IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ARTHUR DOE, et al. **PLAINTIFFS**

VS. **CAUSE NO: 3:16-cv-789**

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

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, sued in their official capacities only, and submit this memorandum in opposition to Plaintiff Arthur Doe's motion for summary judgment [Doc. 97] as follows, to-wit:

Plaintiff Arthur Doe's motion for summary judgment [Doc. 97] should be denied, because (1) Arthur Doe is not entitled to facial relief based on substantive due process, because *Lawrence v. Texas* did not facially invalidate Mississippi's unnatural intercourse statute, Miss. Code Ann. § 97-29-59; (2) Arthur Doe is not entitled to as-applied relief because his unnatural intercourse conviction was for sexual activity [redacted] that is not constitutionally protected under *Lawrence* or otherwise; (3) Arthur Doe has not been denied procedural due process; and (4) requiring registration for unnatural intercourse convictions based on [redacted] does not violate the Equal Protection Clause of the Fourteenth Amendment.[1]

[1] The parties have filed competing motions for summary judgment. In the interest of judicial economy, Defendants accordingly incorporate by reference their own Motion for Summary Judgment (with all exhibits) [Doc. 91] and their Memorandum in Support of Defendants' Motion for Summary Judgment [Doc.92]. All references herein to Exhibits are to the Exhibits attached to Defendants' Motion for Summary Judgment [Doc. 91].

THE UNDISPUTED MATERIAL FACTS PROVE ARTHUR DOE IS NOT ENTITLED TO ANY RELIEF WHATSOEVER.

The undisputed material facts relevant to the parties' competing motions for summary judgment are: (1) Arthur Doe pled guilty to unnatural intercourse in 1978 at the same time he pled guilty to [redacted]; (2) Arthur Doe was [redacted], (3) the victim was [redacted]; and (4) Arthur Doe admitted that he engaged in sodomy [redacted]. Although the victim alleged [redacted], Arthur Doe alleges [redacted]. However, any dispute [redacted], is irrelevant and immaterial. It is undisputed that Section 97-29-59 prohibits both oral and anal sodomy. *State v. Mays*, 329 So. 2d 65, 65-67 (Miss. 1976); *State v. Davis*, 79 So. 2d 452, (Miss. 1955) (unnatural intercourse statute prohibits sodomy, whether *per anus* or *per os*).

Plaintiffs argue that "[t]he State will not be able to save its registration requirement for Mr. Doe by arguing that it may do so based on any alleged, never-proven circumstances underlying his conviction." [Pl. Mem. at 24]. Defendants have no need to resort to such a tactic, because the undisputed material facts show that Arthur Doe's 1978 conviction for unnatural intercourse was based on sodomy involving Arthur Doe [redacted] *See, e.g.*, *People v. Groux*, No. F059366, 2011 WL 2547022, at *10 11 (Cal. Ct. App. June 28, 2011).

The CANS Plaintiffs' Claims Are Irrelevant and Immaterial to Any Issue Before the Court.

In the Amended Complaint, Plaintiffs asserted equal protection claims brought on behalf of

the CANS Plaintiffs who were on the MSOR solely because of Louisiana convictions for "Crimes Against Nature Solicitation." However, those claims were resolved by the parties, and the individuals entitled to be removed from the MSOR based on the Agreed Order [Doc. 103] and Partial Judgment [Doc. 104] were removed from the registry on or about May 30, 2018. Therefore, the facts and circumstances of the convictions of the CANS Plaintiffs and their previous registration on the MSOR are now irrelevant and have no bearing on Arthur Doe's motion for summary judgment. Arthur Doe's claims must stand on their own merit, and therefore those claims necessarily fail.

Arthur DOE IS NOT ENTITLED TO ANY FACIAL OR AS-APPLIED RELIEF UNDER *LAWRENCE V. TEXAS*.

This Case Is Not about Private Consensual Sex Between Adults.

From the outset, Plaintiffs have postured as if this case was about private, consensual sex between adults. That is not what this case is about. Throughout this litigation, Defendants have conceded that *Lawrence v. Texas* held that Fourteenth Amendment substantive due process generally bars criminalization of private consensual sex between adults. [*See, e.g.*, Doc. 26 at 4-5]. *Cf. Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) ("Because of *Lawrence*, the issue before us is whether the Texas statute impermissibly burdens the individual's substantive due process right to engage in private intimate conduct of his or her choosing.").

But Plaintiffs' position has always been (with one notable tacit admission discussed *infra* at 12-13) that *Lawrence facially* invalidated all state sodomy statutes, such that "Miss. Code Ann. § 97-29-59 is *facially unconstitutional and unenforceable in any situation involving conduct between human beings*." [*See* Doc. 60, at 27-29] (emphasis added).

If this case was actually about the criminalization of private consensual sex between adults,

Plaintiffs have had every opportunity to prove it. However, Plaintiffs have not come forward with any evidence to suggest that any person is a registered sex offender in Mississippi because of private consensual sex between adults. On the other hand, Defendants *have* produced credible evidence that Arthur Doe's conviction was not based on any constitutionally protected conduct, and that granting the facial relief requested by Arthur Doe would ultimately result in the removal of numerous sexual predators from the MSOR. [Doc. 91-1]. By clinging to their overbroad interpretation of *Lawrence*, Plaintiffs have put themselves in the position of asking the Court to order Defendants to remove from the MSOR dangerous sex offenders. It cannot genuinely be disputed that most of the convictions for unnatural intercourse that "relate[] to activity between human beings" were based on sexual abuse of minors, or crimes of force or coercion, including sexual battery and rape. [*See* Doc. 91-4, 91-5].

