UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

DOE,

Plaintiff,

v.

HOOD, *et al*,

Defendants.

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

Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF ARTHUR DOE'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2003, in the landmark decision *Lawrence v. Texas,* the Supreme Court held that anti-sodomy statutes are facially unconstitutional under the Fourteenth Amendment. Despite this unequivocal ruling, Mississippi continues to enforce its pre-*Lawrence* sodomy prohibition – the "Unnatural Intercourse" statute – by requiring individuals with sodomy convictions to register with the Mississippi Sexual Offender Registry (MSOR).

Registration as a sex offender burdens almost every aspect of daily life. Plaintiff Arthur Doe – required to register because of one Unnatural Intercourse conviction from 1978, decades before both the enactment of the MSOR and the decision in *Lawrence v. Texas* – suffers significant restrictions on his public and personal life through Mississippi's plainly unconstitutional conduct. He moves for summary judgment and injunctive relief to stop Mississippi from enforcing its unconstitutional sodomy prohibition and to remove the Unnatural Intercourse statute as an offense subject to the MSOR.

There is no genuine issue of material fact that Mississippi is violating the Plaintiff's rights under the Fourteenth Amendment. First, Mr. Doe can demonstrate that the Supreme Court has long held that sodomy prohibitions are facially invalid, and that enforcement of the Unnatural Intercourse statute through the sex offender registry thus violates the Due Process Clause as a matter of law. Second, Defendants' classification of Mr. Doe as a sex offender – in marked contrast to its treatment of those with materially identical prostitution convictions, who are not required to register as sex offenders – has no rational basis justifying a legitimate state end and thus violates the Equal Protection Clause as a matter of law. Defendants cannot provide any rational basis for classifying Mr. Doe's conviction for Unnatural Intercourse as a registrable offense, while convictions for identical acts performed in exchange for money are not.

Arthur Doe is entitled to summary judgment as a matter of law, and Defendants must be enjoined from continuing to infringe his constitutional rights by keeping him on the MSOR.

FACTS

I. Mississippi Criminalizes Oral and Anal Sex and Requires Those Convicted to Register as Sex Offenders for a Minimum of Twenty-Five Years

Mississippi's Unnatural Intercourse statute criminalizes "the detestable and abominable crime against nature committed with mankind"[1] and subjects those convicted to imprisonment for up to ten years. Miss. Code Ann. § 97-29-59. Mississippi courts have interpreted the Unnatural Intercourse statute to bar oral or anal sex. *See, e.g.*, *State v. Davis*, 79 So. 2d 452 (Miss. 1955); *State v. Mays*, 329 So. 2d 65 (Miss. 1976). The statute criminalizes sodomy without requiring any element of force, public conduct, commercial activity, or conduct with a minor.

Criminalization of oral and anal sex dates back to the State's founding. In 1802, Mississippi adopted the prohibition as part of its adoption of all common law crimes, and then codified the prohibition in 1839. The State Constitution of 1890 even permitted excluding the public from trials for those accused of engaging in oral or anal sex. Mississippi Const., Art. 4, § 26 (1890). While its location in the code has changed over the decades, that same prohibition survives today as the Unnatural Intercourse statute.

The prohibition on oral and anal sex targets conduct that is widely practiced among consenting adults. Federal government survey data from 2011 to 2013 demonstrates that 86% of women and 87% of men nationwide aged 18-44 had engaged in oral sex with a different-sex

[1] The Unnatural Intercourse statute also criminalizes sexual conduct "with beast." This litigation addresses only the prohibition on sexual conduct "with mankind."

partner and 36% of women and 42% of men had engaged anal sex with a different-sex partner.[2] Assuming the nation-wide survey data is generally indicative of the practices of Mississippians, the Unnatural Intercourse statute makes criminals of more than a million Mississippi residents.

Since 1995, when Mississippi established the Mississippi Sex Offender Registry (MSOR) through the enactment of the Mississippi Sex Offender Registration Law, Miss. Code Ann. § 45-33-21 *et seq*., Mississippi has required registration on a public sex offender registry for a range of convictions, including convictions under the Unnatural Intercourse statute. *Id*. § 45-33-23(h)(xi). Mississippi also requires registration for a conviction in another jurisdiction which Mississippi deems the equivalent of an Unnatural Intercourse conviction. *Id*. § 45-33-23(h)(xxi).

