep, Defendants seize on *Lawrence*'s dictum that "[t]he present case does not involve minors . . . [or] persons who might be injured or coerced or who are situation in relationships where consent might not easily be refused . . . [or] public conduct or prostitution . . ." in attempt to save the invalid law. *See* Defs. Mem. at 10. As Defendants have it, *Lawrence* was nothing more than an as-applied challenge applicable only to Mr. Lawrence and his co-defendant, and that Texas' law, along with all other state laws that criminalize oral and anal sex with no other elements, remain enforceable. The decision itself, as well as virtually all subsequent authority, demonstrates that Defendants are wrong.

First, while *Lawrence* "d[id] not involve minors," "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused" or "public conduct or prostitution," 539 U.S. at 578, that is not a basis for preserving the Unnatural Intercourse statute or the challenged applications of the MSOR statute. To the contrary: the Court in *Lawrence* did not attempt to save limited applications of the Texas statute directly under challenge; instead, from the outset of the majority opinion, Justice Kennedy made clear that the Court was addressing the "*validity* of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." *Lawrence*, 539 U.S. at 562 (emphasis added). Throughout its analysis, the Court addressed the constitutional deficiencies of laws targeted at intimate sexual behavior. *See*, *e.g.*, *id*. at 567 ("The *laws* involved in *Bowers* and here are, to be sure, *statutes* that purport to do no more than prohibit a particular sexual act. Their *penalties* and *purposes*, though, have more far-reaching consequences. . . .") (emphases added); *id*. at 571 ("The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."). The Court recognized that these laws impermissibly reach into the sexual intimacies of adults free to exercise their liberty to engage in such conduct without government interference and contribute to stigma and discriminatory treatment toward gay people. *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1379-80 (2005) (explaining that the Court invalidated all sodomy-only laws to eradicate the stigma those laws engendered).

Indeed, the Court's subsequent ruling in its landmark same-sex marriage case makes clear that *Lawrence* invalidated not only Texas' sodomy-only law, but also *multiple* sodomy-only laws. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Justice Kennedy, writing for himself and Justices Ginsburg, Breyer, Sotomayor, and Kagan, stated that "*Lawrence invalidated laws*

that made same-sex intimacy a criminal act." 135 S. Ct. at 2600 (2015) (emphasis added). The five-Justice majority continued: "Then in 2003, the Court overruled *Bowers*, holding that *laws* making same-sex intimacy a crime 'demea[n] the lives of homosexual persons.'" *Id.* at 2596 (quoting *Lawrence*, 539 U.S. at 575) (emphasis added). And again: "Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from *laws* making intimacy in the lives of gays and lesbians a crime against the State," *id.* at 2604 (emphasis added). Three dissenting judges characterized Lawrence the same way: "*Lawrence* relied on the position that criminal sodomy *laws*, like bans on contraceptives, invaded privacy by inviting 'unwarranted government intrusions' that 'touc[h] upon the most private human conduct.'" *Id.* at 2620 (Roberts, C.J., dissenting) (quoting *Lawrence*, 539 U.S. at 562, 567) (emphasis added). The scope of *Lawrence* is clear; it is not an as-applied ruling, because as-applied rulings do not "invalidate" a law, and a decision that reaches only a single state statute does not involve "laws."[4]

[4] The weight of scholarship supports Plaintiff's view. *See, e.g.*, Erwin Chemerinsky, CONSTITUTIONAL LAW: POLICIES AND PRINCIPLES, 868 (4th ed. 2011) ("*Lawrence* means that laws in 13 states prohibiting private consensual homosexual activity are unconstitutional."); Ronald Rotunda & John Nowak, CONSTITUTIONAL LAW, 931 (7th ed. 2004) ("In *Lawrence v. Texas* the Justices, by a 6 to 3 vote, invalidated a state statute that prohibited persons from engaging in sodomy with a person of the same sex."); William Rich, MODERN CONSTITUTIONAL LAW, 429 (3rd ed. 2011) ("[I]n the course of relying upon the Due Process Clause to invalidate a Texas law prohibiting homosexual sodomy, Justice Kennedy explained for the majority that '[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.'"); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 938 and n.143, 948 and n.211 (2011); Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. at 1334 n.8 (describing *Lawrence* as having "invalidat[ed the] sodomy statute on its face"); Scott A. Keller and Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes In Toto*, 98 U. VA. L. REV. 301, 354 n.198 (2012) (citing *Lawrence* as example of when the Supreme Court "does invalidate statutes in toto").

Defendants' argument that the Supreme Court only intended an as-applied ruling is also in conflict with the interpretation of the decision by Texas courts, which have been called upon to interpret the continued validity of Texas Penal Code § 21.06—the law at issue in *Lawrence*. The Texas appellate courts have correctly recognized that "in *Lawrence v. Texas*, the defendants successfully challenged *the facial constitutionality* of the Texas sodomy statute without producing one whit of evidence." *Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009) (emphasis added); *see also De Leon v. City of El Paso*, 353 S.W.3d 285, 288 n.9 (Tex. App. 2011) ("In *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), the United States Supreme Court held that section 21.06 violates the due process clause of the Fourteenth Amendment."). The State's characterization of the nature of *Lawrence*'s challenge also conflicts with the framing of the Texas appellate court that initially heard the challenge and asserted that "the narrow issue presented here is whether Section 21.06 is facially unconstitutional." *Lawrence v. State*, 41 S.W.3d 349, 350 (Tex. App. 2001), rev'd *Lawrence v. Texas*, 539 U.S. 558 (2003). Similarly, the Fifth Circuit has stated that "[t]he Court in *Lawrence* . . . overruled its decision in *Bowers v. Hardwick* and *struck down* Texas's sodomy ban." *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743 (5th Cir. 2008) (emphasis added) (internal footnote omitted).

Defendants' argument is also contrary to the conclusion of the Fourth Circuit, which has offered the most detailed analysis on the 'facial versus as-applied' nature of *Lawrence*. *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), *cert denied* 134 S. Ct. 200 (2013). The Fourth Circuit found that the district court had erred in finding Virginia's anti-sodomy provision to be constitutional as applied to an individual who had been convicted of criminal solicitation predicated on Virginia's anti-sodomy law because the sex act involved a minor. *MacDonald*, 710

F.3d at 162. As the Fourth Circuit explained, under *Lawrence*'s facial rule, "the anti-sodomy provision is unconstitutional when applied to any person." *Id*.

In short, the State's characterization of the *Lawrence* ruling is in conflict with the readings of the Supreme Court itself, the Fifth and Fourth Circuits, Texas' state courts, and the scholarship. Defendants' unusual reading, in contravention of the great weight of authority, is a futile attempt to salvage its unconstitutional law and registration scheme. Like Georgia's sodomy prohibition, the Unnatural Intercourse law prohibits all acts of sodomy, full stop. There is no element in the statute requiring that the sex be forcible, commercial, public, or with a minor. Mississippi has criminal prohibitions encompassing each of these elements,[5] but Arthur Doe was not charged under any of those statutes. The State errs in failing to recognize that, under *Lawrence*, all sodomy-only statutes, the Unnatural Intercourse statute included, are facially invalid.

The Supreme Court has established that a facial attack is proper where a statute "lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal citations and quotations omitted). Defendants' position – that *United States v. Salerno*, 481 U.S. 739, 745 (1987), requires upholding statutes if "no set of circumstances exists under which the Act would be valid," *see* Defs. Mem. at 13, simply is not the standard applied to facial challenges. The Supreme Court has recognized that a statute need not be found unconstitutional in all of its applications to be facially invalid. *City of Chicago v. Morales,* 527 U.S. 41, 55 n.22 (1999) ("[T]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."); *Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S.

[5] *See* Miss. Code Ann. §§ 97-3-71 (rape); 97-29-51 (prostitution); 97-29-31 (indecent exposure); 97-5-23 (touching a child for lustful purposes).

1174, 1175-76 (1996) (Stevens, J., denying petition for certiorari) (noting that *Salerno* formulation is dicta that "does not accurately characterize the standard for deciding facial challenges" or "accurately reflect the Court's practice with respect to facial challenges" (quoting Michael C. Dorf, *Facial Challenges to State and Federal Statutes,* 46 Stan. L. Rev. 235, 236, 238 (1994))).

Rather, the Court has described facial challenges as requiring that the petitioner demonstrate that the invalid applications of the statute are "substantial" when "judged in relation to the statute's plainly legitimate sweep.'" *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973); *see also United States v. Raines,* 362 U.S. 17, 23 (1960) (a facial challenge is proper where "the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover").