Early on, Defendants explained their need for discovery to separate the wolves from the sheep, including the need for discovery related to Arthur Doe's conviction:

> Only one of the named Plaintiffs, Arthur Doe, even sets out a potentially arguable *Lawrence* claim, as he alleges he is on the sex offender registry solely because of a Mississippi conviction for unnatural intercourse in 1979 (pre-*Lawrence*). However, Arthur Doe has not alleged, nor at this time have the Defendants had the opportunity to discover, whether Arthur Doe's unnatural intercourse conviction was actually for conduct protected by *Lawrence*, *i.e.*, private, non-commercial, sexual activity between consenting adults, or whether that conviction was based on sexual activity falling outside the scope of constitutional protection recognized by *Lawrence*. In point of fact, at this early stage of the proceedings, no evidence has been offered to indicate that *any* person on the MSOR is on the registry solely for sexual conduct of the type protected by *Lawrence*."

[Doc. 26, at 6]. Now that discovery has been conducted, Defendants have produced evidence proving that Arthur Doe was not convicted for conduct protected by the Constitution, [Doc. 91-1], and that no evidence has been developed to indicate that any person is on the MSOR for conduct

recognized as constitutionally protected by *Lawrence*. If Plaintiffs had any evidence to prove that any offender was registered on the MSOR for private consensual sex between adults, they would have produced it to the Court by now. If any such evidence exists, Plaintiffs have not identified it in any of their discovery responses, filings, or exhibits, to either Defendants or the Court.

The Supreme Court Did Not Say What Plaintiffs Allege the Court "Intended."[2]

Plaintiffs' entire argument is based on the dubious proposition that *Lawrence v. Texas* facially invalidated all state sodomy laws. Plaintiffs frequently engage in hyperbole, describing the Supreme Court's holding in *Lawrence* with such terms and phrases as "unequivocal," "unmistakably," and "unusually candid and explicit language." Plaintiffs argue that the "plain language" of *Lawrence* "made clear" that *Lawrence* facially invalidated all sodomy statutes, yet then devote page after page of their brief in an attempt to convince the Court of what *Lawrence* supposedly said in "unusually candid and explicit language." If the meaning of Lawrence was "made clear" there should be no need to"explain" what the Court said and did. Plaintiffs use of the terms "apparent" and "intended" to describe the holding of *Lawrence* further undermine their semantical arguments.

Plaintiffs have parsed *Lawrence* line by line and base their argument on such phrases as the "*statute* further[ed] no legitimate state interest." [Pl. Mem. at 50]. However, there are even more contextual clues in *Lawrence* that the more direct and logical interpretation of *Lawrence* is an as-applied case.

The key language in *Lawrence* is the section where the majority described what the "case" was not about, a strong statement that discredits and contradicts Plaintiffs' position, which

[2] [Pl. Mem. at 10].

Plaintiffs therefore unsurprisingly attempt to dismiss as a "dictum":

> This *case* does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their *private* lives. The State cannot demean their existence or control their destiny by making their *private sexual conduct* a crime . . . *The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution*.

Lawrence, 539 U.S. at 568 (emphasis added).

Plaintiffs argue that in this passage, the Court was saying that all anti-sodomy statutes are unconstitutional on their face, but if a state wanted to enact a statute criminalizing sodomy that added an additional element, such as age, or injury, or coercion, or public conduct, or prostitution, that would be constitutionally permissible. [Pl. Mem. at 18-20]. If the Supreme Court had "intended" that meaning, it would have said so. It did not. For instance, the Court could have said any "criminal statute whose only element is the commission of oral or anal sex is unconstitutional." [Pl. Mem. at 5]. It did not. The Court could have used some version of the word "facial" to describe the scope of its ruling. For example: "the Texas statute under which *Lawrence* was convicted is facially invalid"; "the Texas law is unconstitutional on its face"; or "all state statutes which criminalize sodomy in any way are unconstitutional and must be struck down." The Court did not say any of those things. Further, the *Lawrence* Court did not say that "all sodomy laws are unconstitutional even when applied to sex with children, forcible sodomy, or assaults on vulnerable adults." Moreover, the Court did not say "it is unconstitutional [redacted]"

In his dissent in *McDonald v. Moose*, Judge Diaz discussed the way various words in *Lawrence* could be interpreted (or misinterpreted), but could not conclude that the majority

correctly interpreted the key "this case does not involve minors" section:

> The majority characterizes this segment of the opinion as "ruminations concerning the circumstances under which a state might permissibly outlaw sodomy" that "no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary." I do not see how the majority can be so certain. If anything, the commentary on what "the present case does not involve" is characteristic of an as-applied ruling, particularly because the Court used the words "this case," not "this statute," to limit its holding. This language arguably confines the scope of constitutional protection to private sexual intimacy between consenting adults. In fact, the Court repeatedly emphasized these distinctions throughout its historical and legal analysis of sodomy laws. . . . [*Lawrence*'s] historical discussion also evinces an as-applied ruling to private consenting adults, for it is only relevant inasmuch as it identifies the valid applications of sodomy laws outside this zone of constitutionally protected liberty. In any event, in order for MacDonald to prevail on his federal habeas petition, it must be clear that *Lawrence* facially invalidated all sodomy statutes. *Nowhere in the opinion does the Court do that.*

MacDonald v. Moose, 710 F.3d 154, 169 (4th Cir. 2013) (Diaz, J., dissenting) (internal citations and cross-references omitted) (emphasis added).

