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 SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, sued in their official capacities only, and submit this memorandum in support of their motion for summary judgment as follows, to-wit:

NATURE OF ACTION

Five "named" plaintiffs filed this class action pursuant to 42 U.S.C. § 1983 asserting official capacity claims for declaratory and injunctive relief against five Mississippi public officials.[1] The named Plaintiffs brought this action on behalf of themselves and a putative class, challenging the constitutionality of Mississippi's unnatural intercourse statute, Miss. Code Ann. § 97-29-59, as well as the constitutionality of Plaintiffs' inclusion on the Mississippi Sex Offenders Registry ("MSOR") pursuant to the Mississippi Sex Offenders Registration Law, Miss. Code Ann. §§ 45-33-21, *et seq*. Plaintiffs asked the Court to order the removal of a putative class of all offenders convicted of unnatural intercourse under Mississippi law (or out-of-state equivalents) from the Mississippi Sex Offender Registry ("MSOR").

In addition to as-applied relief on behalf of Plaintiff Arthur Doe, Plaintiffs also seek facial invalidation of the Mississippi law criminalizing unnatural intercourse, Miss. Code Ann. §

[1] The Court granted the Plaintiffs' motion allowing them to proceed under pseudonyms. [Doc. 43].

97-29-59, as well as the law requiring those convicted of sodomy to register as sex offenders, Miss. Code Ann. § 45-33-23(h). Plaintiffs have asserted a Fourteenth Amendment substantive due process claim based on the premise that *Lawrence v. Texas*, 539 U.S. 558 (2003) facially invalidated all state unnatural intercourse laws, such that the application of section 97-29-59 to any person, and/or the inclusion of any person on the sex offender registry pursuant to section 45-33-23(h), "solely or in part" for an unnatural intercourse conviction involving "[sexual] activity between human beings," should be held unconstitutional. [Doc. 60, at 15, 25]. Although Plaintiffs' original and amended complaints sought extremely broad, class-based relief, the asserted claims have been whittled down to Plaintiff Arthur Doe's personal claims for facial and/or "as-applied" relief.

PROCEDURAL POSTURE

This case is in a somewhat unusual procedural posture, as Plaintiffs and Defendants have been able to resolve the claims of the CANS Plaintiffs with the assistance of the Magistrate Judge. The parties have presented a pair of proposed orders to the Court disposing of those claims, but the orders have not yet been entered. As the CANS claims have been resolved, the extensive allegations in the Amended Complaint concerning the CANS Plaintiffs are no longer relevant or material to any remaining claims before the Court.[2] Further, Plaintiffs have indicated they no

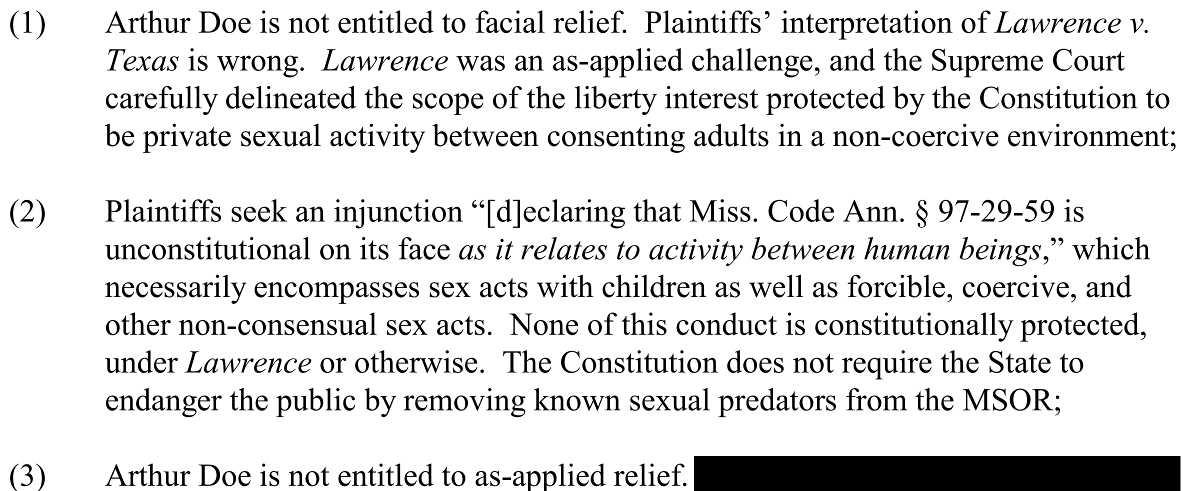
[2] In Count 2, Plaintiffs asserted an equal protection claim based on the fact that people convicted in the past of "Crimes Against Nature Solicitation" ("CANS") in Louisiana are still required to register as sex offenders in Mississippi, even though the Louisiana law has been struck down, and a Louisiana district court ordered that Louisiana remove such offenders from its own sex offender registry. The parties reached a resolution of the CANS Plaintiffs providing that those Plaintiffs, and any others similarly on the MSOR because of CANS convictions, shall be removed from the MSOR, and Defendants shall not require any person to register with the MSOR in the future based on a CANS conviction. If Plaintiffs intend to attempt to pursue an Equal Protection claim on behalf of Arthur Doe, there is no factual or legal basis for such a claim. Prostitution necessarily involves a consensual offer to engage in sex for money. Arthur Doe is not similarly situated to any person who has been or could have been

longer intend to seek class certification for any class or subclass of putative class members.[3]

Once the claims of the CANS Plaintiffs and the claims of the putative class members are eliminated, the only claims that remain are the facial and as-applied claims personally asserted by Arthur Doe. Defendants are entitled to judgment as a matter of law on Arthur Doe's claims, for the following reasons:

(1) Arthur Doe is not entitled to facial relief. Plaintiffs' interpretation of *Lawrence v. Texas* is wrong. *Lawrence* was an as-applied challenge, and the Supreme Court carefully delineated the scope of the liberty interest protected by the Constitution to be private sexual activity between consenting adults in a non-coercive environment;

(2) Plaintiffs seek an injunction "[d]eclaring that Miss. Code Ann. § 97-29-59 is unconstitutional on its face *as it relates to activity between human beings*," which necessarily encompasses sex acts with children as well as forcible, coercive, and other non-consensual sex acts. None of this conduct is constitutionally protected, under *Lawrence* or otherwise. The Constitution does not require the State to endanger the public by removing known sexual predators from the MSOR;

(3) Arthur Doe is not entitled to as-applied relief. 

Thus, Doe is not entitled to as-applied relief because he was not convicted for any conduct protected by *Lawrence*.

convicted under Mississippi's prostitution statute.