The requirement to register burdens numerous aspects of daily life. Those required to register must personally appear to re-register every 90 days and pay a fee. *Id*. § 45-33-31. Any address or workplace changes must be reported. *Id*. §§ 45-33-31, 45-33-35, 45-33-36. Registrants are required to carry state identification cards or driver's licenses that bear the words "Sex Offender" in large letters, thus exposing their status any time they must show identification. *Id*. §§ 45-35-3(2); 63-1-35. Registrants must notify members of their community of their status as sex offenders, including volunteer agencies where registrants have direct and unsupervised contact with minors and places of employment where registrants participate in close contact with children. *Id*. §§ 45-33-32, 45-33-59. Registrants must notify these organizations and agencies in writing and the organization must then notify the parents of any children whom the agency serves. *Id*. § 45-33-32. The Department of Public Safety also makes available the registrant's

[2] *See* Centers for Disease Control & Prevention, *Sexual Behavior, Sexual Attraction, and Sexual Orientation Among Adults Aged 18–44 in the United States: Data From the 2011–2013 National Survey of Family Growth*, 88 NAT'L VITAL HEALTH STAT. REP. 1 (2016), available at https://www.cdc.gov/nchs/data/nhsr/nhsr088.pdf (accessed May 8, 2018). *See also Mohammed v. State*, 561 So.2d 384, 386 n.1 (Fla. Ct. App. 1990) (citing surveys showing between 85% and 87% of adults engage in oral sex)

status as a sex offender on its public website and to schools, social service entities, and law enforcement offices within the registrant's jurisdiction. *Id*. § 45-33-36.

Registrants may not live within 3,000 feet of schools, child care facilities, child care homes, or recreation facilities where children are present. *Id*. § 45-33-25. Nor may they go to public areas where children are present, including schools, beaches or campgrounds, without advanced approval from the Department of Public Safety. *Id*. §§ 45-33-26(1)(a)(i-ii), 45-33-26(1)(b). Failure to re-register, to pay the fee, or to comply with other aspects of the registration law can result in a fine of up to $5,000 and/or imprisonment for up to five (5) years. *Id*. § 45-33-33(2)(a). Noncompliance can also result in arrest or driver's license suspension. *Id*. § 45-33-33(4), (7). The State has prosecuted numerous individuals for failure to register, including those whose sole convictions triggering registration are for Unnatural Intercourse.

Offenses are categorized into "tiers" that determine the length of time an individual must register. Unnatural Intercourse is considered a Tier II offense, requiring at least twenty-five years of registration. Thus individuals with one conviction under the Unnatural Intercourse statute or an out-of-state conviction that Mississippi deems equivalent must register as a sex offender for a minimum of 25 years before he or she is permitted to petition a court for removal from the registry. *Id*. § 45-33-47(2). A second conviction requires lifetime registration, with no possibility of removal. *Id*. §45-33-47(2)(d)(xvi). Sex offenses that require registration can never be expunged, sealed, destroyed, or purged from someone's criminal record unless the registrant was a minor at the time of the offense. *Id*. § 45-33-55.

Mississippi interprets the 25-year requirement be a requirement for years spent on the registry, rather than years since conviction for the sex offense. Statement of Undisputed Material Facts (hereinafter "SUMF") ¶ 8; *see also* Miss. Code Ann. § 45-33-47(2)(a). Incarceration for

any offense restarts the minimum registration period. Miss. Code Ann. § 45-33-47(2)(a). Thus, individuals who were convicted years or even decades before the establishment of MSOR are often required to register decades later and remain on the registry forty or fifty years after the initial conviction, even when the individual has not been convicted of any other sex offense in the intervening time.