Despite Plaintiff's assertion that their interpretation of *Lawrence* is "unmistakably" correct, many distinguished courts have come to the opposite conclusion, and held that *Lawrence* was an as-applied challenge. *See, e.g.*, *See Toghill v. Commonwealth*, 289 Va. 220, 768 S.E.2d 674, 676-82 (2015) (holding Virginia anti-sodomy statute did not violate substantive due process "as applied" to person convicted of soliciting sodomy from a minor); *State v. Music*, 193 Wash. App. 1039, 2016 WL 1704687 (Apr. 28, 2016) *pet. for review continued*, 380 P.3d 484 (table) (*Lawrence* did not support facial challenge to Washington's former sodomy statute); *U.S. v. Marcum*, 60 M.J. 198, (U.S. Ct. App. Arm. For. 2004); *Hamilton v. Clarke*, 2017 WL 6757644, at *7-9 (E.D. Va. Dec. 29, 2017) ("*Lawrence* simply does not afford adults with the constitutional right to engage in sodomy with minors[,]); *State v. Whiteley*, 172 N.C. App. 772, 776-77 (N.C. Ct. App. 2005) ("Our courts have already recognized the limits of the narrow liberty interest

articulated in *Lawrence v. Texas*, and have upheld laws regulating sexual conduct outside those boundaries."); *In re R.L.C.*, 643 S.E.2d 920, 924-25 (N.C. 2007) (holding crime against nature statute applying to "any person" was constitutional under *Lawrence* "as applied" to sodomy between two minors); *see also D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) (explaining that *Lawrence* "invalidat[ed] Texas' sodomy statute as applied to consensual, private sex between adults"); *Muth v. Frank*, 412 F.3d 808, 812 (7th Cir. 2005) (*Lawrence* held that Texas sodomy statute "was unconstitutional insofar as it applied to the private conduct of two consenting adults"). *McDonald v. Moose* is an outlier and this Court should reject its flawed analysis and conclusion.

Arthur Doe Cannot Meet His Heavy Burden to Prove There Is No Set of Circumstances in Which the Challenged Statutes Are Constitutional.

In addition, Plaintiff's argument ignores the most basic precepts of the framework for analyzing facial vs. "as-applied" constitutional challenges. Facial challenges are disfavored, *see, e.g.*, *City of El Cenizo v. Texas* --- F.3d ---, 2018WL2121427 (5th Cir. May 8, 2018) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)), and a plaintiff bears a heavy burden when asking a court to strike down a statute in its entirety:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Salerno, 481 U.S. at 745. Further, "statutes should be construed whenever possible so as to uphold their constitutionality." *Noatex Corp. v. King Const. of Houston*, L.L.C., 732 F.3d 479, 484 (5th Cir. 2013) (quoting *United States v. Vuitch*, 402 U.S. 62, 70 (1971)).

There are many different circumstances and sexual acts that unnatural intercourse statutes

could be applied to, but in *Lawrence*, the Supreme Court only identified one such potential application of the Mississippi statute that is barred by the Constitution: the criminalization of private, consensual sexual activity involving adults. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) ("The plaintiffs' facial challenge fails. *Lawrence* did not identify a protected liberty interest in all forms and manner of sexual intimacy. *Lawrence* recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one's home and one's own private life. The Court made it abundantly clear that there are many types of sexual activity that are beyond the reach of that opinion.") (internal citations omitted). In every other application, sodomy with minors, forcible sodomy, victims unable to consent, and the like, the unnatural intercourse statute can be constitutionally applied. Therefore, Arthur Doe has failed to show that there is no set of circumstances in which the unnatural intercourse statute can be constitutionally applied, and his claim for facial invalidation of the statutes must be denied.

Arthur Doe Lacks Standing to Assert Claims on Behalf of Others.

Also fatal to Plaintiffs' claim for facial relief is that Arthur Doe, the sole remaining named Plaintiff, does not have standing to assert a facial challenge on behalf of others. The federal courts have no authority to entertain a claim which does not satisfy standing requirements establishing the existence of an actual case or controversy between a specific plaintiff and the defendant:

> "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). "First, the plaintiff must have suffered an injury in fact an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" Id. (internal quotation marks and citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Id.* (internal quotation marks and citations omitted). "Third, it must be likely, as opposed to merely speculative, that

> the injury will be redressed by a favorable decision." *Id.* at 561, 112 S. Ct. 2130 (internal quotation marks and citation omitted).

Barber v. Bryant, 860 F.3d 345, 352 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 652, 199 L. Ed. 2d 531 (2018), *and cert. denied sub nom*. *Campaign for S. Equal. v. Bryant*, 138 S. Ct. 671, 199 L. Ed. 2d 535 (2018). Only a hypothetical plaintiff, who was convicted of unnatural intercourse for private consensual sex among adults, and who was required to register as a sex offender, might satisfy the "irreducible consitutional minimum of standing" to assert such a claim.

A court should decline to strike down a law simply because it might be unconstitutional under a different set of circumstances. *See, e.g.*, *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219 20 (1912) ("But this court must deal with the case in hand, and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now."). If a statute can be constitutionally applied to a plaintiff, that plaintiff cannot pursue claims on behalf of others: "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960). To obtain relief, a plaintiff must prove that his conduct was within the zone of protected conduct recognized in *Lawrence*:

> In the present case, regardless of whether Gilbert is attempting to make a "facial" or an "as-applied" challenge to the constitutionality of § 13A-6-65(a)(3), he failed to set forth any evidence in the record indicating that his conduct falls within the specific conduct protected under *Lawrence*. Specifically, there is no evidence in the record indicating that Gilbert engaged in consensual deviate sexual intercourse. Because there is no evidence in the record indicating that Gilbert's conduct was protected under *Lawrence*, Gilbert has failed to meet his burden of establishing that § 13A-6-65(a)(3) is unconstitutional as applied to him. Furthermore,

because the record is devoid of any evidence indicating that Gilbert engaged in consensual deviate sexual intercourse and Gilbert cannot show that § 13A-6-65(a)(3) is unconstitutional as applied to him, he does not have standing to mount a facial challenge to § 13A-6-65(a)(3).

Gilbert v. State, No. CR-13-0839, 2016 WL 1084731, at *6 (Ala. Crim. App. Mar. 18, 2016).

Arthur Doe has not established that the unnatural intercourse statute or the registration statute are unconstitutional as-applied to his conviction. As Arthur Doe was convicted for sexual activity [redacted] which is not constitutionally protected, he lacks standing to assert any claim on behalf of some hypothetical person allegedly convicted of unnatural intercourse based on private sexual activity involving consenting adults. Plaintiffs have not come forward with any evidence to prove such a hypothetical person exists.

The Court Should Reject Plaintiffs Demand That Their Claims Be Considered in the Abstract, Without Regard for the Real Consequences.