In *Lawrence,* as here, the statute at issue was a general anti-sodomy statute that has no plainly legitimate sweep because it sought to prohibit all acts of sodomy and had no other purpose. After *Lawrence*, it is clear that the Unnatural Intercourse law "lacks any plainly legitimate sweep" and is thus facially invalid.

B. Dictum in *Lawrence* Did Not Salvage Sodomy-Only Statutes in Certain Circumstances But Rather Anticipated Hypothetical Future Legislative Enactments.

Defendants cling to dictum in *Lawrence* because it is the only avenue to salvage the Unnatural Intercourse statute and the State's unconstitutional registration scheme. But as Plaintiff demonstrated in his motion for summary judgment, this *Lawrence* dictum simply recognizes situations where hypothetical laws that reach sodomy in narrowly tailored circumstances might withstand constitutional scrutiny. *See* Pls. Mem. at 17-18. The only federal

Court of Appeals to address this issue is in agreement. *MacDonald*, 710 F.3d at 165 (rejecting the same argument that State advances here and explaining the *Lawrence* dictum as "reserving judgment on more carefully crafted enactments yet to be challenged").

Other states have recognized that *Lawrence*'s mandate and have passed narrowly tailored laws that include prohibitions on sodomy in certain situations in response to the Supreme Court's invalidation of their statutes that prohibited oral and anal sex with no other elements. In 2006, Missouri amended its Sodomy statute to only apply to sex acts with minors less than 14 years old. Mo. Rev. Stat. § 566.062. In 2010, Kansas repealed its prohibition outright. Kan. Stat. Ann. § 21-3505. And in 2014, following the holding in *MacDonald* that *Lawrence* had rendered its prohibition on oral and anal sex unconstitutional, Virginia amended its Crimes Against Nature statute to apply only to bestiality and incest. Va. Code Ann. § 18.2-361.

But Mississippi has not, and the State cannot continue to enforce a facially unconstitutional law in a manner that it believes would fit within the confines of narrower, hypothetical enactments. Enacting laws is the province of the Legislature, not the Executive. Because Mississippi has not amended the Unnatural Intercourse statute to provide constitutional limitations, the Unnatural Intercourse statute as written cannot survive *Lawrence*'s holding.

Defendants cite a variety of authority that it claims supports its reading of the *Lawrence* dictum. *See* Defs. Mem. at 16-17. But much of it supports Plaintiff's reading of *Lawrence*, not Defendants. For instance, *People v. Groux*, No. F059366, 2011 Cal. App. Unpub. LEXIS 4817 (Cal. Ct. App. June 28, 2011)—an unpublished California Court of Appeal decision[6] that the State believes supports the continued validity of the Unnatural Intercourse statute, Defs. Mem. at

[6] The California Rules of Court declare that "an opinion of a California Court of Appeal . . . that is not certified for publication . . . must not be cited or relied on by a court or a party in any other action." California Rules of Court, Rule 8.1115(a).

16-17—does no such thing. Prior to 1975, California's laws operated like Mississippi current-day law—they criminalized oral and anal sex with no additional elements. Cal. Penal Code §§ 286 (1952) (sodomy); 288a (1952) (oral copulation). But in 1975, California amended those prohibitions to only apply in circumstances involving minors, nonconsensual sex acts, or activity in prisons. Cal. Penal Code §§ 286 (2018) (sodomy); 288a (2018) (oral copulation). In *Groux*, the California Court of Appeal did not consider the continuing validity of a sweeping prohibition on oral and anal sex because the California legislatures had repealed those homophobic laws more than forty years earlier. Instead, it was considering the type of narrowly tailored law that *Lawrence* envisioned, applicable only in specific circumstances. *Groux*, 2011 Cal. App. Unpub. LEXIS 4817 at *30 (considering Cal. Penal Code, § 288a(e), which criminalizes "an act of oral copulation while confined in any state prison").

So too with *Commonwealth v. Mayfield*, 832 A.2d 418 (Pa. 2003), another case the State erroneously relies on. Defs. Mem. at 17. In *Mayfield*, the accused was charged with violating Pennsylvania's "Institutional Sexual Assault" law, 18 Pa. Cons. Stat. Ann. § 3124.2. *Mayfield*, 832 A.2d at 420. In stark contrast to Mississippi's sweeping Unnatural Intercourse statute, *Mayfield* considered the validity of a Pennsylvania law prohibits prison guards, counselors at state youth camps, and employees at "mental health or mental retardation facilit[ies]" from "sexual intercourse, deviate sexual intercourse or indecent contact" with their charges. 18 Pa. Cons. Stat. Ann. § 3124.2.[7]

While the California and Pennsylvania laws at issue in *Groux* and *Mayfield* do reach oral and anal sex, they do so under carefully delineated circumstances. These were exactly the kind of

[7] The same is true of *U.S. v. Marcum*, 60 M.J. 198, (U.S. Ct. App. Arm. For. 2004), which addressed the now-repealed sodomy prohibition under the Uniform Code of Military Justice. *See* Defs. Mem. at 13. As a provision of the UCMJ, the statute was *necessarily* limited to conduct in a military environment.

laws that the *Lawrence* dictum envisioned and sought to preserve when it noted that the Texas statute was not limited to—and the facts of the case before it did involve—minors, prostitution, public conduct, or "persons who might be injured or coerced." *Lawrence*, 539 at 578. These laws are a far cry from Mississippi Unnatural Intercourse statute, which, like the Texas law struck down in *Lawrence*, criminalizes wholesale every act or oral and anal sex regardless of the circumstances or setting. Both rulings are perfectly consistent with both *Lawrence* and with Plaintiff's position that *Lawrence* invalidated all sodomy-only laws.

Even one of the State's two cases that considered the validity of sodomy-only statutes does not support the State's position. In an unpublished, nonprecedential decision,[8] the Washington state Court of Appeals reversed the vacating of a conviction under Washington's now-repealed sodomy law for a rape that took place in 1974. *State v. Music*, No. 33285-3-III, 2016 Wash. App. LEXIS 862 (Wa. Ct. App. Apr. 28, 2016). The court grounded its decision in the fact that, prior to 1975, Washington's rape laws applied only to "instances of vaginal-penile intercourse." *Id*. at *7. Prior to 1975, "sodomy was the only offense that applied" to anal rape in Washington. *Id*. at *8. The Court reviewed the repealed sodomy statute's history to show that it was used exclusively to prosecute "cases of assaultive conduct." *Id*. at *13. Because there was no other law prohibiting anal rape at the time of Music's crime, the state appeals court overturned the district court's order vacating Music's conviction. *Id*. at *14-*15.

Mississippi's rape and sexual assault laws were not historically and are not currently limited to vaginal-penile intercourse. When put to its burden of proving the elements beyond the simple sex, Mississippi has no trouble convicting anal rapists for crimes other than Unnatural

[8] The Washington Rules of Court declare that "Unpublished opinions of the Court of Appeals have no precedential value and are not binding *on any court*." Washington Court's General Rule 14.1 (emphasis added).

Intercourse. For instance, the Mississippi Supreme Court unanimously upheld a 1990 conviction "on three counts of sexual battery under Miss. Code Ann. §§ 97-3-95 & 99-7-2 (1972)" for a man who anally raped his seven-year-old nephew. *Edwards v. State*, 594 So. 2d 587, 587 (Miss. 1992). Unlike Washington, Mississippi could and did try rapists under laws other than the Unnatural Intercourse law. The unpublished *Music* decision would not support Defendants' position even if it had precedential value.

The *Music* case underscores the weakness of Defendants' position. Defendants try to avoid *Lawrence*'s clear consequences by claiming that relief in this case will allow sexual predators to seek relief from registration and live unmonitored by the State, implying, without support, *see* SUMF ¶42, that such an outcome would reduce public safety. But if the State had the evidence, it could have charged and convicted such individuals with generally-applicable crimes prohibiting sexual violence against children or adults. The State did just that in the *Edwards* case—and a simple query of the Mississippi Sex Offender Registry shows the offender in the *Edwards* case remains registered on account of his convictions for sexual battery.

C. This Court Cannot and Should Not Rewrite the Unnatural Intercourse Statute in Order to Apply It More Narrowly Than the Statute's Plain Text.

Lawrence's facial invalidation of the sodomy statute also comports with the longstanding admonition against judicial tinkering with overly broad statutes to fulfill the legislative duty that branch has abdicated. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006). *Ayotte* cautioned against rewriting a law to conform to constitutional requirements "even as we strive to salvage it." *Id.* at 329 (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). This concern is especially acute when legislative "line-drawing" is more appropriate. *Ayotte*, 546 U.S. at 330.