To be relieved of the duty to register after spending twenty-five years on the registry, Tier II registrants must petition to the court in which they were convicted for removal and present evidence at a hearing. Miss. Code Ann. § 45-33-47(3). Of the hundreds of individuals who have been required to register as sex offenders in Mississippi, only four have ever successfully petitioned for relief from the duty to register pursuant to § 45-33-47(3). SUMF ¶ 41. No one convicted of Unnatural Intercourse has ever petitioned pursuant to § 45-33-47(3). SUMF ¶ 41. Thus, registration for an Unnatural Intercourse conviction is in effect a lifelong requirement.

II. Although the U.S. Supreme Court Banned Statutes Criminalizing Oral and Anal Sex Fifteen Years Ago, Mississippi Continues to Enforce the Statute.

In 2003, the United States Supreme Court struck down Texas's sodomy prohibition in its entirety on due process grounds because the "*statute* further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added). In striking down the Texas law and asserting that it lacked any legitimate state interest, the Court necessarily held that any criminal statute whose only element is the commission of oral or anal sex is unconstitutional. *Id*. at 578-79. In explicitly overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), a prior unsuccessful facial challenge to Georgia's sodomy statute, the Court held that its ruling was not limited to Texas or to laws singling out same-sex couples. Further, the Court emphasized that the requirement to register as a sex offender in four states, including Mississippi, as a result of a sodomy conviction,

demonstrated the "consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition" of sodomy. *Lawrence*, 539 U.S. at 576. These consequences compelled the Court to hold all anti-sodomy statutes unlawful. *Id*. at 575-76.

In the wake of the Supreme Court's unequivocal ruling, numerous states have repealed or amended their prohibitions on oral and anal sex. In 2006, Missouri amended its Sodomy statute to only apply to sex acts with minors less than 14 years old. Mo. Rev. Stat. § 566.062. In 2010, Kansas repealed its prohibition outright. Kan. Stat. Ann. § 21-3505. And in 2014, following a decision by the Fourth Circuit Court of Appeals holding that *Lawrence v. Texas* had rendered its prohibition on oral and anal sex unconstitutional, *Macdonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), *cert denied* 134 S. Ct. 200 (2013), Virginia amended its Crimes Against Nature statute to apply only to bestiality and incest. Va. Code Ann. § 18.2-361. But Mississippi's Unnatural Intercourse statute, including the provision outlawing a "crime against nature committed with mankind," remains on the books, as does the requirement to register.

Approximately 22 individuals are on the registry solely for Unnatural Intercourse convictions or for out-of-state convictions for oral or anal sex that Mississippi deems equivalent to Unnatural Intercourse. SUMF ¶ 37. In addition, approximately 29 individuals have convictions under Louisiana's "Crimes Against Nature by Solicitation" statute, for which Louisiana does not require registration. *Id*.[3] Several registrants, including Plaintiff Doe, pled

[3] Plaintiffs and Defendants have entered into a settlement agreement and proposed a partial judgment that is pending before the Court. The agreement provides for Plaintiffs Brenda Doe, Carol Doe, Diana Doe, and Elizabeth Doe, [redacted]. These Plaintiffs have previously moved for summary judgment under the Due Process and Equal Protection clauses of the Fourteenth Amendment. *See* ECF Nos. 15-17. Because of the pending settlement, they have not done so here. In the event that the Court does not approve the settlement, Plaintiffs respectfully reserve the right to move for summary judgment on these Plaintiffs' claims.

guilty to Unnatural Intercourse years before it was a registrable offense. SUMF ¶¶ 23-24. Although public defenders counseling their clients emphasize "avoiding convictions for registerable offenses," these registrants were not able to avail themselves of the common "strategy" of avoiding a guilty plea that would trigger registration. SUMF ¶¶ 39-40. The only trigger for registration is a conviction; there is no statutory provision or mechanism for considering underlying charges or alleged conduct when evaluating an individual's requirement to register. SUMF ¶ 39.