Plaintiffs argue that "[t]here is no element in the statute requiring that the sex be forcible, commercial, public, with a minor, between people of the same sex, or any other factor." [Pl. Mem. at 14]. That statement is true, insofar as it goes. However, that there is no separate element in the unnatural intercourse statute criminalizing, for example, sodomy with 13 year-olds, does not render the statute unconstitutional on its face. Plaintiff's argument is essentially that the circumstances and actual conduct for which a person was convicted of unnatural intercourse are irrelevant, and that the Court should decide this case based solely on comparing the required statutory elements of various offenses in the abstract. Thus, Plaintiffs blithely assert that everyone convicted of unnatural intercourse should be removed from the MSOR, regardless of whether the victim was a child, or the conduct was forcible, or the like. Because if one looks at what these offenders actually did, such as Offender No. 10, who forced a 9-year-old female child to perform oral sex on him, [Doc. 91-5 at MSOR.008282, 8369, 8381], and Offender No. 19, who engaged in anal

sodomy with a 10-year-old boy, [Doc. 91-5 at MSOR.010831], there can be no reasonable dispute that such an offender was convicted of criminal sexual activity with another human being which is not constitutionally protected. There is no constitutional protection for forcing pre-pubescent children to perform oral sex on an adult. There is no constitutional protection for acts of sodomy, whether oral or anal, which occur during rape. There is no constitutional protection for acts of sodomy performed on a victim who was unable to give or refuse consent.

It strains credulity to suggest that if the Supreme Court had been asked in *Lawrence v. Texas* to hold that the Texas sodomy statute was unconstitutional where an adult had performed sodomy on a ten-year-old child, the Supreme Court would have blessed that conduct by striking down the statute. Yet the same result would be reached if this Court granted Arthur Doe the facial relief he demands.

In their response to Interrogatory No. 10, Plaintiffs made a significant concession. Interrogatory No. 10, and Plaintiffs' Response, read as follows:

INTERROGATORY NO. 10: [redacted]

RESPONSE TO INTERROGATORY NO. 10: [redacted]

[Doc. 91-2, at 9].

Thus, Plaintiffs tacitly admitted that if an offender's crime *would* constitute another registrable offense under Mississippi law, that offender would not belong to the class on whose

behalf they were seeking relief. This is significant because it means that the underlying conduct, must be considered in determining whether an unnatural intercourse conviction would constitute another registrable offense. For example, under current Mississippi law, a person who performed oral or anal sex on a minor could be convicted of multiple offenses, most particularly sexual battery.[3] However, the same conduct could also be prosecuted as unnatural intercourse. Plaintiffs' interrogatory answer concedes that if a conviction would constitute another registrable offense under Mississippi law, the offender would not be entitled to removal from the MSOR. This is at odds with Plaintiff's argument that underlying conduct does not matter.

However, the problem is that many of the offenders who are on the MSOR for unnatural intercourse convictions, and who committed offenses that would also constitute sexual battery under Mississippi law, were convicted only of unnatural intercourse. So, if this Court strikes down the unnatural intercourse statute on its face, those offenders' convictions would disappear. Suggesting that the State could pass a new statute including an additional element such as age or

[3] Under Mississippi law, sexual battery includes same-sex assaults: "(a) 'Sexual penetration' includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body." Miss. Code Ann. § 97-3-97(a). *See also, e.g.*, *Winding v. State*, 908 So. 2d 163, 165-66 (Miss. Ct. App. 2005); *Bateman v. State*, 125 So. 3d 616, 623 (Miss. 2013) ("This Court has held that slight penetration to the vulva or labia is sufficient to constitute the offense of rape. Sexual battery is no different. In *Johnson*, this Court affirmed the trial court's use of a jury instruction defining "sexual penetration" as, among other things, "mouth to vagina contact commonly called cunnilingus." This Court held that "proof of contact, skin to skin, between a person's mouth, lips, or tongue and the genital opening of a woman's body, whether by kissing, licking, or sucking, is sufficient proof of 'sexual penetration' through the act of 'cunnilingus' within the purview of § 97 3 97(a) ....") (internal citations omitted). However, the crime of sexual battery did not exist under Mississippi law until 1980. *See* Laws 1980, Ch. 450, § 1. At the time of Arthur Doe's conviction, the crime of unnatural intercourse was the only sexual offense he could be charged with for a same-sex sexual assault.

force in addition to sodomy would do nothing to alleviate this problem. A new criminal statute could not be enforced to criminalize past conduct (and thus keep child molesters on the MSOR) without violating the *Ex Post Facto* clause. The bottom line is that facial invalidation is not warranted and would result in an absurd result: persons convicted of unnatural intercourse with children, or through the use of force would have to be removed from the registry.

The Mississippi Legislature's Findings and Declaration of Purpose Are Due Substantial Deference.

Plaintiffs attempt to make an issue out of the fact that "[a]t no point have Defendants studied or analyzed the public safety implications of requiring individuals with Unnatural Intercourse convictions to register." [Pl. Mem. at 7]. However, in connection with establishing the Mississippi Sex Offender Registry, the Mississippi Legislature included specific findings and a declaration of purpose:

> The Legislature finds that the danger of recidivism posed by criminal sex offenders and the protection of the public from these offenders is of paramount concern and interest to government. The Legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations, and quickly apprehend criminal sex offenders are impaired by the lack of information shared with the public, which lack of information may result in the failure of the criminal justice system to identify, investigate, apprehend, and prosecute criminal sex offenders. The Legislature further finds that the system of registering criminal sex offenders is a proper exercise of the state's police power regulating present and ongoing conduct. Comprehensive registration and periodic address verification will provide law enforcement with additional information critical to preventing sexual victimization and to resolving promptly incidents involving sexual abuse and exploitation. It will allow law enforcement agencies to alert the public when necessary for the continued protection of the community.
>
> Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in safety and in the effective operation of government. In balancing offenders' due process and other rights, and the interests of public security, the Legislature finds that releasing such information about criminal sex offenders to the general public will further the primary governmental interest of protecting vulnerable populations and, in some instances the public, from

> potential harm.
>
> Therefore, the state's policy is to assist local law enforcement agencies' efforts to protect their communities by requiring criminal sex offenders to register, to record their addresses of residence, to be photographed and fingerprinted, and to authorize the release of necessary and relevant information about criminal sex offenders to the public as provided in this chapter, which may be referred to as the Mississippi Sex Offenders Registration Law.