[3] At the outset, Plaintiffs moved for class certification, but the Court denied that motion, without prejudice, finding that Defendants were entitled to discovery concerning the class certification issues. The evidence developed during discovery now confirms that class certification is not warranted, and Plaintiffs have indicated that they intend to abandon their claim for class certification. Should Plaintiffs change this position, Defendants respectfully reserve the right to seek leave to file a supplemental motion for summary judgment to address the claims of the putative class members described in the Amended Complaint.

(4) Neither of the alternative legal theories asserted in the Amended Complaint (Procedural Due Process and Equal Protection) provide a basis for either facial or as-applied relief for Arthur Doe.

Defendants are entitled to judgment as a matter of law, and there are no genuine issues of material fact. Defendants therefore move for an order granting summary judgment to Defendants on Arthur Doe's facial and as-applied claims, and respectfully request that those claims, the only claims against Defendants remaining in this action, be dismissed, with prejudice, pursuant to Fed. R. Civ. P. 56.

FACTS

In their Amended Complaint, Plaintiffs demanded a judgment granting broad global relief. Because Arthur Doe still seeks facial invalidation of the statutes in question, even though Plaintiffs no longer seek class certification, facial invalidation would still result in relief applicable to many more persons than simply Arthur Doe. In light of the resolution of the CANS claims and in the absence of a certified class, the following requested relief still has relevance to Arthur Doe's facial or as-applied claims:

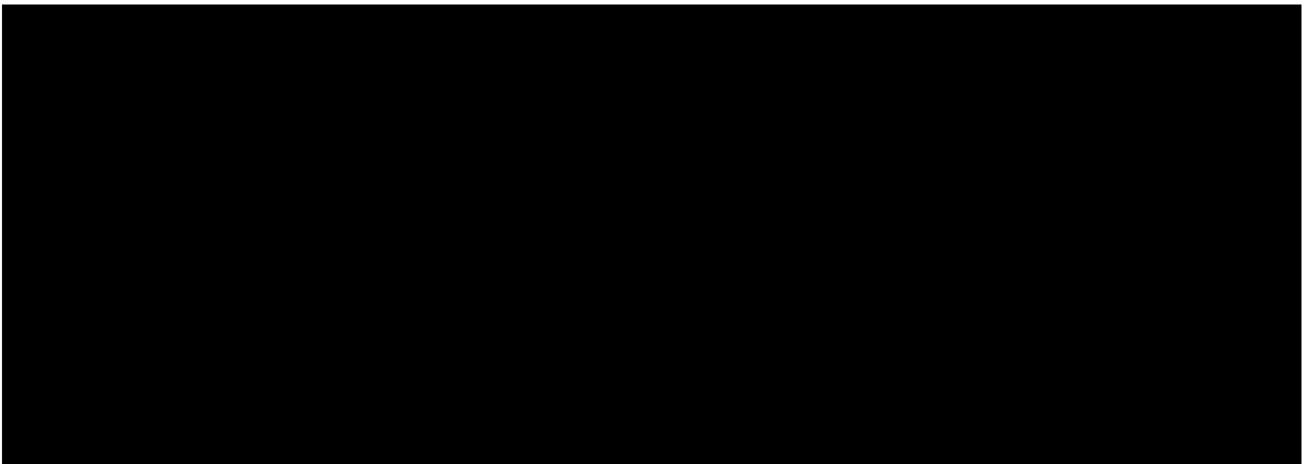
> b) Declaring that Miss. Code Ann. § 97-29-59 is unconstitutional on its face as it relates to activity between human beings;
>
> c) Declaring that Miss. Code Ann. § 45-33-23(h)(xi) is unconstitutional insofar as it requires individuals convicted of Unnatural Intercourse involving activity between human beings to register as sex offenders;
>
> ***
>
> e) Declaring that Defendants' actions violate [Arthur Doe's] rights under the Fourteenth Amendment to the United States Constitution;
>
> f) Permanently enjoining Defendants from enforcing Miss. Code Ann. § 97-29-59 in any situation involving activity between human beings;

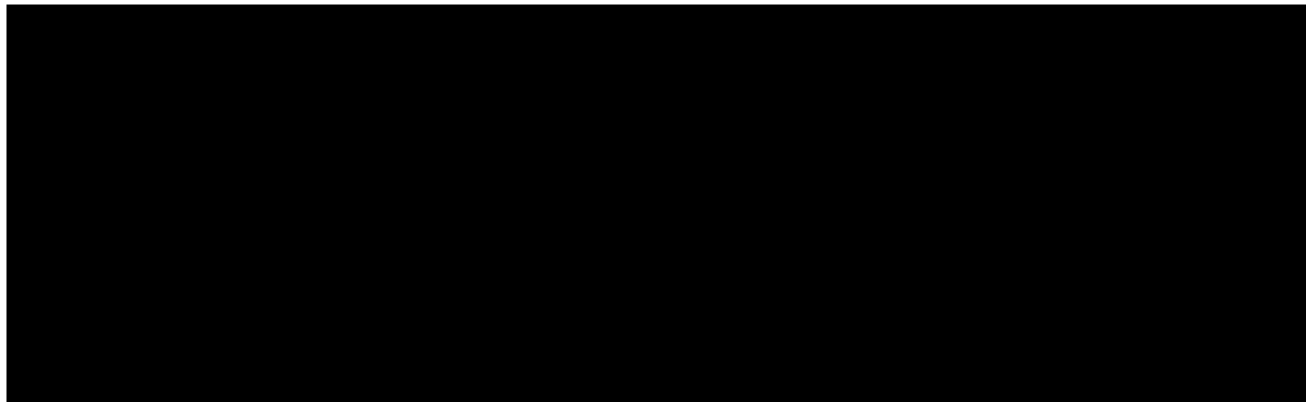
> g) Permanently enjoining Defendants from enforcing Miss. Code Ann. § 45-33-23(h)(xi) in any situation involving activity between human beings;
>
> ***
>
> j) Ordering Defendants to permanently remove the named Plaintiffs and all members of the Plaintiff class from the MSOR;
>
> k) Ordering Defendants to expunge all state records indicating that the named Plaintiffs and all members of the Plaintiff class were ever registered on the MSOR;
>
> l) Ordering Defendants to alert all agencies who were provided information about the named Plaintiffs' and class members' registration (including courts, police departments, sheriff's departments, and the Federal Bureau of Investigation) that this information is no longer valid;
>
> ***
>
> p) Ordering such other relief as this Court deems just and proper.