The State asks this Court to duck *Lawrence*'s mandate by peering behind the curtain into decades-old convictions and approving the State's unconstitutional registration by reading into the Unnatural Intercourse law a variety of limitations that the Mississippi Legislature did not put there. As the Fourth Circuit Court of Appeals explained in *MacDonald*, the *Lawrence* dicta left room for legislatures to enact future targeted legislation that might cover some amount of the same conduct prohibited under traditional sodomy laws. *MacDonald*, 710 F.3d at 165. It was not an invitation for courts to perform interpretive acrobatics to preserve laws, the existence of which codifies discrimination and dehumanization against a class of individuals. Such "drastic action" would be contrary to Supreme Court precedent. *Id*. at 166; *see also Ayotte*, 546 U.S. at 329-30; *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884-85 (1997). In short, this Court cannot and should not attempt to save Mississippi's unconstitutional statute by judicially rewriting it.

Judicially rewriting the Unnatural Intercourse law to apply only to certain plaintiffs and certain sets of facts would vitiate two constitutional principles. First, separation of powers problems would arise from a court's tinkering with a constitutionally problematic statute to save it from facial invalidity. These concerns trump the general principle that a court should nullify no more of a legislature's work than is necessary:

> [M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewriting state law to conform it to constitutional requirements" even as we strive to salvage it. . . . [M]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" then we ought to undertake.

Ayotte, 546 U.S. at 329-30. Following these principles, for example, the Fourth Circuit Court of Appeals concluded that "[t]he Court's ruminations [in *Lawrence*] concerning the circumstances under which a state might permissibly outlaw sodomy . . . no doubt contemplated deliberate

action by the people's representatives, rather than by the judiciary." *MacDonald*, 710 F.3d at 165. This Court should take the same approach.

Second, and relatedly, the Supreme Court has warned that when a court saves an overly broad and otherwise unconstitutional criminal statute through creative interpretation, it creates dangerous incentives for legislatures. Court should be "wary of legislatures who would rely on our intervention," to rewrite broad statutes. *Ayotte*, 546 U.S. at 330. "'[I]t 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.'" *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)); *accord Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972) (striking down vagrancy law because it left to the courts to to "'say who could be rightfully detained, and who should be set at large'"); *Reno*, 521 U.S. at 884 n.49. As *Ayotte* explained, "'[t]his would, to some extent, substitute the judicial for the legislative department of the government.'" 546 U.S. at 330 (quoting *Reese*, 92 U.S. at 221).

Because of these concerns, the Supreme Court has made clear that a court generally should refrain from saving a facially unconstitutional statute by applying it more narrowly. *See Reno*, 521 U.S. at 884-85 ("This Court 'will not rewrite . . . law to conform it to constitutional requirements.'" (quoting *Am. Booksellers Ass'n*, 484 U.S. at 397); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) (recognizing "[o]ur obligation to avoid judicial legislation"); *Aptheker v. Sec'y of State*, 378 U.S. 500, 515 (1964) (warning against judicial rewriting of statute to "save it against constitutional attack"); *cf. Skilling v. United States*, 561 U.S. 358, 415-16 (2010) (Scalia, J., concurring) ("A statute that is unconstitutionally vague

cannot be saved by a more precise indictment, nor by judicial construction that writes in specific criteria that its text does not contain." (internal citation omitted)).[9]

Fifth Circuit precedent is in accord. In *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016), the Fifth Circuit struck down a Texas law regulating use of the professional title "psychologist" because "it regulate[d] outside the context of the actual practice of psychology . . . [to a] political website or filing forms for political office." *Id*. at 361. In an attempt to save the law, Texas asked the Fifth Circuit to read limitations into the law that cabined its application to professional psychologists. The Fifth Circuit rejected this invitation. *Id*. at 369. Because the "plain text" of the statute, on its face, reached "[l]ife coaches, weight loss counselors, and AA sponsors," the Fifth Circuit "decline[d] to give [the unconstitutional law] an additional extra-textual limiting construction in a frantic attempt to rescue it." *Id*.

These concerns are especially significant in the context of criminal prohibitions. The Supreme Court has admonished that a statute cannot broadly proscribe an entire category of activity that includes constitutionally protected conduct, and then leave it for the judicial system to decide who can be charged. *See United States v. L. Cohen Grocery Co*., 255 U.S. 81, 89 (1921) ("[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."); *see also State v.*

[9] Indeed, in his *Lawrence*-endorsed dissent in *Bowers*, Justice Stevens made a similar point: "If the . . . statute cannot be enforced *as it is written* – if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens – *the State must assume the burden of justifying a selective application of the law*." *Bowers,* 476 U.S. at 218 (emphases added). That burden can be met only if there is "a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others." *Id*. "Unless the Court is prepared to conclude that such a law is constitutional," which *Lawrence* foreclosed, "it *may not* rely on the work product of the Georgia Legislature to support its holding." *Id.* (emphasis added).

Newstrom, 371 N.W.2d 525, 529 (Minn. 1985) ("Courts cannot save a penal statute by imposing post facto limitations on official discretion through case by case adjudications where no such restraints appear on the face of the legislation."); *Pacesetter Homes, Inc. v. Vill. of S. Holland*, 163 N.E.2d 464, 467 (Ill. 1959) ("[T]he relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again." (quoting *United States v. Ju Toy*, 198 U.S. 253, 262 (1905))).

It is particularly inappropriate for courts to insert words into a criminal sodomy statute that has no such language. Here, the Unnatural Intercourse law prohibits only "the detestable and abominable crime against nature committed with mankind," and so narrowing it only to certain applications would effectively require the addition of other elements, such as solicitation, age, or coercion. Miss. Code Ann. § 97-29-59. Mississippi's state courts have made clear that the Unnatural Intercourse statute is a sodomy-only statute that bars oral or anal sex without any other element. *State v. Mays*, 329 So. 2d 65 (Miss. 1976); *State v. Davis*, 79 So. 2d 452 (Miss. 1955). But Defendants have determined that for the purposes of Arthur Doe's claim, the Unnatural Intercourse statute can be rendered constitutional because it is applied to the prison context, "an inherently coercive environment." Defs. Mem. at 3. This phrase, not found anywhere in *Lawrence* or related case law,[10] appears to have been extrapolated from the dictum in *Lawrence* noting that the case does not arise from "a person who *might* be injured or coerced or …a situation in which consent *might* not be easily refused." 539 U.S. at 578 (emphasis added). *See*

[10] The phrase "inherently coercive environment" appears to be drawn from completely inapposite case law related to the requirement that police give *Miranda* warnings when an individual is being questioned by the police. *See Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (Brennan, J. concurring).

Defs. Mem at 3. This text, which relies twice on the word "might," is too vague and amorphous to be construed as an exception to *Lawrence*'s reach.

If accepted, Defendants' "inherently coercive environment" argument would require courts to invent and impose a vague and enormously broad exception to conduct protected by *Lawrence*. What are the parameters of an "inherently coercive environment"? Would it encompass a workplace where a staff person with seniority engages in oral sex with a staff person more junior? A relationship where one party is financially more secure than the other? Defendants' promotion of this undefined and unsupported exception could swallow almost the entirety of *Lawrence*'s holding.

In any case, if, in order to make a statute constitutional, a court "would be required not merely to strike out words, but to insert words that are not now in the statute," the court then is "'mak[ing] a new law, not . . . enforc[ing] an old one. This is no part of our duty.'" *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (citation omitted); *Butts v. Merchs. & Miners Transp. Co.*, 230 U.S. 126, 135 (1913) ("To do this would be to introduce a limitation where Congress intended none, and thereby to make a new penal statute, which, of course, we may not do."). In short, if the legislature wishes to include certain sexual acts within a statute's reach, it should do so with specificity. *See MacDonald* 710 F.3d at 165 (reading the *Lawrence* dictum to find that "although the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor, it has not seen fit to do so," and ruling that it could not usurp that legislative power to rewrite the statute in the way the state requested). It is not for the courts to write Mississippi's criminal law.

As Justice Breyer reasoned in an analogous case:

> [T]he ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what

> circumstances. And I see no way to distinguish in the ordinance's terms between one application of that discretion and another. The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid *in all its applications*.

Morales, 527 U.S. at 71 (Breyer, J., concurring in part and concurring in the judgment) (emphasis added).