Miss. Code. Ann. § 45-33-21 (2000). Such legislative findings and declarations of purpose are due substantial deference by the courts. For example:

> However, the Oklahoma legislature's findings provide a rational basis for the license requirement. Oklahoma enacted its Sex Offender Registration Act after making three findings: (1) "that sex offenders who commit other predatory acts against children and persons who prey on others as a result of mental illness pose a high risk of re-offending after release from custody"; (2) "that the privacy interest of persons adjudicated guilty of these crimes is less important than the state's interest in public safety"; and (3) "that a system of registration will permit law enforcement officials to identify and alert the public when necessary for protecting the public safety." Okla. Stat. tit. 57, § 581(B). These findings support the license requirement.

Carney v. Oklahoma Dep't of Pub. Safety, 875 F.3d 1347, 1353 (10th Cir. 2017); *see also Windwalker v. Governor of Alabama*, 579 F. App'x 769, 774 (11th Cir. 2014) ("Windwalker cannot state a rational-basis equal protection claim, especially given ASORCNA's expressly incorporated legislative findings articulating several reasonable bases for enacting the law, *see* Ala. Code § 15-20A-2(1)-(5)).

[redacted] **Is Not Constitutionally Protected under *Lawrence*.**

Lawrence v. Texas does not include within its protected zone of sexual privacy [redacted] *See Willson v. Buss*, 370 F. Supp. 2d 782, 786 (N.D. Ind. 2005) ("There are increasing numbers of constitutionally protected privacy rights in open society that may not be protected in the prison context. To be sure, *Bowers v. Hardwick* . . . has now been given a decent judicial burial in *Lawrence v. Texas* . . . However, it is not argued here that there is a constitutionally protected

privacy right to engage in consensual homosexual relationships in the prison. The advocate for the plaintiff here has specifically belied any such argument before this Court. Beyond any doubt, the expectation of privacy under the Fourth Amendment of the Constitution of the United States is severely limited.") (internal citations omitted).

Violent inmates can easily intimidate and coerce weaker inmates into committing sexual acts which might on the surface appear consensual. But prison is an inherently coercive environment, subject to widespread abuse. Thus, inmates in prisons fall within the exceptions described as not at issue in *Lawrence* when it said: "[this case] does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Lawrence*, 539 U.S. at 478.

Arthur Doe was not convicted because of sodomy "in the most private of places, the home." *Lawrence*, 539 U.S. at 562. Arthur Doe was convicted of [redacted] Doe was not convicted for any conduct protected by *Lawrence*.

ARTHUR DOE HAS NOT BEEN DENIED EQUAL PROTECTION OF THE LAWS.

Arthur Doe is Not Similarly Situated to Individuals Convicted of Prostitution.

Plaintiffs do not even attempt to explain how Arthur Doe is similarly situated to a person who has been convicted under Mississippi's prostitution statute, Miss. Code Ann. § 97-29-49. They cannot do so because [redacted] is not remotely comparable to engaging in prostitution or soliciting sex for money. Instead, Plaintiffs' whole argument is narrowly focused on a comparison of the elements of the unnatural intercourse statute, Miss. Code Ann. § 97-29-59, and the prostitution statute. They claim that the statutes are "materially indistinguishable" and "target the same conduct[.]" [Pl.' Mem. at 25].

This argument does not hold up under even the slightest scrutiny.

First, it is generally recognized that in most instances "people charged with and convicted of different crimes are not similarly situated to each other" for equal protection purposes. *Vanderwall v. Commonwealth of Va.*, 2006 WL 6093879, at *7 (E.D. Va. Aug. 9, 2006) (rejecting equal protection challenge to statutory designation of certain sex offenses as "sexually violent"); *see also Creekmore v. Attorney Gen. of Texas*, 341 F. Supp. 2d 648, 663 (E.D. Tex. 2004) (holding that registered sex offender convicted under Uniform Code of Military Justice was not similarly situated to offenders convicted under Texas law). Second, Plaintiffs' claim that the "two statutes contain the same elements and target the same conduct" is completely contradicted by the fact that, as even they acknowledge, the prostitution statute requires the State to prove an additional element not found in the unnatural intercourse statute: that the offender "perform[ed], or offer[ed] or agree[d] to perform, sexual intercourse or sexual conduct for money or other property." [Pl.' Mem. at 25]; Miss. Code Ann. § 97-29-49(1).

It is the transactional nature of prostitution that fundamentally distinguishes it from the conduct prohibited as unnatural intercourse. The requirement that there be an "exchange or offer of exchange of money or property" for sex is fatal to Arthur Doe's equal protection claim, as it conclusively demonstrates that the two statutes target completely different conduct. The prostitution statute is primarily aimed at prohibiting the public offering of consensual sex for money, whereas the unnatural intercourse prohibits much destructive, non-consensual sexual misconduct, including forcible sodomy; sodomy with minors and persons unable to consent; and sodomy in inherently coercive environments [redacted]. *See Miller v. State*, 636 So. 2d 391, 393 (Miss. 1994) (affirming unnatural intercourse conviction of adult defendant who fondled and

performed oral sex on inebriated minor child). [Doc. 91-5]. Although it is true that an individual who engages in, offers to engage in, oral or anal sex in exchange for money or property could theoretically be convicted of unnatural intercourse in Mississippi, there is no evidence in the record that this has ever occurred, and there is absolutely no evidence that any person who has been convicted of unnatural intercourse in Mississippi for engaging in prostitution-related conduct is currently registered as a sex offender with the MSOR.[4]