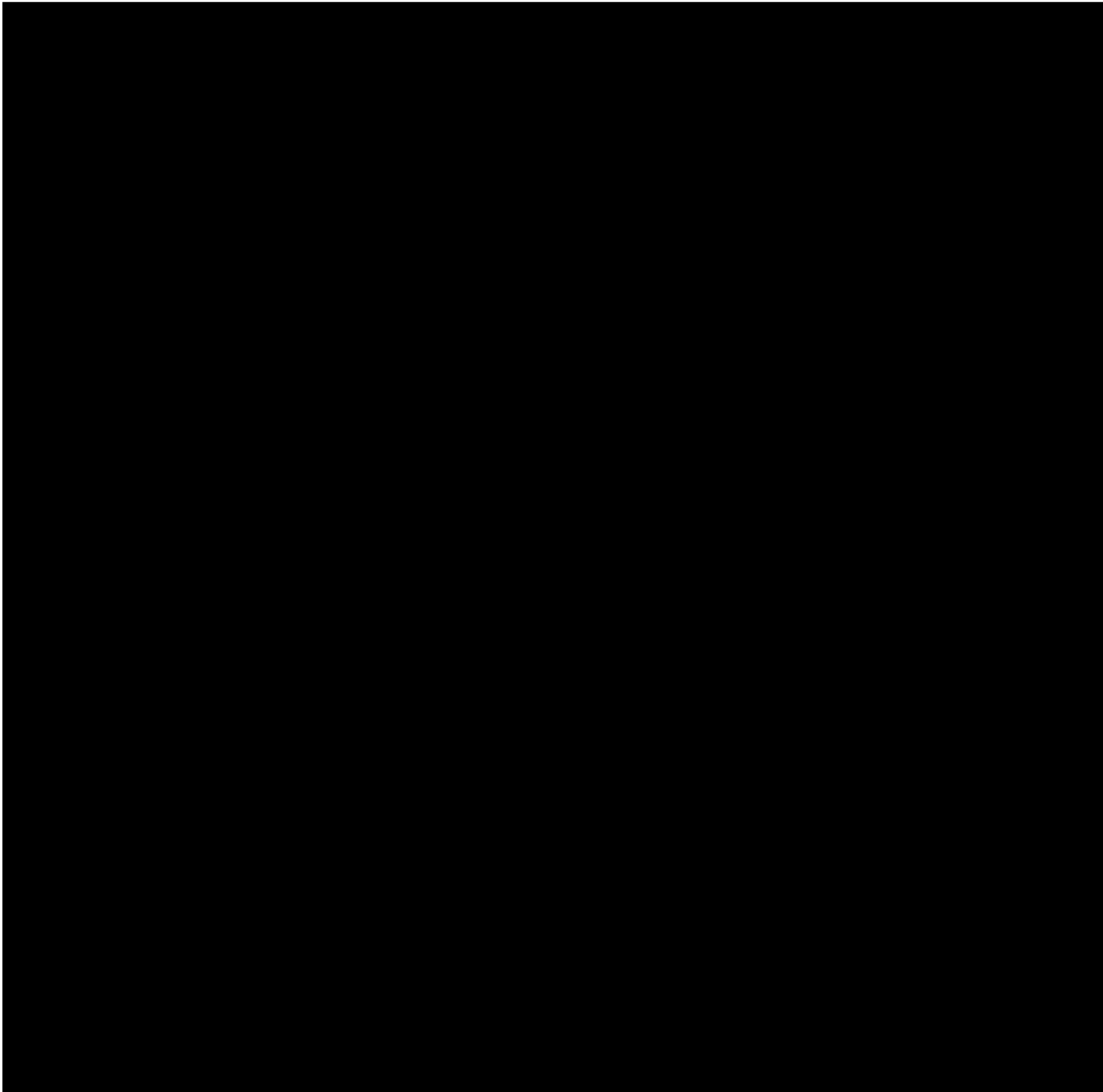
[Doc. 60, at 27-29].

Granting the relief sought by Plaintiffs would ultimately lead to the removal of sexual predators from the MSOR, because facial relief would encompass a great deal of sexual criminal misconduct that is not constitutionally protected.

Arthur Doe







ARGUMENT

Arthur Doe is not entitled to either facial or as-applied relief under any of the legal theories offered in the Amended Complaint. Of course, a determination that Arthur Doe is not even entitled to as-applied relief would take the issue of facial relief entirely off the table: "A party has

standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant attempting to demonstrate that a fact is not genuinely disputed must "cit[e] to particular parts of materials in the record" or "show that the materials cited do not establish the . . . presence of a genuine dispute." *Id.* at (c)(1)(A), (B). "A genuine issue of material fact exists if the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party." *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721, 725 (5th Cir. 2002) (citing *Geoscan, Inc. v. Geotrace Techs, Inc.*, 226 F.3d 387, 390 (5th Cir. 2000)).

The moving party has the initial burden of showing that there is no genuine issue as to any material fact. *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994) (citation omitted). As to issues on which the nonmoving party bears the burden of proof, "the burden on the moving party may be discharged by 'showing' that is, pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets that burden, the nonmoving party "must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at

trial." *Forsyth*, 19 F.3d at 1533 (citing Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324). "[T]he nonmoving party must rebut with 'significant probative' evidence." *Ferguson v. Nat'l Broadcasting Co., Inc.*, 584 F.2d 111, 114 (5th Cir. 1978) (quoting *First Nat'l Bank of Arizona v. Cities Servs. Co.*, 391 U.S. 253, 290 (1968)). "Such evidence must be sufficient on its own to support a jury verdict in the nonmoving party's favor." *Armour v. Knowles* 512 F.3d 147, 153 (5th Cir. 2007) (internal quotation marks and citation omitted).

A court must view the record in the light most favorable to the nonmoving party, drawing all factual inferences in the nonmoving party's favor. *Scales v. Slater*, 181 F.3d 703, 708 (5th Cir. 1999) (citing *Hood v. Sears Roebuck & Co.*, 168 F.3d 231, 232 (5th Cir. 1999)). However, the nonmoving party cannot carry its burden of demonstrating genuine issues for trial by relying on "conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence." *Chambers v. Sears Roebuck & Co.*, 428 Fed. Appx. 400, 407 (5th Cir. 2011) (per curiam) (citing *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 229 (5th Cir. 2010)).

FACIAL RELIEF IS NOT WARRANTED UNDER *LAWRENCE V. TEXAS*

Plaintiffs' Misinterpretation of *Lawrence* Merely Begs the Question

Plaintiffs' entire approach to this case is based on a misreading of *Lawrence v. Texas*. Plaintiffs assert that *Lawrence* facially invalidated all state unnatural intercourse laws, such that the application of section 97-29-59 to any person, and/or the inclusion of any person on the sex offender registry pursuant to section 45-33-23(h), "solely or in part" for an unnatural intercourse conviction involving "[sexual] activity between human beings," is unconstitutional. *See* Amended Complaint at 15, 27-29 [Doc. 60]. The key to the correct interpretation and application of

Lawrence is the type of conduct the Supreme Court held in that case to be protected by the Constitution: private, consensual sexual activity between adults. The sexual activity protected by *Lawrence* is of great significance to many Americans, but constitutes only one potential application of state laws regarding unnatural intercourse.