Mississippi has "set a net" so large it ensnares millions. *Ayotte*, 546 U.S. at 330; *Papachristou*, 405 U.S. at 165; *Reno*, 521 U.S. at 884 n.49. Nearly 90% of people aged 18-44 have had oral sex, and nearly 40% have had anal sex.[11] This is a net far larger than those cast by the statutes at issue in *Ayotte*, *Papachristou*, or *Reno*. It is hard to image Defendants taking the same position in a different context. The State could obviously not pass a law prohibiting *all* sex acts and requiring sex offender registration following conviction and expect the courts to accept its assurances that it would only apply the law in cases of rape or child molestation. As the Supreme Court has emphasized, the Constitution exists to prevent laws that would cast such a wide net and "leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. The Supreme Court has admonished that the judiciary to "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* (citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 473 (2001)).

And the State similarly could not prosecute interracial married couples for miscegenation under circumstances not presented by *Loving v. Virginia*, 388 U.S. 1 (1967)—perhaps that the husband was already married, or that the couple were first cousins, or they were too young to wed. Of course, such marriages are already prohibited by other laws than a miscegenation

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[11] *See* Centers for Disease Control & Prevention, *Sexual Behavior, Sexual Attraction, and Sexual Orientation Among Adults Aged 18–44 in the United States: Data From the 2011–2013 National Survey of Family Growth*, 88 NAT'L VITAL HEALTH STAT. REP. 1 (2016), available at https://www.cdc.gov/nchs/data/nhsr/nhsr088.pdf (accessed June 1, 2018).

statute,[12] but maybe the State would not want to be put to its burden of proving the elements of those crimes and would see a miscegenation statute as a convenient shortcut.

These examples sound absurd, but this is exactly what Defendants ask this Court to endorse with the Unnatural Intercourse statute. The result here should be no different simply because the unconstitutional law is aimed at non-procreative sex acts traditionally associated with homosexuality instead of interracial marriage.

This Court may not uphold a law that Mississippi never enacted. And it may not uphold an unconstitutionally broad law because Defendants claim that Mississippi is using it responsibly. The Unnatural Intercourse law does not target sex acts in prison (nor sex with minors, nor nonconsensual sex). And for a court to find that it does—because the activity the law does target may not constitutionally be criminalized—would run afoul of the separation of powers principles discussed above. Furthermore, such a ruling would frustrate the Supreme Court's reasoning for invalidating such laws in *Lawrence*. Because the statute criminalizes only "the detestable and abominable crime against nature committed with mankind," no judicial decision attempting to save the statute could possibly provide adequate notice to defendants of what conduct remains criminal and what conduct is permitted. Such a decision would therefore create a looming specter of uncertainty for persons at risk of being convicted and would ensure an enduring stigma that *Lawrence* sought to eliminate.

Moreover, there is no practical need for the Court to engage in the risky legislative business of trying to save the Unnatural Intercourse statute. That statute is unnecessary to achieve any interests the Mississippi legislature might have in criminalizing sodomy in cases of prostitution, between an adult and a minor, and in other cases of sexual battery or rape — all of

[12] Miss. Code Ann. §§ 97-29-13 (prohibition on bigamy); 93-1-1 (prohibiting marriage between first cousins); 93-1-3 (prohibiting men under 17 from marrying).

which are already prohibited under Mississippi law, and even if they were not, could be. *See supra* note 5.

The same is doubly true for the challenged applications of the MSOR statute. First, the inclusion of the Unnatural Intercourse statute as a predicate offense to MSOR registration, Miss. Code Ann. § 45-33-23(h)(xi), is unnecessary. The Mississippi legislature has, for example, evinced its clear intent in the MSOR statute as to which sexual batteries should give rise to registration with the MSOR. *See* Miss. Code Ann. § 45-33-23(h)(iv). There is thus no need for this Court to preserve an application of the MSOR based on the Unnatural Intercourse statute to create any hypothetically valid collateral consequences for such conduct. Second, the provision of the MSOR statute covering "offense[s] resulting in a conviction in another jurisdiction, which, if committed in this state, would be deemed to be . . . a [registrable] crime" is unnecessary for the same reason—i.e., certain sexual batteries committed in other states might still be registrable without recourse to the Unnatural Intercourse statute. Thus, all offenders who were convicted in other jurisdictions for crimes involving oral or anal sex where the statute required force or the being a child would remain registrable in Mississippi. The State would simply have to check a different box for the equivalent crime. This is true for each of the offenders that Defendants labels Offenders A through D, who were convicted in other jurisdictions under statutes prohibiting oral or anal sex through force or against child victims. *See* Defs. Mem. at 19-21. A decision on Arthur Doe's case would have no effect whatsoever on Mississippi's requirement that these individuals register.

As for many of the other offenders whose crimes Defendants describe in their brief, it is the State's responsibility to convict those accused of acts such as rape or sexual violence against children for those acts. Whether the State did not believe it could meet its burden of proving

those charges for those convicted of Unnatural Intercourse; or accepted a plea to the lesser crime of Unnatural Intercourse; or did not want to be put to its burden on those other crimes and saw an easy conviction through the overly broad and easily-proven Unnatural Intercourse law—the fact that the State chose to prosecute under the Unnatural Intercourse statute does not change the Supreme Court's rulings or save the statute. The State cannot rely on its own failures to defend an unconstitutional vestige of a homophobic past.

* * *

The continued existence of the Unnatural Intercourse statute and the continued challenged applications of the MSOR codify and invite discrimination and stigmatization. *Lawrence*, 539 U.S. at 575. They constitute an intrusion on the personal liberty of citizens that the Supreme Court could not abide. Fifteen years after *Lawrence*, this Court should echo the Supreme Court's clarion call that sodomy prohibitions and their attendant collateral consequences facially violate the Due Process Clause of the Fourteenth Amendment, and accordingly may not be given legal effect.

D. Defendants Attempt to Avoid the Constitutional Issues by Engaging in Arguments from Adverse Consequences Related to Individual Offenders Not Before the Court.

In moving for summary judgment against Arthur Doe, Defendants repeatedly emphasize that the State convicted numerous people accused of forcible sex acts and sex acts on minors in an attempt to scare the Court from recognizing the obvious consequence of *Lawrence*. The State's argument suffers two fundamental and fatal flaws: 1) the State never met any burden of proof of *proving* those facts for Arthur Doe by securing a *conviction* for anything other than the simple act of engaging in oral or anal sex; and 2) the State continues to require registration for

people convicted of Unnatural Intercourse (or equivalent out-of-state convictions) for whom it has *no* evidence or even reason to believe involved anything but consenting adults.

Allegations in a criminal indictment or arrest report are not substitutes for convictions. The State has to be put to its burden of proof to prove its allegations. The Fifth, Sixth, and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see also Sullivan v. Louisiana*, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires guilt to be established beyond a reasonable doubt). When it secures a plea or conviction for a statute where the only element is engaging in oral or anal sex, that is all the defendant has admitted to or the proved.[13]

Numerous individuals are charged with registrable offenses but plead to or are convicted of lesser charges that avoid registration. Robert Rudder, the Training Director for the Mississippi Office of State Public Defender, testified that he trains public defenders throughout Mississippi to prioritize plea bargains that avoid sex offender registration. As Mr. Rudder makes clear, public defenders can secure pleas that avoid registration because it is not the facts alleged against the accused that trigger registration, but the statute under which the accused it ultimately convicted. Defendants have admitted as much, *see* SUMF ¶ 38, but nonetheless devote more than

[13] Defendants' claim that "Arthur Doe waived any right he might have had to challenge the facts in the indictment" by "[p]leading guilty" to Unnatural Intercourse is wrong. Defs. Mem. at 7. Defendants seek to paint Mr. Doe as a rapist when it only charged him with, and he only pleaded guilty to, having oral or anal sex. The State did not prove, and Doe did not admit to, anything more; nor did Defendants seek to depose Mr. Doe in this lawsuit about his conduct of forty years ago. If someone who is accused of vehicular manslaughter and driving with a burned-out taillight pleads guilty to having the burned-out taillight and is never convicted on the manslaughter claim, the State cannot treat him as though he was convicted of manslaughter for the remainder of his life. To hold otherwise would be a gross violation of the Fifth, Sixth, and Fourteenth Amendments.

1,600 words to painting all of those who it has forced to register under its unconstitutional law as sexual predators in the hopes of alarming the Court. Defs. Mem. at 18-23.