As discussed *supra*, Plaintiffs have framed this case in a manner to make it seem that it is about consensual sex between adults. This is why their equal protection analysis is confined to the elements of the two statutes. If one looks at the actual conduct that has resulted in convictions under Mississippi's unnatural intercourse statute, Plaintiffs' argument that the "State is targeting precisely the same conduct under different statutes" completely falls apart. [Pl.' Mem. at 27]. Forcing a three-year-old child to perform oral sex is not comparable to engaging in prostitution. [Exhibit 5 at MSOR. 008636, 010837-39]. Forcing a ten-year-old child to have anal sex does not bear any resemblance to prostitution. [Exhibit 5 at MSOR.010831]. Forcing a fellow inmate to engage in anal sodomy does not constitute a violation of the prostitution statute; it is a violation of the unnatural intercourse statute. [Exhibit 5 at MSOR.009041, 010812]. Given that the unnatural intercourse statute has been used on many occasions to prosecute and punish such egregious sexual abuse, it cannot be credibly argued that the group of registered sex offenders who are registered solely because of convictions under that statute are similarly situated to those convicted of prostitution. For this reason alone, Arthur Doe's equal protection claim fails as a matter of law.

[4] Hypothetically, if such a person existed, they might have a valid equal protection claim, depending on the underlying circumstances of their convictions. Arthur Doe does not come close to fitting this description.

See Brennan v. Stewart, 834 F.2d 1248, 1257 (5th Cir. 1988) ("[I]f the challenged government action does not appear to classify or distinguish between two or more relevant persons or groups, then the action even if irrational does not deny them equal protection of the laws.").

In any event, Plaintiffs' arguments are misleading insofar as they create the impression that Mississippi law treats all persons convicted of unnatural intercourse differently than persons convicted of prostitution-related offenses when it comes to sex offender registration. In point of fact, there is no disparity of treatment between persons convicted of unnatural intercourse for engaging in oral or anal sex with a minor under the age of 18 and persons convicted of procuring or attempting to procure oral or anal sex from a minor under the age of 18 in exchange for money or property. Both crimes are registrable offenses. *See* Miss. Code. Ann. § 97-29-51(c); Miss. Code Ann. 45-33-23(xix); [*see* Doc. 91-7, Defs.' Supplemental Responses to Pl.' Interrogatories at 5-6]. Thus, there is no equal protection issue with regard to sex offender registration requirements for these two groups of offenders.

This Case is Not About Homosexuality.

Plaintiffs contend that the "harsher treatment" of persons convicted of unnatural intercourse in Mississippi, compared to those convicted of prostitution, "perpetuates the condemnation of nonprocreative sex and of conduct particularly associated with homosexuality[.]" [Pl.' Mem. at 28]. Plaintiffs' attempt to inject the issue of discrimination against homosexuals in order to enhance Arthur Doe's otherwise meritless claims should be rejected out of hand. As Defendants have explained and demonstrated, there is no evidence that any homosexual (or heterosexual) person has ever been required to register with the MSOR because of an unnatural intercourse conviction for private, consensual sexual conduct with another adult. If there was any evidence

that anyone is a currently registered sex offender because of *Lawrence*-protected conduct, Plaintiffs have not presented it.

Further, Mississippi's unnatural intercourse statute, unlike the Texas statute at issue in *Lawrence*, prohibits both homosexual and heterosexual sodomy. *See, e.g*, *State v. Davis*, 223 Miss. 862, 864, 79 So. 2d 452, 452 (1955) (unnatural intercourse statute prohibited heterosexual fellatio). The issue of discrimination against homosexuals is thus not even implicated by the unnatural intercourse statute. This is why Plaintiffs' reliance on *Kansas v. Limon*, 122 P.3d 22 (Kan. 2005), to support their equal protection claim is utterly misplaced. [Pl.' Mem. at 28]. In that case, the court held that a "Romeo and Juliet statute" violated the Equal Protection Clause because it was limited to situations in which "the victim and offender are members of the opposite sex," and provided for more lenient punishment, including no sex offender registration requirement, than other sex offense statutes. *Limon*, 122 P.3d at 24, 29 (citing K.S.A.2004 Supp. 21-3522; K.S.A. 22-4902.). The criminal defendant had been convicted of sodomy for engaging in oral sex with another male less than four years younger than him. *Limon*, 122 P.3d at 24. He claimed that he would have been prosecuted and convicted under the Romeo and Juliet statute but for the limitation to heterosexual relationships. The Court agreed that there was no rational basis for this statutory classification. *Id.*

By contrast, the classification challenged by Plaintiffs on equal protection grounds is between unnatural intercourse and prostitution, not between heterosexual and homosexual conduct. In fact, Arthur Doe does not identify as, or claim to be, a homosexual. Therefore, this red herring should be treated as such.

***Doe v. Jindal* Provides No Support for Arthur Doe's Equal Protection Claim.**

Despite the fact that Defendants have agreed to resolve the CANS Plaintiffs' claims and remove them from the MSOR, Plaintiffs inexplicably cite the Louisiana district court decision in *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012), as supporting Arthur Doe's equal protection claim. In *Jindal*, the district court held that there was no rational basis for Louisiana to require persons convicted of violating the CANS statute to register as sex offenders, when it did not require the same of those convicted under the state's prostitution statute. *Id.* at 1007. The classification at issue in this case is not even remotely comparable to the one struck down in *Jindal*, where the only difference between the two crimes was the nature of the sex act being solicited. In other words, the equal protection analysis of the Louisiana district court involved an "apples-to-apples" comparison between two prostitution-related offenses. That is not the case here. *Jindal* therefore has no relevance to Arthur Doe's equal protection claim.

Requiring Individuals Convicted of Unnatural Intercourse to Register As Sex Offenders Rationally Furthers Legitimate State Interests.