In *Lawrence*, the Supreme Court carefully delineated the scope of the liberty interest protected by the Constitution, explaining the types of conduct that were and were *not* at issue in *Lawrence*:

> 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. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. *The 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. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, supra, at 847, 112 S. Ct. 2791. The Texas statute furthers no legitimate state interest which can justify its intrusion into the *personal and private life* of the individual.

Id. at 578 (emphasis added). Thus, of the numerous potential applications for enforcement of anti-sodomy laws, the *Lawrence* Court identified only one unconstitutional application: private sexual activity between consenting adults.

The conclusion that private sexual conduct between consenting adults, whether heterosexual or homosexual, was protected by the Constitution required that *Bowers v. Hardwick*, 478 U.S. 186 (1986), another case involving the application of an anti-sodomy law to private, consensual sexual activity between same-sex adults, be overruled: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v.*

Hardwick should be and now is overruled." *Lawrence*, 539 U.S. at 577-78.

Plaintiffs' reliance on the Fourth Circuit's interpretation of *Lawrence* in *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013) is misplaced. It is true that, in *MacDonald*, the Fourth Circuit panel majority reached the conclusion that *Lawrence* facially invalidated all sodomy laws: "[w]e are confident, however, that we adhere to the Supreme Court's holding in *Lawrence* by concluding that the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional." *MacDonald*, 710 F.3d at 166. However, the dissenting judge diplomatically disagreed, stating "[g]iven the opaque language of *Lawrence*, I do not share the majority's conviction concerning the facial unconstitutionality of Virginia's anti-sodomy provision." *MacDonald*, 710 F.3d at 170 (Diaz, J., dissenting).

To support the argument that *Lawrence* facially invalidated all sodomy statutes, proponents of that view (such as the majority in *McDonald*) have argued that *Bowers* was also a facial challenge, and that by overruling *Bowers*, *Lawrence* implied that all such statutes were facially invalid. *See McDonald*, 710 F.3d at 163-64 ("The Supreme Court granted certiorari [in *Lawrence*] on three issues . . . whether *Bowers v. Hardwick* . . . which upheld *against facial challenge* a Georgia statute criminalizing all sodomy, should be overruled") (emphasis added). In fact, *Lawrence* said nothing about *Bowers* being a facial challenge. *Lawrence* stated the question presented simply as "[w]hether *Bowers v. Hardwick*, *supra*, should be overruled?" *Lawrence*, 539 U.S. at 564.

The Fourth Circuit's characterization of *Bowers* as a "facial challenge" is difficult to understand in light of the text of the *Bowers* opinion itself. In the majority opinion, Justice White stated that "[r]espondent then brought suit in the Federal District Court, challenging the

constitutionality of the statute *insofar as it criminalized consensual sodomy*," and then added in a footnote: "[t]he only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute *as applied to consensual homosexual sodomy.* We express no opinion on the constitutionality of the Georgia statute *as applied to other acts of sodomy*." *Bowers*, 478 U.S. at 188 & n.2 (emphasis added). Thus, the interpretation of *Lawrence* as a facial invalidation of sodomy statutes is built on a foundation of sand, the mischaracterization of *Bowers* as a facial challenge. In light of *Bowers v. Hardwick*'s self-description as an "as applied" challenge, the *McDonald v. Moose* majority's conclusion is confusing, flawed, and not well-founded. That premise is further undermined by the fact that no form of the term "facial" appears anywhere in the *Lawrence* majority opinion.

In contrast, numerous other courts have concluded that *Lawrence* only supports as-applied relief and nothing more. *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); *see also 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).

In both *Lawrence* and *Bowers*, the defendants were convicted for private, consensual sex between adults *within private homes*. In *Lawrence*, police entered a private residence in response to a reported weapons disturbance, and arrested two men who were having anal sex in the privacy of their home. *Lawrence*, 539 U.S. at 563-64. In *Bowers*, Hardwick was charged with violating a Georgia statute criminalizing sodomy after he was found "committing that act with another adult male in the bedroom of respondent's home." *Bowers*, 478 U.S. at 187-88. No evidence has been

offered to show that Arthur Doe's case has anything to do with private sexual conduct between consenting adults. This case is not *Lawrence*. This case is not *Bowers v. Hardwick*.

The characterization of *Lawrence* as a "facial" invalidation of sodomy laws is also inconsistent with the Supreme Court's admonition that "[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.*" *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). Further, facial challenges are disfavored, and "[a]s-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (quoting Fallon, *As Applied and Facial Challenges and Third Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)).

The United States military courts have also concluded that *Lawrence* did not facially invalidate sodomy statutes, and must be considered on an as-applied basis. *See, e.g.*, *U.S. v. Marcum*, 60 M.J. 198, (U.S. Ct. App. Arm. For. 2004) (sodomy prohibition in Uniform Code of Military Justice was constitutional under *Lawrence v. Texas* "as applied" to superior convicted of non-forcible sodomy with subordinate in a military position where consent might not easily be refused). Further, the Fourth Circuit's interpretation of the former version of Virginia's sodomy statute was specifically rejected by the Virginia Supreme Court, which held that *Lawrence* protected only private, consensual sexual activity between adults. *See Toghill*, 768 S.E.2d at 676-82. The Virginia Supreme Court concluded that the then-existing sodomy statute, which did not contain specific limiting language, must be construed to criminalize only conduct not protected by *Lawrence*.

The Fourth Circuit's decision in *McDonald* is an outlier, and despite the existence of

McDonald as "binding" circuit precedent, even the district courts in Virginia have circumvented that decision's flawed analysis and conclusion by accepting the Virginia Supreme Court's interpretation of state sodomy law to be controlling. *See, e.g.*, *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[,]" and "*Lawrence* did not prevent [Virginia] Code § 18.2 361(A) from being constitutional and enforceable as applied to sodomy between adults and minors.") (quoting *Toghill*, 768 S.E.2d at 679).

In addition, the state courts of North Carolina have also adhered to the correct, "as-applied" interpretation of *Lawrence*. *See, e.g.*, *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").

The interpretation of *Lawrence v. Texas* adopted by the Virginia Supreme Court, the Washington Court of Appeals, the U.S. Court of Appeals for the Armed Forces, and other courts is sound and should be adopted by this Court. *Lawrence* recognized only that private sexual activity between consenting adults is constitutionally protected. *Lawrence* did not facially invalidate all applications of anti-sodomy statutes.