Even so, the facts alleged against those forced to register for Unnatural Intercourse or out-of-state equivalent convictions demonstrate that the State is not operating under a principle of protecting the public from so-called sexual predators. For example, Registrant No. 36 was convicted under the California sodomy statute, California Penal Code § 286. *See* Supp. Schwarz Decl. Ex. 10, MSOR.004093-MSOR.004134. From 1952 to 1975, section 286 stated: "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the State Prison not less than one year nor more than twenty years." Cal. Pen. Code § 286 (1952). In other words, like Mississippi's current Unnatural Intercourse statute, the California statute criminalized oral and anal sex with no additional elements. Offender No. 36 was arrested just north of San Francisco in 1966, when he was in his twenties. The paperwork that Mississippi has on Offender No. 36 shows the purported "victim" was a 30-year-old man. MSOR.004099. Again according to the State's paperwork, the crime did not involve force ("Use of Force Against the Victim: [] Yes [X] No"). *Id*. Thus, more than fifty years after Registrant No. 36 was convicted of consensual sex with an adult, forty years after California legalized such sex, and fifteen years after the Supreme Court declared such sex was constitutionally protected, Mississippi continues to require him to submit to a sex offender registry with all of its attendant daily humiliations.

Similarly, Registrant No. 7 was convicted in Louisiana in 2000—three years before the *Lawrence* decision—of a "Crime Against Nature," La. R.S. § 14:89. *See* Supp. Schwarz Decl. Ex. 11, MSOR 005400-5530. Like Mississippi's Unnatural Intercourse law, the Louisiana "Crime Against Nature" statute criminalizes oral and anal sex with no additional elements. *Id*.

The State's file reflects only that the Registrant, 25 at the time, engaged in oral sex and that no force was involved. MSOR.005416, MSOR.005529. Yet the State charged Registrant No. 7 with failing to re-register as a sex offender [redacted]—even though he was convicted under a clearly unconstitutional statute and registration scheme—and sentenced him to [redacted] prison. MSOR.005410; MSOR.005427. Like Registrant No. 36, Registrant No. 7 was and is forced to submit to a sex offender registry with all of its attendant daily humiliations for the simple act of engaging in sex with another man. Registrant No. 7's conviction cannot be valid under any reading of *Lawrence*, and Defendants have produced no evidence or argument to the contrary.

Registrant No. 22 was convicted in Virginia of engaging in oral or anal sex (Defendants' documents do not specify which one) with a woman when he was 19 and she 17 years old. *See* Supp. Schwarz Decl. Ex. 12, MSOR.006252-MSOR.006317. The State's documents indicate that no force was involved. MSOR.006253. Had a 19-year-old engaged in vaginal sex with a 17-year-old, the offender would not only have avoided registration, but also would not have even committed a crime in Mississippi. Miss. Code Ann. § 97-3-65 (establishing age of consent at 16 years old). The requirement that Registrant No. 22 register as a sex offender is exclusively a result of continued irrational distinctions between vaginal sex and sex acts traditionally associated with homosexuality.

In fact, Defendants are not in possession of *any* documents describing underlying charges or convictions for four people it forces to register for Unnatural Intercourse convictions or out-of-state equivalents. It is impossible for either Plaintiff or the State to have any understanding of the original accusations against these four "offenders" because all either side knows is that Mississippi forces them to register for Unnatural Intercourse convictions or out-of-state

equivalents. And under existing state law, Mississippi is required to register these individuals. Because despite Defendants' refrain about the unproven facts supposedly underlying the facts of some of those forced to register under the Unnatural Intercourse statute, the facts underlying the conviction are simply not relevant to the requirement to register. Registration is a function of the statute under which the defendant is convicted, not the facts giving rise to that conviction or charge. Indeed, as Defendants have conceded, Mississippi would require registration for individuals convicted under the statutes declared invalid in *Lawrence*. *See* SUMF ¶18.

The unconstitutionality of the State's registration scheme is perhaps best laid bare by one simple example: if Michael Hardwick had been convicted of violating the Georgia statute that he admitted to violating and that the Supreme Court upheld in *Bowers v. Hardwick*, Mississippi would force him to register as a sex offender if *today* he relocated to the state: "In August 1982, . . . Hardwick . . . was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of [his] home." *Bowers*, 478 U.S. at 187-88. The Georgia statute is virtually indistinguishable from the Unnatural Intercourse statute, criminalizing "any sexual act involving the sex organs of one person and the mouth or anus of another." Georgia Code Ann. § 16-6-2 (1984). The prosecutor dropped the charges, but Hardwick avoided conviction only on account of the District Attorney's grace. Clearly, if the prosecutor had proceeded with the charge, the conviction would have been upheld as constitutional at the time. *Bowers*, 478 U.S. at 192.

Defendants candidly admit that Mississippi would require registration in such circumstances. *See* SUMF ¶ 18, citing Schwarz Decl. Ex. 1 (Defendants' Response to Plaintiffs' Request For Admission No. 7 ("Defendants admit only that, under Miss. Code Ann. § 45-33-23(h)(xxi), an individual with a conviction for violating Georgia's "Sodomy" statute (Ga. Code

Ann. § 16-6-2(a)(1)) who resides in Mississippi must register with the MSOR regardless of the facts and circumstances underlying the conviction."). The State also bluntly admits that anyone with a conviction under the Texas law declared unconstitutional under *Lawrence* would be forced to register in Mississippi, *even under the exact factual circumstances* presented in *Lawrence*. *See* SUMF ¶ 18, citing Schwarz Decl. Ex. 1 (Defendants' Response to Plaintiffs' Request For Admission No. 6 ("Defendants admit only that, under Miss. Code Ann. § 45-33-23(h)(xxi), an individual with a conviction for violating Texas' "Homosexual Conduct" statute (Tex. Penal Code § 21.06) who resides in Mississippi must register with the MSOR regardless of the facts and circumstances underlying the conviction.").

So too for William MacDonald. MacDonald was convicted of solicitation with a predicate felony of Virginia's "Crimes Against Nature" statute, which, at the time of his conviction, criminalized all oral and anal sex. *MacDonald*, 710 F.3d at 156; Va. Code § 18.2–361(A) (2005). The Fourth Circuit granted MacDonald habeas relief and declared the Virginia law unconstitutional, *MacDonald*, 710 3.d at 167, but his conviction, equivalent to one under Mississippi's Unnatural Intercourse statute, remains. If MacDonald relocated to Mississippi, the plain text of the registration statute would require his inclusion on the Mississippi Sex Offender Registry. As it does with the unconstitutional Texas and Georgia laws, the State openly admits this. *See* Supp. Schwarz Decl. Ex. 14 (Defendant Hill's Response to Plaintiffs' Request For Admission No. 32 ("Defendants admit only that an individual with a pre-April 23, 2014 conviction for violating Virginia's Crimes Against Nature law who resides in Mississippi must register with the MSOR regardless of the facts and circumstances underlying the conviction.").

The Supreme Court and the Fourth Circuit have declared that the statutes that these men were convicted under are and were unconstitutional. Yet the State would require them to submit

themselves to a civil surveillance system purportedly designed to protect against sexual predators. Thus Mississippi concedes that underlying conduct notwithstanding, it would enforce its registration law for individuals convicted under statutes plainly struck down in *Lawrence*. The constitutional infirmary of the State's position could not be more clear.

Defendants want to have it both ways. They point to allegations, never proven, and, in Arthur Doe's case, never even mentioned in the indictment, to justify registration for those convicted of Unnatural Intercourse. But when, as with Registrant No. 36 and Registrant No. 7, , there are no allegations of involvement with minors, public conduct, or other hypothetical scenarios described in *Lawrence*'s dictum, Defendants rely on the straightforward application of the conviction to the registration statute. These contradictory positions cannot be reconciled.

II. Defendants' Imposition of Registration Requirements on Arthur Doe Violates the Equal Protection Clause By Requiring Registration for Unnatural Intercourse but not For Materially Indistinguishable Prostitution Offenses.

As Plaintiff argues in his Motion for Summary Judgment, 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). *See Doe v. Caldwell*, 913 F. Supp. 2d 262, 265 (E.D. La. 2012) (holding that the state's mandating "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. Jindal*, 851 F. Supp. 2d 995, 1009 (E.D. La. 2012) (finding plaintiffs entitled to judgment as a matter of law under the Equal Protection Clause because, *inter alia*, "the straightforward

comparison for the plaintiffs, for Equal Protection purposes, is with those convicted of solicitation of Prostitution").