As Defendants explained in their memorandum in support of their Motion for Summary Judgment, requiring persons convicted of unnatural intercourse to register as sex offenders is rationally related to the legitimate government interest in protecting the public from dangerous sex offenders, because many of these offenders were convicted for forcible sodomy or engaging in sodomy with children. [Doc. 92 at 31; Doc. 91-5, 91-7]. That is, it furthers the aims of the Sex Offender Registration Law, as articulated by the Mississippi Legislature. *See* Miss. Code Ann. § 45-33-21. In contrast, those who have engaged in prostitution do not pose the same threat to public safety. [Doc. 91-7 at 5-6]. Those who solicit minors to commit prostitution are also required to register as sex offenders. Miss. Code. Ann. § 97-29-51(c); Miss. Code Ann. 45-33-23(xix).

Plaintiffs address this rational basis for the classification only in a footnote in their

memorandum. [Pl.' Mem. at 27, n. 5]. They assert that this rationale is "illegitimate" because Defendants' claim that most of the sex offenders registered with the MSOR on account of unnatural intercourse convictions "'engaged' in coercive conduct" is "not borne out by the evidence." [Id.]. First, Plaintiffs misstate what Defendants have claimed:

[Exhibit 7 at 5-6].

Second, Plaintiffs' argument presupposes that Defendants have the burden of demonstrating that the statutory classification has a rational basis and producing evidence in support thereof. This is incorrect. As the Fifth Circuit recently explained:

> In cases that do not implicate suspect classes or fundamental rights, "[t]he appropriate standard of review is whether the difference in treatment between [classes] rationally furthers a legitimate state interest." *Id.* at 11, 112 S. Ct. 2326. Statutory classifications are given broad deference under rational basis review and will survive "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L.Ed.2d 257 (1993). *Texas is under no obligation to prove its reasons; it need only offer them. "'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it' whether or not the basis has a foundation in the record.*" *Id.* at 320 21, 113 S. Ct. 2637 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L.Ed.2d 351 (1973)). Classifications survive rational basis review "even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321, 113 S. Ct. 2637.

Harris v. Hahn, 827 F.3d 359, 365 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 650, 196 L. Ed. 2d 523 (2017) (emphasis added). Third, Defendants' characterization of the evidence concerning the non-CANS Plaintiffs is totally accurate.

Plaintiffs have not carried their burden of negating every conceivable rational basis for requiring those convicted of unnatural intercourse to register as sex offenders, but not requiring the same of those convicted under Mississippi's prostitution statute. Their primary argument that requiring this group of sex offenders to register does not rationally further the State's interest in protecting the public is that the offenders with CANS convictions have been required to register, but did not use "force or coercion of any kind."[5] [Pl.' Mem. at 27, n. 5]. To begin with, the CANS Plaintiffs no longer have any relevance because they have been removed from the MSOR. Moreover, although Plaintiffs purport to dispute Defendants' claim that "most" of the offenders registered for unnatural intercourse convictions have engaged in serious sexual misconduct, they only do so by counting twenty-nine CANS Plaintiffs. [Doc. 91-4, 91-5].

Plaintiffs also argue that "numerous convictions for Unnatural Intercourse, including that of Plaintiff Arthur Doe, were obtained via plea agreement rather than trial." [Id.]. It is unclear what this has to do with whether there is a rational basis for the registration requirement. The bottom line is that Plaintiffs have not produced or presented any evidence affirmatively showing that any of these convictions by way of plea bargain involved sexual acts between consenting adults. Defendants have presented evidence showing that many of these offenders have been convicted of engaging in sexual abuse of minors and forcible acts of sodomy. [Doc. 91-4, 91-5]. Therefore, the Court should hold that statutory classification rationally furthers legitimate state interests.

[5] Plaintiffs' assertion that the CANS offenders did not use force or coercion directly undermines their contention that persons convicted of unnatural intercourse are similarly situated to persons convicted of prostitution.

HOLDING THAT *LAWRENCE* DID NOT FACIALLY INVALIDATE ALL SODOMY STATUTES WOULD NOT CREATE A PROCEDURAL DUE PROCESS VIOLATION.

Frankly, Plaintiffs' argument that Arthur Doe has been denied procedural due process if the Court agrees with Defendants that *Lawrence* did not facially invalidate all sodomy statutes is confusing, at best. [Pl.' Mem. at 21-24]. They assert that even if the Court "could rewrite the [unnatural intercourse] statute to limit its application to scenarios contemplated by *Lawrence's* dicta, this rewriting would require a post-hoc investigation that cannot be squared with the plain language of the MSOR law or with procedural due process requirements." [*Id.* at 21]. As an initial matter, Plaintiffs' contention that Defendants are effectively asking the Court rewrite the unnatural intercourse statute lacks merit. Defendants' position is that, under *Lawrence*, the statute is not facially unconstitutional because it can be constitutionally enforced in all circumstances except as applied to private, consensual sex between adults. To adopt this position would not require that this Court rewrite the statute.

Moreover, if Plaintiffs are attempting to assert that Arthur Doe has been denied procedural due process because Mississippi law does not provide for a hearing to "determine whether an individual's conviction had been rendered invalid by *Lawrence*," they are simply mistaken. [Pl. Mem. at 22]. Although the Sex Offender Registration Law itself does not afford Arthur Doe with a procedural mechanism to be heard on his *Lawrence* claim, it is untrue that Mississippi law does not provide a forum for the adjudication of this type of claim.

Under Mississippi's Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss. Code. Ann. § 99-39-1 *et seq.*, "[a]ny person sentenced by a court of record of the State of Mississippi, including a person currently . . . subject to sex offender registration for the period of

the registration or for the first five (5) years of the registration, whichever is the shorter period," can file a motion for post-conviction relief asking the state circuit court in which he was sentenced to vacate his conviction. Miss. Code. Ann. § 99-39-5(1); *see Smith v. Epps*, 210 So. 3d 982, 984 (Miss. Ct. App. 2015) (citing Miss. Code. Ann. § 99-39-7 (Supp. 2014)). One of the statutory grounds for vacatur is that "the conviction or the sentence was imposed in violation of the Constitution of the United States." Miss. Code. Ann. § 99-39-5(1)(a). Accordingly, after he initially registered with the MSOR, Arthur Doe could have filed a motion for post-conviction relief in the jurisdiction where he pleaded guilty asserting his arguments that *Lawrence* rendered his unnatural intercourse conviction invalid. If his conviction had been vacated pursuant to the process afforded by the UPCCRA, he would then be relieved of his duty to register. *See* Miss. Code. Ann. § 45-33-47(4) ("The offender will be required to continue registration for any sex offense conviction unless the conviction is set aside in any post-conviction proceeding.").