This Court's Preliminary Rulings Correctly Analyzed *Lawrence v. Texas*

Although this Court expressly declined to reach the merits of Plaintiffs' original motions for summary judgment and class certification, the Court's preliminary rulings support Defendants' view of *Lawrence*. For example, the Court stated that

> In *Lawrence*, the Supreme Court held that a Texas statute criminalizing sodomy was unconstitutional *as applied to* "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." 539 U.S. at 579. *By contrast,* conduct with minors or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused" is not protected. *Id.*

[Doc. 43 at 3 n.1] (emphasis added). Further, in another preliminary ruling, the Court agreed that Defendants were entitled to discovery: "[t]o confirm, for example, that (1) the only conviction that would require plaintiffs and putative class members to comply with Mississippi's Sex Offender Registry was Unnatural Intercourse or its out of state equivalent; and (2) that the facts supporting the conviction involved only consenting adults." [Doc. 44]. Although those were preliminary rulings, the Court's characterization of *Lawrence* was spot-on.

Also, the Texas statute struck down in *Lawrence* specifically applied only to same sex conduct. 539 U.S. at 566. Conversely, for many decades Mississippi's unnatural intercourse statute has been applied evenhandedly to both opposite sex and same sex activity without discrimination. *See, e.g.*, *Contreras v. State*, 445 So. 2d 543, 545 (Miss. 1984) (male/female fellatio and cunnilingus violated unnatural intercourse statute); *Davis v. State*, 367 So. 2d 445, 446 (Miss. 1979) (statute proscribes male/female unnatural intercourse); *State v. Davis*, 223 Miss. 862, 864, 79 So. 2d 452, 452-53 (1955) (unnatural intercourse statute bars both oral and anal sodomy).

Sexual Activity in Prisons is Not Constitutionally Protected Under Lawrence

[redacted] *Lawrence v. Texas* does not include within its protected zone

of sexual privacy conduct in prison. It goes without saying that 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.

In illustration of this point, the California Court of Appeals has directly addressed the application of *Lawrence* to incarcerated inmates: "Defendant acknowledges our conclusion in *Santibanez* that section 288a, subdivision (e) does not violate prisoners' due process rights . . . but he proposes that the more recent case of *Lawrence v. Texas* (2003) 539 U.S. 558 . . . requires us to reconsider." *People v. Groux*, No. F059366, 2011 WL 2547022, at *10 11 (Cal. Ct. App. June 28, 2011). The California court performed a detailed analysis of why the prisoner's argument had to be rejected:

> In *Lawrence*, the United States Supreme Court struck down a state law prohibiting same-sex sodomy as a violation of privacy and personal autonomy interests under the due process clause. The law, as applied to consenting adults, constituted an intrusion into the most intimate form of behavior sexual conduct in the most private of places the home. Even if the personal relationships were "not entitled to formal recognition in the law," the government could not prohibit the conduct itself . . . *Lawrence*, however, was limited to its factual situation . . . .We see nothing in *Lawrence* to suggest that prisoners have the right to sexual privacy. Accordingly, we reiterate our explanation in *Santibanez*: "[The defendant] argues that the constitutional right to privacy in the area of family and sexual matters [citations] should be extended to those persons confined in state prison or county jail so as to legitimize consensual sexual conduct between adult prisoners. However, it is clear that prisoners have no cognizable right to sexual privacy in a jail cell. In *People v. Frazier* (1967) 256 Cal.App.2d 630, which involved a prosecution for acts of sodomy committed in a prison, it was held that the right of privacy . . . has no application in a prison setting . . . This holding is consistent with the general rule that prisoners have a much lesser expectation of privacy than do other citizens . . . 'A (person) detained in jail cannot reasonably expect to enjoy the privacy afforded

> to a person in free society. His lack of privacy is a necessary adjunct to his imprisonment.'"

People v. Groux, 2011 WL 2547022, at *10 11 (certain internal citations omitted). *Cf. Commonwealth v. Mayfield*, 832 A.2d 418, 425 26 (Pa. 2003) (addressing consensual sexual relations between inmates and correctional staff) ("While the state interest in regulating private consensual sex between adults is low . . . in the setting of a correctional institution the calculus of interests is fundamentally different.").

Although Plaintiffs no longer seek class certification, consideration of the impact that striking down the challenged statutes on their face would have on persons other than Arthur Doe must inform the Court's analysis of *Lawrence*. If this Court granted facial relief, although that ruling would not immediately and directly require the MSOR to remove additional dangerous sexual predators from the registry, such a ruling would undoubtedly provide a basis for such relief in any subsequent action(s) filed on behalf of other registered offenders. In that scenario, an offender who molested a 3-year-old child but who was convicted for "sodomy" or "unnatural intercourse" rather than "sexual battery" could come to Court, rely on the facial invalidation of the statutes, and obtain a ruling that the child molester's conviction was unconstitutional. There is no evidence to suggest that the Supreme Court in *Lawrence* intended to imply that the sexual abuse of children was constitutionally protected conduct.

As Defendants told the Court at the outset, they suspected that numerous sexual predators would fall within the putative class, but needed discovery to determine whether any, and how many, of the named Plaintiffs and prospective class members are actually on the registry solely for conduct recognized as constitutionally protected by *Lawrence*. The order granting Defendants' motion for discovery [Doc. 44] states "[t]he Court agrees that defendants should be afforded an

opportunity to confirm the nature of each individual's "registerable offense(s)" and continued in a footnote: "[t]o confirm, for example, that (1) the only conviction that would require plaintiffs and putative class members to comply with Mississippi's Sex Offender Registry was Unnatural Intercourse or its out of state equivalent; and (2) that the facts supporting the conviction involved only consenting adults." [Doc. 44].

After completion of discovery, Defendants can now confirm that there is no evidence which Plaintiffs can rely on to satisfy their burden of proof. In fact, Defendants have evidence that specifically and affirmatively proves that the majority of the putative class members are, in fact, sexual predators, child molesters, and rapists who should not be removed from the MSOR for any reason

THE FACIAL RELIEF REQUESTED BY ARTHUR DOE WOULD REQUIRE REMOVAL OF SEXUAL PREDATORS FROM THE REGISTRY

Plaintiffs did not limit the class for which they originally sought relief to individuals who are on the registry solely because of conduct protected by *Lawrence*, or whose inclusion might violate equal protection because of the disparity of penalties for prostitution involving unnatural intercourse. Even in the absence of certification of a putative class, this is extremely problematic, because Arthur Doe is asking the Court to strike down a pair of statutes *on their face* pursuant to which numerous sexual predators who have committed forcible sodomy and/or sex crimes against minors, have been required to register with MSOR.