While an Unnatural Intercourse conviction requires registration, a conviction for identical conduct under Mississippi's materially indistinguishable Prostitution statute does not. The Prostitution statute, Miss. Code Ann. § 97-29-49, bars the performance of sexual intercourse or sexual conduct for money, and states that "'sexual conduct' includes 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." Prostitution between adults is not a registrable offense in Mississippi. *See* Miss. Code Ann. § 45-33-23(h)(i-xxiv). Yet the Unnatural Intercourse Statute, which contains no element of solicitation but also bans oral and anal intercourse, Miss. Code Ann. § 97-29-59, does require registration. This is so even though the two statutes contain the same elements and target the same conduct, except that the Prostitution statute requires an additional element: exchange or offer of exchange of money or property, conduct specifically cited in *Lawrence* dictum, that, under Defendants' reading, would exempt those convicted from Lawrence's protections. *See* 539 U.S. at 578 (noting that statute in *Lawrence* does not discuss prostitution). Such a classification is arbitrary and cannot be justified by any legitimate state interest. *See generally* Pl's. Mem. at 24-30. (ECFs No. 98, 109).

Although Defendants' motion is premised entirely on the idea that *Lawrence* applies only to consensual, private, non-commercial conduct between adults, Defendants argue that Prostitution includes an "element of consent" and thus is not comparable to the Unnatural Intercourse statute, "which encompasses a much broader range of conduct than the prostitution statute, including sex with minors and forcible sex acts." But, like the Unnatural Intercourse statute, the Prostitution statute contains no reference to minors or forcible sex acts; it simply

criminalizes sex for money, and does not limit its prohibition to adults or to consent. Yet Defendants' argument essentially makes Plaintiff's equal protection point – neither statute contains any requirement of force, minority, or public conduct, yet the statute that criminalizes oral and anal sex only carries a registration requirement, and the statute that criminalizes the same sexual conduct for money does not. That Defendants find prostitution somehow different from the other offenses they believe are exempted from *Lawrence*'s protections illustrates the illogic of their position. An offer of compensation does not preclude the use of force, or the engagement of minors, any more than conduct in "coercive environment" precludes compensation.

Under any reading of *Lawrence*, *Lawrence* does not apply to Mississippi's Prostitution *statute*, because its holding is limited to statutes whose only elements are oral or anal sex. Mississippi could prosecute individuals engaging in oral or anal sex for money under the Unnatural Intercourse statute rather than the Prostitution statute; the State's choice would result in drastically different outcomes for defendants engaged in identical conduct. Indeed, this is the exact situation found to violate the Equal Protection clause in *Doe v. Jindal*, 851 F. Supp. 2d at 1007 ("there is no legitimating rationale in the record to justify targeting only those convicted of Crime Against Nature by Solicitation for mandatory sex offender registration"). *See also* Pl's. Mem. at 24-30. (ECFs No. 98, 109). Until May 31, 2018, Mississippi was requiring registration for individuals convicted of Louisiana's Crimes Against Nature by Solicitation statute, essentially an attempted prostitution crime, deeming the Unnatural Intercourse statute an equivalent offense. The State abandoned this requirement only after the instant lawsuit was filed and discovery nearly completed. *See* Amended Agreed Order (ECF No. 105).

Defendants' position is that such an outcome did not and would not violate *Lawrence*, because Lawrence does not apply to prostitution. Thus if the State were able to look behind an Unnatural Intercourse conviction and use non-proven allegations to demonstrate that an Unnatural Intercourse conviction involved an exchange of money, the requirement that those with Unnatural Intercourse convictions register would survive. But *Lawrence* does not save the registration requirements from scrutiny under the Equal Protection clause. The MSOR requires registration for Unnatural Intercourse for a minimum of twenty-five years. But the Prostitution statute, which remains valid after *Lawrence*, triggers no registration at all. Defendants do not offer any rational basis or legitimate state interest for this arbitrary and devastating result for those convicted of Unnatural Intercourse.

Defendants attempt to justify Arthur Doe's registration by stating that 1) his conviction resulted from conduct he engaged in while he was incarcerated and 2) that "his cellmate claimed he was forcibly sodomized." Defs. Mem. at 29. Thus the registration requirement is not arbitrary, because his conduct "cannot … be considered similar" to engagement in sexual intercourse in exchange for compensation. *Id*. This position is untenable in a summary judgment motion. First, Mississippi does not criminalize sexual intercourse while incarcerated. It is irrelevant to the Court's equal protection analysis here that Pennsylvania and California do. The question for equal protection purposes is whether the Mississippi Sex Offender Registration Law arbitrarily and irrationally classifies convictions under the two statutes. *See Doe v. Jindal*, 851 F. Supp. 2d at 1009. Second, Mr. Doe was not indicted, much less convicted, for any forcible act. Defendants' reference to the "specific facts of Mr. Doe's case" amounts only to an unproven claim, supported only by notes supplied by a third party, about alleged conduct. Such hearsay evidence – which does not appear even in Mr. Doe's indictment – cannot substitute for a

conviction for forcible sex. *See In re Winship*, 397 U.S. at 364. In Arthur Doe's case, all the state could prove – and indeed, all the state even attempted to prove – was engagement in sodomy.

Finally, Defendants' argument that the State has a rational basis to classify Unnatural Intercourse or out-of-state convictions differently because many registrants have committed "egregious" acts or harmed others is meritless. As Defendants' documents indicate, the registration requirement for those with Unnatural Intercourse convictions has applied to a wide range of conduct, including conduct where there is no suggestion, much less admissible evidence or proof, of coercive, harmful, or currently-unlawful acts. *See supra* at 5-6, 28-30. Given the wide range of conduct covered by the Unnatural Intercourse statute, the differential classification of those convicted under the Prostitution statute has no rational basis. The requirement to register for an Unnatural Intercourse conviction for a "crime against nature with mankind" cannot stand under *Eisenstadt v. Baird*.

III. Defendants Have Violated Plaintiff's Procedural Due Process Rights by Using Unproven Facts to Justify Registration and by Failing to Provide Him With Notice and Opportunity to Challenge Registration Under Mississippi Law.

In arguing for summary judgment on substantive due process and equal protection grounds, Defendants repeatedly state that post-hoc assertions of underlying, never-proven facts in Arthur Doe's case are enough to remove him from the protections of Lawrence and to refuse to extend the reasoning of the *Doe v. Jindal* court. But when arguing that the State has not violated Mr. Doe's procedural due process rights, Defendants rely exclusively on the fact of his conviction, because "under Mississippi law, registration with the MSOR is only triggered when an offender is convicted of one of the enumerated registrable offenses." Defs. Mem. at 26. Thus, Defendants argue, because Mr. Doe was convicted, "'no further process is due before imposing

sex offender [registration] conditions.'" Defs. Mem. at 26, quoting *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010).

Defendants' reliance on this principle is misplaced. As Plaintiff has argued, Pls. Mem. at 23, in *Meza*, the Fifth Circuit makes clear that individuals facing sex offender registration are entitled to, "at a minimum: (1) written notice that sex offender conditions may be imposed as a condition of his mandatory supervision, (2) disclosure of the evidence being presented against [him] to enable him to marshal the facts asserted against him and prepare a defense, (3) a hearing at which [him] is permitted to be heard in person, present documentary evidence, and call witnesses, (4) an impartial decision maker, and (5) a written statement by the factfinder as to the evidence relied on and the reasons it attached sex offender conditions to his mandatory supervision." 608 F.3d at 409. There is no factual dispute that Mr. Doe was not offered these procedural protections at any time, not when he was convicted in 1978, not when the MSOR was enacted in 1995, not when *Lawrence* was decided in 2003, and at no other time since. *See* Pls. Mem. at 23-24.

Such procedural protections are mandated not only under Fifth Circuit precedent, but also under the MSOR itself, which requires courts to "provide written notification to any defendant charged with a sex offense" and to include such notification on "guilty plea forms and judgment and sentence forms." Miss. Code Ann. § 45-33-39. Mr. Doe's guilty plea pre-dated the issuance of *Lawrence* by 25 years. Defendants argue that in spite of *Lawrence* they can require registration under the unconstitutional statute based on the facts of the allegations against an individual registrant, but, in the wake of the *Lawrence* decision, the State never provided those with Unnatural Intercourse convictions the opportunity to challenge the MSOR's requirement that those with Unnatural Intercourse convictions submit to sex offender registration. "[D]ue

process demands more than no hearing at all." *Bowlby v. City of Aberdeen*, 681 F.3d 215, 221 (5th Cir. 2012) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972)).