Of course, because Arthur Doe failed to utilize the due process procedures available to him under state law, he cannot prove that he has been deprived of procedural due process. While as a general rule an aggrieved person need not exhaust state remedies before filing suit in federal court to vindicate a state deprivation of constitutional rights, there is "an exception to this rule that applies when the alleged constitutional deprivation is the denial of procedural due process." *Vicari v. Ysleta Indep. Sch. Dist.*, 2008 WL 4111407, at * 2 (5th Cir. Aug. 28, 2008) (plaintiff "complains of an absence of process, but she did not use the sufficient process provided")); *see Rathjen v. Litchfield*, 878 F.2d 836, 840 (5th Cir.1989) ("[N]o denial of procedural due process occurs where a person has failed to utilize the state procedures available to him."); *Galloway v. Louisiana*, 817 F.2d 1154, 1158 (5th Cir.1987) ("An employee cannot ignore the process duly extended to him and

later complain that he was not accorded due process.").

Plaintiffs' argument that Defendants have denied Arthur Doe procedural due process because he pleaded guilty 17 years prior to the enactment of the Sex Offender Registration Law and was not provided notice that he was pleading guilty to an offense that would later require him to register as a sex offender, [Pl. Mem. at 24], is foreclosed by binding U.S. Supreme Court precedent. First, this claim is nothing more than an *ex post facto* claim cloaked in procedural due process garb, since it is predicated on the notion that sex offender registration laws cannot be retroactively applied to sex offenders who pleaded guilty to registrable offenses before the enactment of the registration law. Plaintiffs had every opportunity to bring an *ex post facto* claim on behalf of Arthur Doe, but apparently decided that was not justified. Regardless, the Supreme Court has held that sex offender registration laws do not violate the *Ex Post Facto* Clause merely because they are retroactively applied to sex offenders convicted prior to the imposition of the registration requirement. *See Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (holding that Alaska's sex offender registration law "is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause").

Second, the Supreme Court has held that registered sex offenders "who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory [registration] scheme." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003). Further, the Court held that where the registration "law's requirements turn on an offender's conviction alone," the offender is not entitled to a hearing to prove some other set of facts, because the "convicted offender has already had a procedurally safeguarded

opportunity to contest" the only "fact" that matters his conviction. *Id.* at 7.[6]

Because the registration requirements of Mississippi's Sex Offender Registration Law "'turns on an offender's conviction alone,'" whether *Lawrence* facially invalidated all sodomy statutes, and thereby invalidated Arthur Doe's unnatural intercourse conviction, is not relevant under the statutory scheme. *Doe v. Fortenberry*, 2006 WL 2192548, at *3 (S.D. Miss. Aug. 1, 2006) (quoting *Connecticut Dep't of Pub. Safety*, 538 U.S. at 8) (dismissing procedural due process claim brought by sex offender registered with MSOR who was convicted before registration requirement was enacted, but claimed he was entitled to prove he had been rehabilitated). Therefore, Defendants are not constitutionally required to provide Arthur Doe with an opportunity to be heard on his *Lawrence* claims, and have not deprived him of procedural due process.

Last, Plaintiffs cite the Fifth Circuit's decision in *Meza v. Livingston*, 607 F.3d 392, 401 (5th Cir. 2010), *decision clarified on denial of reh'g*, 2010 WL 6511727 (5th Cir. Oct. 19, 2010), as though it supports Arthur Doe's position, but in fact it does the opposite. [Pl. Mem. at 23]. In that case, the plaintiff was a parolee who had never been convicted of a registrable sex offense, but had sex offender conditions imposed on him as a part of his mandatory supervision. *See Meza*, 607 F.3d at 395. The Fifth Circuit recognized that "prisoners who have not been convicted of a sex

[6] Additionally, Arthur Doe's procedural due process claim fails as a matter of law, because to the extent he was deprived of a liberty interest, it was the result of the passage of the Sex Offender Registration Law. In this regard, the Fifth Circuit has held as follows: "While an individual is entitled to notice and a hearing before state action deprives him of life, liberty, or property, no such right attends legislative enactments that affect a general class of persons." *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir. 1986); *see Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989) ("[I]t is well established law that once an action is characterized as legislative, procedural due process requirements do not apply.") (citing *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915)).

offense have a liberty interest created by the Due Process Clause in freedom from sex offender classification and conditions." *Id.* at 401 (internal quotation marks and citation omitted). Thus, *Meza* is distinguishable because it involved a plaintiff who had not been convicted of a registrable sex offense. Moreover, the Court made clear that persons convicted of registrable sex offenses do not have the same procedural due process rights:

> When an individual is convicted of a sex offense, no further process is due before imposing sex offender conditions. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003); *Jennings v. Owens*, 602 F.3d 652 (5th Cir. 2010). The individual "convicted of a sex crime in a prior adversarial setting, whether as the result of a bench trial, jury trial, or plea agreement, has received the minimum protections required by due process." *Neal*, 131 F.3d at 831.

Id. For these reasons, Arthur Doe is not entitled to summary judgment on his procedural due process claim.

CONCLUSION

For the foregoing reasons, Plaintiff Arthur Doe's motion for summary judgment should be denied. The undisputed material facts prove that it is Defendants who are entitled to judgment as a matter of law, and the Court should instead grant Defendants' motion for summary judgment [Doc. 91].

Respectfully submitted this the1st day of June, 2018.

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