Plaintiffs' request for an order declaring the statutes "facially unconstitutional and unenforceable in any situation involving conduct between human beings," Amended Complaint, at

27, is astonishingly overbroad. "[C]onduct between human beings" encompasses sex acts with children as well as forcible, coercive, and other non-consensual sex acts. None of that conduct is constitutionally protected, under *Lawrence v. Texas* or otherwise. Removal of sexual predators from the MSOR would put the public at risk. The discovery process permitted Defendants to obtain the pertinent information and evidence to show that the majority of registered sex offenders who are on the MSOR based on unnatural intercourse convictions are on the registry because of sex offenses involving children, forcible sodomy, or other non-consensual sexual activity. There is not the slightest hint in *Lawrence* that any member of the Supreme Court had the slightest inkling that the *Lawrence* decision, which protects private, consensual sex between adults in the privacy of their own homes, could later be asserted as a basis to find that child molestation and rape was constitutionally protected sexual activity. Further, there has been no evidence adduced in discovery to establish that *any* person is a registered sex offender on the MSOR based on sexual activity protected by *Lawrence*.

Even if the Court decided, *arguendo*, that Arthur Doe was entitled to some as-applied relief (which he is not), under no circumstances can facial relief that would permit sexual predators to bootstrap their way to removal from the MSOR themselves be justified or countenanced. The members of the asserted putative class are a danger to the public and deserve to be registered sex offenders.

For example, Offender A is an adult male sex offender on the Registry who was convicted of four crimes in Virginia involving two minor female victims: crimes against nature, two counts

of forcible sodomy, and aggravated sexual battery. [*See* Exhibit 3]. These convictions are based on a situation involving activity between human beings. Further, crimes against nature and forcible sodomy each independently satisfy the elements of the crime of unnatural intercourse in Mississippi, and would be punishable as violations of Miss. Code Ann. § 97-29-59. Therefore, Offender A was a member of the class on whose behalf Plaintiffs originally sought relief, and who would have to be removed from the MSOR if the Court facially invalidated the statutes at issue.

Offender B is an adult female sex offender on the Registry who was convicted of second degree sodomy in Alabama for performing oral sex on a 13-year-old male child. [*See* Exhibit 3]. This conviction is based on a situation involving activity between human beings. Further, performing oral sex on a 13-year-old victim satisfies the elements of the crime of unnatural intercourse in Mississippi, and would be punishable as a violation of Miss. Code Ann. § 97-29-59. Therefore, Offender B was a member of the class on whose behalf Plaintiffs originally sought relief, and who would have to be removed from the MSOR if the Court facially invalidated the statutes at issue.

Offender C is an adult male sex offender on the Registry who was convicted of sodomy with a 15-year-old male child in Florida. [*See* Exhibit 3]. This conviction is based on a situation involving activity between human beings. Further, engaging in sodomy with a 15-year-old child satisfies the elements of the crime of unnatural intercourse in Mississippi, and would be punishable as a violation of Miss. Code Ann. § 97-29-59. Therefore, Offender C was a member of the class on whose behalf Plaintiffs originally sought relief, and who would have to be removed from the MSOR if the Court facially invalidated the statutes at issue.

Offender D is an adult male offender convicted of sodomy and taking indecent liberties

with a 12-year-old female child in Colorado. [*See* Exhibit 3]. This conviction is based on a situation involving activity between human beings. Further, sodomy with a 12-year-old child satisfies the elements of the crime of unnatural intercourse in Mississippi, and would be punishable as a violation of Miss. Code Ann. § 97-29-59. Therefore, Offender D was a member of the class on whose behalf Plaintiffs originally sought relief, and who would have to be removed from the MSOR if the Court facially invalidated the statutes at issue.

None of the conduct committed by these four exemplar offenders was recognized as constitutionally protected by *Lawrence*, yet Defendants would ultimately be required to remove these serious sex offenders from the Registry if the Court were to grant facial relief to Arthur Doe. That would be a drastic and unwarranted step which would endanger the public.

In their discovery responses, Plaintiffs tacitly admitted that child molesters and rapists such as Offenders A, B, C, and D should not be granted relief.

Defendants carefully reviewed the list of offenders Plaintiffs asserted should be granted relief as members of the putative class, and determined that the majority were also child molesters

and rapists, just as the four exemplars originally identified by Defendants. Defendants will not belabor the point by listing each and every sexual predator who would receive relief if the statutes were facially invalidated, but a few additional examples[4] further illustrate the point:

a. Offender No. 2 attempted to engage in oral sodomy with a minor child. [Exhibit 5 at MSOR.008624, 010842];

b. Offender No. 3 forced an inmate to engage in anal sodomy. [Exhibit 5 at MSOR.009041, 010812];

c. Offender No. 4 engaged in anal sodomy with a fourteen-year-old child. [Exhibit 5 at MSOR.009385, 010866, 010868-69];

d. Offender No. 8 committed unnatural intercourse with a 17-year-old female when he was 36 years old. Nature of crime described as sexual assault when offender registered. [Exhibit 5 at MSOR.004576, 4588, 4632].

e. Offender No. 10 forced a 9-year-old female child to perform oral sex on him. [Exhibit 5 at MSOR.008282, 8369, 8381];

f. Offender No. 11 engaged in anal sodomy with a 15 or 12-year-old male child. [Exhibit 5 at MSOR.006907, 006915]. Nature of crime described as sexual assault when offender registered. [*Id.* at MSOR.006907].

g. Offender No. 13 indicated that he had been convicted of unnatural intercourse when he registered. [Exhibit 5 at MSOR.008259]. However, he was found guilty of sexual battery for engaging in sexual penetration with a child under the age of 14. [*Id.* at MSOR.010970-73].

h. Offender No. 17 indicated that he had been convicted of sexual battery with a 15-year-old child when he registered. [Exhibit 5 at MSOR009585]. However, he was actually convicted of unnatural intercourse for engaging in bestiality. [*Id.* at MSOR.010801-04]. Offender was indicted for unnatural intercourse with a human being several years earlier. [*Id.* at MSOR.010805-06]. Court records do not reflect whether he was also convicted of that crime.

i. Offender No. 19 engaged in anal sodomy with a 10-year-old male child. [Exhibit 5 at MSOR.010831].

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[4] For convenience and clarity, Defendants will refer to these additional offenders by the number assigned to them by Plaintiffs in their supplemental response to Interrogatory No. 11. [Exhibit 4, at 4-7].

j. Offender No. 24 engaged in unnatural intercourse with a male between age of 14 and 18. [Exhibit 5 at MSOR.010116]; and

k. Offender No. 31 forced a 3-year-old female child to perform oral sex on him. [Exhibit 5 at MSOR. 008636, 010837-39].

These eleven additional examples are representative of the other putative class members. Under no circumstances should offenders like these be permitted to argue that the U.S. Constitution requires that they be removed from the MSOR as an unintended consequence of *Lawrence v. Texas*.

The circumstances under which Arthur Doe was convicted bear no resemblance to the conduct and circumstances at issue in either *Lawrence* or *Bowers*. Arthur Doe has no legal right to as-applied relief from either his conviction under the Mississippi unnatural intercourse statute, or the registration statute.