Defendants cannot save Mississippi's registration requirement for Mr. Doe[14] by arguing that the State can require registration based on any alleged, never-proven circumstances, especially given their position that conviction is the only trigger for registration. Indeed, such an argument, if accepted, would require the Court to rewrite the MSOR itself to allow for post-hoc investigation into conduct alleged decades earlier. As with Defendants' proposed revision and narrowing of the Unnatural Intercourse statute, such judicial rewriting would run afoul of the Supreme Court's urgings in *Ayotte* and *Morales*. *See* Section I.C, *supra*.

* * *

Mr. Doe's claims that his registration is unconstitutional rely on the language of the statute under which he was convicted. That the State possesses a note written by a prison employee purporting to summarize an inmate's statement that he did not consent to sodomy with Mr. Doe cannot substitute for a conviction for forcible conduct, especially given that those same notes indicate that Mr. Doe stated that he engaged in consensual sex. Even if Mr. Doe had been indicted for forcible sexual contact – which he was not – this indictment would not have altered the plain words of the statute under which he was convicted or provided him with the notice to

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[14] Nor has the State ever provided any due process for those with out-of-state convictions the State deems equivalent to Unnatural Intercourse. The State simply decides, on its own, that certain out-of-state offenses, even if they are not registrable in the jurisdiction in which the registrant was convicted, must trigger registration in Mississippi. *See* Supp. Schwarz Decl. Ex. 15 (Excerpts from the Deposition of Lt. Charlie Hill at 48:7-52:12 (describing process by which the Department of Public Safety determines that an individual with an out-of-state conviction must register); 53:10-54:22 (describing lack of notification to individuals with out-of-state offenses deemed registrable in Mississippi)). Given the Department of Public Safety's lack of training related to (or even awareness of) *Lawrence*, *id*. at 40:19-41:16, it is not surprising that Mississippi continues to require individuals with convictions for oral or anal sex only to register.

which he was entitled. Arthur Doe is entitled to summary judgment on his substantive due process claim under *Lawrence*, his equal protection claim under *Eisenstadt*, and his procedural due process claim under *Meza*.

IV. *Heck v. Humphrey* Does Not Bar Relief Under the Due Process or Equal Protection Clauses.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that an inmate's § 1983 damages claims for malicious prosecution, destruction of evidence, and attendant due process violations at trial were barred if his underlying conviction had not yet been invalidated (by successful direct appeal, executive action, or habeas relief). Defendants argue that *Heck*'s rule also bars *any* "injunctive or declaratory relief which, if granted, would necessarily imply that a conviction is invalid." Defs. Mem. at 24 (citation and internal quotation marks removed). But *Heck*'s bar is not nearly so broad or subjective in application.

Heck and the later Supreme Court cases applying it impose a rule requiring exhaustion of habeas remedies.[15] Obviously such a rule applies only where habeas relief is available. Habeas is available only when a petition is filed while the petitioner is still in custody. Where collateral consequences of a conviction (*e.g.* felon disenfranchisement, or registration requirements) are present *after release from custody*, the validity of the conviction may continue to be challenged in a habeas proceeding even after release, but only where the initial petition was *filed while in custody*. *See Carafas v. LaVallee*, 391 U.S. 234, 238-39 (1968) (habeas *jurisdiction* attaches only if individual is in custody at time of filing, per text of habeas statute and "history of the great

[15] *Heck* appears to announce only a rule of issue preclusion, not exhaustion, *see* 512 U.S. at 488-89 & 488 n.9; *cf. id.* at 503 (Souter, J., concurring in judgment) (four justices would apply "explicit policy of exhaustion" borrowed from habeas statute), but the Supreme Court has subsequently described *Heck* as creating a "habeas exhaustion rule" of "resort to state litigation and federal habeas before § 1983." *Muhammad v. Close*, 540 U.S. 749, 751-52 (2004); *see also* Erwin Chemerinsky, FEDERAL JURISDICTION 523-24 (6th ed. 2011) (dating change to *Edwards v. Balisok*, 520 U.S. 641 (1997)).

writ," but *remedy* is not limited to release from confinement); *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004) ("The Supreme Court has made it clear that the 'in custody' determination is made at the time the *habeas* petition is filed." (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998))). "Custody" for these purposes means physical incarceration or equivalent restraints on liberty such as supervised release.[16] To date the five circuits to address the question have uniformly rejected the notion that a sex offender's requirement to register is itself sufficient to constitute "custody" for purposes of the habeas statute. *See Calhoun v. Attorney Gen. of Colorado*, 745 F.3d 1070, 1074 (10th Cir. 2014) (citing 4th, 6th, 7th, and 9th Circuit precedents).

Accordingly five justices of the Supreme Court noted in *Spencer v. Kemna*, 523 U.S. 1 , that a requirement to exhaust under *Heck* only applies if the prisoner is in custody. *Id*. at 21 (Souter, J., concurring, joined by O'Connor, Ginsburg, Breyer, J.J.); *accord id*. at 21-22 (Ginsburg, J., concurring); *id*. at 25 n.8 (Stevens, J., dissenting). The Court applied the rule in this fashion in *Muhammad v. Close*, 540 U.S. 749, 755 (2004), holding that an inmate's § 1983 suit "raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that *Heck*[]... was inapplicable." The Court's 2005 opinions in *Wilkinson v. Dotson*, 544 U.S. 74 (2005) unanimously approved this interpretation, focusing entirely on whether the § 1983 claims at issue held implications for the legality of plaintiff's continuing confinement:

> th[is] Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody. ... [Our] cases, taken together, indicate that a state prisoner's § 1983 action is

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[16] *See, e.g., Hensley v. Mun. Ct.,* 411 U.S. 345, 349 (1973) (pre-trial release); *Barry v. Bergen County Prob. Dep't,* 128 F.3d 152, 159 (3d Cir. 1997) (community service).

> barred … if success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Id. at 81-82. The majority reasoned that plaintiffs' § 1983 challenges to parole proceedings were not subject to habeas and thus not barred by *Heck*. *Id*. at 82 (claims "do not fall within the implicit habeas exception"); *id*. at 85 (Scalia, J., concurring) ("contrary holding would require us to broaden the scope of habeas relief beyond recognition"). Justice Kennedy, the sole dissenter, based his dissent on the grounds that "[c]hallenges to parole proceedings are cognizable in habeas," *id*. at 88-89 (arguing that writ may be granted conditionally, ordering either release or a new parole hearing with remedied procedures), and therefore the *Heck* bar should apply.

Defendants would read the *Heck* bar more broadly than the Supreme Court, arguing that any declaratory or injunctive relief granted here would "imply" unconstitutionality of the Unnatural Intercourse statute under which Arthur Doe was convicted, and thus is also barred by *Heck*. Defs. Mem. at 24-25. In support they cite a pair of unpublished[17] Fifth Circuit decisions, five district court decisions within this Circuit, and an unpublished Tenth Circuit decision. *Id*. at 24, 24 n.5. But in every one of those cases, the § 1983 plaintiff was in custody when he sought relief.[18] Those § 1983 plaintiffs could and should have sought relief in habeas. Despite the severe

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[17] The rules of the Fifth Circuit hold that unpublished opinions dated 1996 and later are not precedent, *see* 5th Cir. R. 47.5.4. (One of the cited Fifth Circuit cases, *Mann v. Denton County*, 364 Fed. Appx. 881 (5th Cir. 2010), cites a published Fifth Circuit opinion, *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002) (applying *Heck* to preclude § 1983 claim seeking to compel state to produce biological evidence for DNA testing). But the *Kutzner* decision was invalidated by the Supreme Court's decision in *Skinner v. Switzer*, 562 U.S. 521, 534 (2011) (holding § 1983 claim for post-conviction DNA testing not barred by *Heck*).) The Tenth Circuit case cited by defendants (Defs. Mem. at 24 n.5), *Lawrence v. McCall*, 238 Fed. Appx. 393 (10th Cir. 2007), is also unpublished and therefore non-precedential under Tenth Circuit rules, *see* 10th Cir. R. 32.1(A).

[18] *See Mann*, 364 Fed. Appx. at 883 n.2 (footnote makes clear plaintiff remained in custody; he therefore presumptively could have challenged alleged violation of terms of plea bargain under state habeas); *Green v. Vu*, 393 Fed. Appx. 225, 225 (5th Cir. 2010) (current "Texas inmate" sought to challenge constitutionality of statute of conviction); *Castaneira v. Perdue*, No.

collateral consequences suffered by Arthur Doe as a result of his unconstitutional conviction, because he is no longer physically in custody, it is likely that habeas relief is unavailable to him. Because *Lawrence* was decided after his release, Doe never had the ability to seek habeas relief while he was in custody.[19] Therefore *Heck* cannot demand exhaustion of habeas remedies, and poses no bar to the equitable relief he presently seeks.

In any event, even if a decision on Mr. Doe's claims under *Lawrence* could be interpreted to undermine the validity of his underlying conviction, his equal protection and procedural due process claims do not. Instead, they challenge the discriminatory and procedurally unfair

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No. 1:10-CV-3385, 2010 WL 5115193, at *1 (N.D. Ga. Dec. 9, 2010) ("Plaintiff, pro se, is confined in the Dooly State Prison"); *Goodnow v. County of Roscommon*, 2010 WL 234715, at *2-*3 (W.D. Mich. Jan.14, 2010) (imprisoned plaintiff initially filed § 1983 claim as habeas petition, but repleaded in order to avoid paying $5 habeas filing fee); *Johnson v. Louisiana*, No. 08-4274, 2009 WL 960564, at *1, *2 & *2 n.2 (E.D. La. Apr. 7, 2009) (pro se prisoner filed § 1983 claims that "are at their core habeas claims," and had failed to exhaust state remedies); *Cordova v. City of Reno*, 920 F. Supp. 135, 137, 139-40 (D. Nev. 1996) (§ 1983 suit filed "while still incarcerated" to challenge constitutionality of vagrancy statute of conviction; court treated complaint as habeas petition and granted relief); *Lawrence v. McCall*, 238 Fed. Appx. 393, 396 (10th Cir. 2007) ("Seeking a writ of habeas corpus is the proper avenue" for plaintiffs who district court opinion (2007 WL 682022 (W.D. Okla. Mar 1, 2007)) confirms are state prisoners).

[19] *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000) (per curiam), a case not cited by Defendants, held that *Heck* barred § 1983 claims arguing that a former prisoner had not received proper credit for time spent in incarceration on a warrant and thus had to serve that time twice. The district court found these claims frivolous, *id*. at 300, but the Fifth Circuit instead applied the *Heck* bar for failure to challenge the alleged miscalculation in habeas. Although the § 1983 claims were filed after release, when Randell no longer had access to habeas relief, the Circuit applied the *Heck* bar, notwithstanding the language in the *Spencer* opinions. *Id*. at 301-02. However, the *pro se* plaintiff in Randell had the ability to seek relief for the miscalculation of the time he had served *while he was in prison*; he simply failed to do so, and the Circuit refused to reward him with a § 1983 damages action in place of the habeas action he should have brought previously. *Id*. at 301 ("Randell has not shown that such a procedural vehicle is lacking; he speaks only of inability to obtain habeas relief."). In any event, *Randell* was decided prior to the Supreme Court's opinions in *Muhammad v. Close* (2004) and *Wilkinson v. Dotson* (2005), described above. No precedential opinion of the Fifth Circuit calls into question the clear interpretation of *Heck* set forth in those opinions. *But cf. Black v. Hathaway*, 616 Fed. Appx. 650 (5th Cir. 2015) (unpublished, non-precedential, per curiam) (expressing ambivalence about impact of *Muhammad v. Close* (but not addressing *Wilkinson v. Dotson*) in dismissing § 1983 claims of *pro se* former-prisoner plaintiff who had in fact brought state and federal post-conviction challenges, and lost).

application of the collateral consequence of his conviction—the registration requirement—to him. Therefore they do not "necessarily imply that [Doe's] conviction is invalid," and on the state's own argument would not be barred by *Heck*.

CONCLUSION

For all these reasons, Plaintiff Arthur Doe respectfully requests that the Court deny Defendants' motion for summary judgment on all of Plaintiff's substantive due process, equal protection, and procedural due process claims.

Dated: June 1, 2018

Respectfully submitted,

CENTER FOR CONSTITUTIONAL RIGHTS

By: /s/ Ghita Schwarz
Ghita Schwarz
pro hac vice
Shayana Kadidal
pro hac vice
Stephanie Llanes
pro hac vice
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6445
Fax: (212) 614-6499
gschwarz@ccrjustice.org
shanek@ccrjustice.org
sllanes@ccrjustice.org

LAW OFFICE OF ROBERT MCDUFF

By: /s/ Robert B. McDuff
Robert B. McDuff
Bar No. 2532
767 North Congress Street
Jackson, Mississippi 39202
Tel:(601) 969-0802
Fax: (601) 969-0804
rbm@mcdufflaw.com

LAW OFFICE OF MATTHEW STRUGAR

By: /s/ Matthew Strugar
Matthew Strugar
pro hac vice
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
Tel: (323) 696-2299
matthew@matthewstrugar.com

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 to of such filing to the following:

PAUL E. BARNES, MSB No. 99107
Special Assistant Attorney General State of Mississippi
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
pbarn@ago.state.ms.us

WILSON MINOR, MSB No. 102663
Special Assistant Attorney General State of Mississippi
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
wmino@ago.state.ms.us

ATTORNEYS FOR DEFENDANTS

THIS, the 1st day of June, 2018.

/s/Ghita Schwarz_
GHITA SCHWARZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ARTHUR DOE, **Plaintiff,** v. **JIM HOOD, Attorney General of the State of Mississippi, *et al*,** **Defendants.**	**Case No. 3:16-cv-00789-CWR-FKB**

SUPPLEMENTAL DECLARATION OF GHITA SCHWARZ IN SUPPORT OF PLAINTIFF ARTHUR DOE'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Ghita Schwarz, declare as follows:

1. I am a member of the State Bar of New York and am admitted *pro hac vice* in this action. I am a Senior Staff Attorney at the Center for Constitutional Rights ("CCR"), and counsel of record along with the Law Office of Robert McDuff and the Law Office of Matthew Strugar for Plaintiffs in this action. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath.

2. I make this supplemental declaration in support of Plaintiff Arthur Doe's Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment.

3. The exhibits attached to my initial declaration (ECF Nos. 99, 111) were numbered Exhibits 1-9.

4. Consistent with Defendants' system of numbering in their opening brief and the protective order in this case, Plaintiff identifies registrants by number. Registrant numbers are

taken from Plaintiffs' responses to Defendants' discovery requests related to the identities of individuals who Plaintiffs believed would belong to a class. *See* Defs. Mem. at 22 n.4; Defs. Ex. 4 at 4-6.

5. Attached as Exhibit 10 is a true and correct copy of the file produced by Defendants regarding Mississippi's requirement that [REDACTED] register as a sex offender. [REDACTED] is identified in Plaintiff's Opposition Memorandum as Registrant No. 36.

6. Attached as Exhibit 11 is a true and correct copy of the file produced by Defendants regarding Mississippi's requirement that [REDACTED] register as a sex offender. [REDACTED] is identified in Plaintiff's Opposition Memorandum as Registrant No. 8.

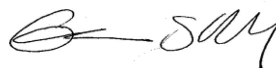
7. Attached as Exhibit 12 is a true and correct copy of the file produced by Defendants regarding Mississippi's requirement that [REDACTED] register as a sex offender. [REDACTED] is identified in Plaintiff's Opposition Memorandum as Registrant No. 22.

8. Attached as Exhibit 13 is a true and correct copy of excerpts from the transcript of the Deposition of Lori Jones (February 21, 2018).

9. Attached as Exhibit 14 is a true and correct copy of Defendant Hill's Response to Plaintiffs' Request For Admission No. 32.

10. Attached as Exhibit 15 is a true and correct copy of excerpts from the transcript of the Deposition of Lt. Charlie Hill (February 21, 2018).

Executed this 1st day of June, 2018



Ghita Schwarz
Attorney for Plaintiff

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:

PAUL E. BARNES, MSB No. 99107
Special Assistant Attorney General
State of Mississippi
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
pbarn@ago.state.ms.us

WILSON MINOR, MSB No. 102663
Special Assistant Attorney General
State of Mississippi
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
wmino@ago.state.ms.us

ATTORNEYS FOR DEFENDANTS

THIS, the 1st day of June 2018.

/s/Ghita Schwarz

GHITA SCHWARZ

Exhibit 10

TO BE FILED UNDER SEAL

Exhibit 11

TO BE FILED UNDER SEAL

Exhibit 12

TO BE FILED UNDER SEAL

Exhibit 13

TO BE FILED UNDER SEAL

Exhibit 14

TO BE FILED UNDER SEAL

Exhibit 15

TO BE FILED UNDER SEAL