ARTHUR DOE'S CLAIMS ARE BARRED BY *HECK V. HUMPHREY*

Alternatively, Defendants are entitled to summary judgment on Arthur Doe's claims because a judgment in his favor would require this Court to declare Mississippi's unnatural intercourse statute unconstitutional on its face or as applied to him. This Court cannot even consider such a claim, let alone grant such relief, under *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Heck*, the Supreme Court held that, if in a § 1983 suit for damages, a "judgment in favor of the plaintiff would necessarily imply the invalidity of [his] conviction or sentence . . . the

complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 487. In other words, "[a] claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983." *Id.* at 487. The *Heck* doctrine is based on the principle that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486.

Although *Heck* itself involved a § 1983 suit seeking only damages, the Fifth Circuit "has held that *Heck* also applies where a plaintiff seeks injunctive or declaratory relief which, if granted, would necessarily imply that a conviction is invalid." *Mann v. Denton County*, 364 Fed. Appx. 881, 883 (5th Cir. 2010) (citations omitted). Further, the Fifth Circuit has recognized that *Heck* bars a § 1983 claim that the statute under which the plaintiff was convicted is unconstitutional. *See Green v. Vu*, 393 Fed. Appx. 225, 226 (5th Cir. 2010) (holding that "[t]o the extent that [plaintiff] seeks to challenge the constitutionality of the Texas statutes under which he was convicted . . . his efforts amount to an attack on his conviction" barred by *Heck*). Other courts have reached the same conclusion.[5]

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[5] *See, e.g.*, *Ridgeway v. Warren*, 2015 WL 12912374, at *1 (E.D.N.C. Oct. 1, 2015) ("*Heck* applies to challenges to the constitutionality of state criminal statutes."); *Castaneira v. Perdue*, 2010 WL 5115193, at *3 (N.D. Ga. Dec. 9, 2010) ("Plaintiff's allegations—that the criminal statutes under which he was convicted are unconstitutional on their face and as applied to him—clearly are inconsistent with the validity of his conviction and necessarily imply that the conviction is invalid."); *Goodnow v. County of Roscommon*, 2010 WL 234715, at *1 (W.D. Mich. Jan.14, 2010) (inmate's declaratory judgment action "challenging the statute on which his [criminal sexual conduct] conviction is based" barred by *Heck*); *Johnson v. Louisiana*, 2009 WL 960564, at *2 (E.D. La. Apr. 7, 2009) (concluding that "a judgment in [plaintiff's] favor finding that the challenged statutes are unconstitutional would necessarily imply the invalidity of his conviction for obscenity"); *Cordova v. City of Reno*, 920 F. Supp. 135, 137 (D. Nev.1996) (dismissing plaintiff's "claims that he was convicted of violating a fatally unconstitutional city ordinance" under *Heck*); *cf. Lawrence v. McCall*, 238 Fed. Appx. 393, 396 (10th Cir. 2007) ("By finding the sentencing procedures used by Oklahoma here unconstitutional, we would invalidate the plaintiffs' prior sentences. *Heck* does not allow us to so act.").

Here, Plaintiffs' Amended Complaint expressly seeks a declaration that Mississippi's unnatural intercourse statute, Miss. Code Ann. § 97-29-59, is both facially unconstitutional and "unconstitutional and unenforceable as applied to [his] conviction[]." [Doc. 60 at ¶¶ 97-98, 107-09]. A declaratory judgment in Arthur Doe's favor that Section 97-29-59 is unconstitutional on its face or as applied to him would necessarily imply the invalidity of his 1978 unnatural intercourse conviction. Because Arthur Doe's unnatural intercourse conviction has not been reversed or declared invalid by any court or tribunal, his claims are barred by the *Heck* doctrine.

PROCEDURAL DUE PROCESS

Plaintiffs' Amended Complaint alleges that Defendants' enforcement of the Sex Offender Registry Law against them violates their rights to "procedural due process under the Fourteenth Amendment." [Doc. 60 at ¶ 94]. However, the Amended Complaint does not explain how any of the Plaintiffs have been denied procedural due process by the MSOR. The only specific allegation that raises a potential procedural due process violation is that the Defendants require offenders with out-of-state convictions "that have sodomy as an element of the conviction," to register with the MSOR but "impose this requirement with no notice or procedure for determining whether an out-of-state conviction should be deemed equivalent to offenses Mississippi designates as registrable." [*Id.* at ¶ 22].

This allegation could only pertain to the CANS Plaintiffs, not Arthur Doe, since he has not been required to register with the MSOR on account of an out-of-state conviction. *Id.* at ¶ 55. As such, Arthur Doe does not have standing to assert a procedural due process claim on behalf of other registered sex offenders.[6] Even if Arthur does assert that his procedural due process rights

[6] *See, e.g.*, *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 154-155 (1979) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact

have been violated in some manner, his claim fails as a matter of law.

"When an individual is convicted of a sex offense, no further process is due before imposing sex offender [registration] conditions." *Meza v. Livingston*, 607 F.3d 392, 401 (5th Cir. 2010), *clarified on denial of reh'g*, 2010 WL 6511727 (5th Cir. Oct. 19, 2010) (citing *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (holding that where sex offender registration is triggered by conviction alone, rather than assessment of danger to public, no additional process is required). "Additional process is only necessary where it gives a sex offender the ability to prove or disprove facts related to the applicability of the registration requirement." *United States v. Juvenile Male*, 670 F.3d 999, 1014 (9th Cir. 2012). Thus, where "the law's [registration] requirements turn on an offender's conviction alone a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest no additional process is required for due process." *Id.* (internal quotation marks and citation omitted).

Arthur Doe was not entitled to any additional process beyond the process afforded him in his criminal case before registering with the MSOR because under Mississippi law, registration with the MSOR is only triggered when an offender is convicted of one of the enumerated registrable offenses. *See* Miss. Code Ann. § 45-33-23(h); § 45-33-25(1)(a). After the Sex

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on his own rights. As a general rule, if there is no constitutional defect in the application of a statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations."); *J & B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 366 (5th Cir. 1998) (explaining that outside of First Amendment context, plaintiffs "to whom a statute may be constitutionally applied normally lack standing to argue that a statute is unconstitutional if applied to persons or situations not before the court") (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)); *Hill v. City of Houston*, 764 F.2d 1156, 1160 (5th Cir. 1985) ("The usual standing rule in this situation is clear: 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.") (citations omitted), *aff'd*, 482 U.S. 451 (1987).

Offenders Registration Law was enacted, Arthur Doe was required to register by virtue of the fact that he had been convicted of unnatural intercourse. *See* Miss. Code Ann. § 45-33-23(h)(xi). Accordingly, there is no genuine issue of material fact as to whether Arthur Doe has been denied procedural due process by Defendants.

In any case, there is no merit whatsoever to Plaintiffs' conclusory and unsubstantiated allegation that the MSOR deprives offenders with out-of-state sex convictions of procedural due process by not having a procedure for such offenders to challenge whether they are required to register in Mississippi. Any sex offender moving to Mississippi who disputes that he or she is required to register with the MSOR can obtain constitutionally adequate process by filing suit in Mississippi state court and seeking an injunction against the MSOR. This is what happened when one individual with an out-of-state sodomy conviction was ordered to register with the MSOR. [*See* Exhibit 6 at MSOR.010859]. The individual filed suit against the Mississippi Department of Public Safety and sought a temporary restraining order against the Department's enforcement of the registration requirements so that he could file a petition to vacate his out-of-state sodomy conviction, which he claimed was unconstitutional under *Lawrence v. Texas*. [*Id.* at MSOR.010859-60]. As it turns out, the petition to vacate the sodomy conviction was granted, and the MSOR informed the individual that, because his conviction had been vacated, he would not be required to register with the MSOR. [*Id.* at MSOR.010864-65]. For these reasons, Defendants are entitled to summary judgment to the extent Arthur Doe asserts a procedural due process claim.

REQUIRING ARTHUR DOE TO REGISTER ON THE MSOR BASED ON HIS UNNATURAL INTERCOURSE CONVICTION DOES NOT VIOLATE EQUAL PROTECTION

The Amended Complaint asserts an equal protection claim based on the allegation that

Plaintiffs are required to register as sex offenders for their unnatural intercourse convictions, while other people convicted of "materially indistinguishable offenses in Mississippi" are not required to register. [Doc. 60 at ¶ 104]. Plaintiffs further allege that this classification "has no rational relationship to a legitimate governmental interest." [*Id.*]. Plaintiffs do not specify which "materially distinguishable offenses in Mississippi" do not require registration, but presumably they are referring to Mississippi's prostitution statute. [*See* Doc. 16 at 18-19]. To the extent the Amended Complaint purports to assert an equal protection claim on behalf of Arthur Doe, summary judgment is warranted because (1) he is not similarly situated to individuals convicted of prostitution, and (2) there is a rational basis for requiring offenders with unnatural intercourse convictions to register, but not requiring the same of persons convicted of prostitution.

To succeed on an equal protection claim, a plaintiff must identify a group of similarly situated people and prove that they are being treated differently. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike."); *Beeler v. Rounsavall*, 328 F.3d 813, 816 (5th Cir. 2003); *Bryan v. City of Madison*, 213 F.3d 267, 276 (5th Cir. 2000). Thus, "if 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." *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988).

If Arthur Doe is asserting an equal protection claim predicated on the notion that he is similarly situated to people who have been convicted of prostitution in Mississippi, his claim must fail. Arthur Doe is not similarly situated to any person who has been convicted for violating

Mississippi's prostitution statute, Miss. Code Ann. § 97-29-49.

The conduct of Arthur Doe cannot under any stretch of the imagination be considered similar to a person who engages in, or offers or agrees to engage in, sexual intercourse in exchange for compensation. Miss. Code Ann. § 97-29-49(1).

Even setting aside the specific facts of Arthur's case, Plaintiffs' argument that unnatural intercourse and prostitution are "materially indistinguishable offenses" is fundamentally flawed. Because the prostitution statute requires an exchange (or the offer of an exchange) of money or property for sexual intercourse or conduct, the crime of prostitution necessarily includes an element of consent. *See* Miss. Code Ann. § 97-29-49(1) ("A person commits the misdemeanor of prostitution if the person knowingly or intentionally performs, or offers or agrees to perform, sexual intercourse or sexual conduct for money or other property."). That is not true for the unnatural intercourse statute, which merely requires that the offender have engaged in oral or anal sodomy. *See* Miss. Code Ann. § 97-29-59. In other words, the unnatural intercourse encompasses a much broader range of conduct than the prostitution statute, including sex with minors and forcible sex acts.

As shown above, convictions have been obtained under the unnatural intercourse statute

against individuals who have engaged in sodomy with minors (and even small children) or have forced others to engage in sodomy. *See supra* at 19-23. These sexual predators are not similarly situated to persons convicted of prostitution in any material respect, other than the fact that their offenses involved sexual conduct. Further, Plaintiffs are incorrect insofar as they assert that all persons convicted of prostitution-related offenses are not required to register as sex offenders. Mississippi law requires any person convicted of the felony of procuring services from a prostitute who is under the age of 18 to register with the MSOR. *See* Miss. Code. Ann. § 97-29-51(c); Miss. Code Ann. 45-33-23(xix); [*see* Exhibit 7, Defs.' Supplemental Responses to Pls.' Interrogatories at 5-6]. For these reasons, Plaintiffs' contention that Arthur Doe and other registered sex offenders with unnatural intercourse convictions are similarly situated to persons with misdemeanor prostitution convictions has no basis in law or fact.

Even if Arthur Doe was similarly situated to a person convicted of violating the prostitution statute, he cannot satisfy the second prong of the equal protection analysis: that there is no rational basis for requiring him and others with unnatural intercourse convictions to register with the MSOR, but not requiring the same of those with prostitution convictions. "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (citation omitted). "In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.* at 632. "On rational-basis review, a classification in a statute . . . bear[s] a strong presumption of validity, . . . and those attacking the rationality of the legislative classification have the burden to negative every

conceivable basis which might support it[.]" *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). The actual intent of the legislature is irrelevant because "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315.

Here, there is a rational basis to treat persons convicted of unnatural intercourse differently than persons convicted of prostitution. The conduct for which many of the registered sex offenders who have been convicted of unnatural intercourse is egregious and has actually harmed the victims of their sexual transgressions. The same cannot be said of those who have violated the prostitution statute.

Requiring persons convicted of unnatural intercourse to register as sex offenders advances the State of Mississippi's legitimate state interests in protecting the public and especially children from dangerous sex offenders. Accordingly, Defendants are entitled to summary judgment as to any remaining equal protection claim.

CONCLUSION

Arthur Doe is not entitled to facial invalidation of either of the statutes in question. *Lawrence v. Texas* did not facially invalidate all unnatural intercourse statutes on their face. Further, granting facial relief would ultimately require the removal of numerous dangerous sexual predators from the MSOR. Moreover, Arthur Doe is not entitled to as-applied relief based on

substantive due process under *Lawrence* or any other alternative theory expressed in the Amended Complaint. Arthur Doe was not convicted of unnatural intercourse for sex with another consenting adult in the privacy of a home,

For the foregoing reasons, Defendants' motion for summary judgment should be granted on all remaining claims asserted against them in this action.

Respectfully submitted this the 8th day of May, 2018.

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Paul E. Barnes, Special Assistant Attorney General for the State of Mississippi, electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notice of such filing to the following:

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THIS, the 8th day of May, 2018.

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