At no point have Defendants studied or analyzed the public safety implications of requiring individuals with Unnatural Intercourse convictions to register. SUMF ¶ 42. While Mississippi's Prostitution statute, Miss. Code Ann. § 97-29-49, bars the performance of sexual intercourse or sexual conduct for money, and states that "'sexual conduct' includes cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object or body part of the genital or anal opening of another," Prostitution between adults is not a registrable offense in Mississippi. *See* Miss. Code Ann. § 45-33-23(h)(i-xxiv). Defendants have never articulated a rationale for the requirement that those convicted of oral sex under the Unnatural Intercourse statute register, while those convicted of fellatio or cunnilingus under the Prostitution statute need not. SUMF ¶ 10. Their only rationale for classifying anal sex under the Unnatural Intercourse statute as registrable is based on a CDC assessment of purported risks of engaging in anal sex, a rationale that, if accepted, would apply to anal sex under the Prostitution statute as well. SUMF ¶ 10. Defendants have thus never presented any facts, data, or reasoning that would justify classifying an Unnatural Intercourse conviction as registrable and a Prostitution conviction as not.

III. Arthur Doe's 1978 Unnatural Intercourse Conviction Will Require Him to Register Without Hope for Relief Until At Least 2033.

Plaintiff Arthur Doe is registered as a sex offender solely as a result of a single Unnatural Intercourse conviction dating from 1978, seventeen years before the establishment of the MSOR. SUMF ¶24. He has no other convictions that would trigger registration under the MSOR. SUMF ¶24. [redacted] SUMF ¶26. More than thirty years later, in 2008, he was first presented with an acknowledgment of the requirement to register as a sex offender because of the Unnatural Intercourse guilty plea he had taken in 1978, [redacted]. SUMF ¶ 27. Mr. Doe had not been charged with any registrable offenses in the intervening decades. Nonetheless, because the statute requires registration for twenty-five years beginning the date of first registration, Mr. Doe would now be required to submit to registration and to re-register every three months until well into his seventies.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "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 has the initial burden of demonstrating to the Court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The non-movant(s) must then present specific facts by affidavit or other admissible form sufficient to raise a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). There must be a genuine dispute as to any material fact—a fact "that might affect the outcome of the suit." *Id*. at 248.

Summary judgment is the preferred vehicle for adjudicating facial challenges to the constitutionality of statutes. 10A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2725 (3d ed. 2011) ("[I]f the only issues that are presented involve the legal construction of statutes or legislative history or the legal sufficiency of certain documents, summary judgment would be proper.")

ARGUMENT

I. By Enforcing the Facially Invalid Unnatural Intercourse Law, Mississippi Is Violating Arthur Doe's Substantive Due Process Rights.

The U.S. Supreme Court unmistakably held in *Lawrence* that a criminal statute whose only element is the commission of oral or anal sex is unconstitutional. The Court in *Lawrence* expressly invalidated Texas's ban on sodomy between same-sex partners based on the "right to liberty under the Due Process Clause," 539 U.S. at 578, making clear that all state statutes remaining in effect in the nation whose only element is the commission of sodomy are invalid. Further, the Court made clear that its ruling applied to all statutes barring sodomy, overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a Georgia law criminalizing consensual sodomy between same-sex and different-sex partners alike. *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today.").

Mississippi's Unnatural Intercourse statute, Miss. Code Ann. §97-29-59, criminalizes, in relevant part, "crimes against nature with mankind," which Mississippi state courts have interpreted to mean oral or anal sex. *State v. Davis*, 79 So. 2d 452 (Miss. 1955); *State v. Mays*,

329 So. 2d 65 (Miss. 1976). This portion of the statute thus clearly a criminalizes oral and anal sex and was expressly held invalid and therefore unenforceable under *Lawrence*.

A. *Lawrence* Invalidated Mississippi's Unnatural Intercourse Statute

Lawrence invalidated the statute before it in that case, along with all remaining sodomy-only laws in this country. That *Lawrence* facially invalidated sodomy statutes is apparent from (1) the language of the *Lawrence* opinion, which demonstrates that the Court was invalidating a statute, and not considering an as-applied challenge, and that it intended to reach all sodomy-only laws; (2) *Lawrence*'s express determination to strike down Texas's same-sex sodomy law on due process rather than equal protection grounds in order to reach other sodomy laws, like Virginia's, prohibiting acts of sodomy engaged in by different-sex couples as well; and (3) the Supreme Court's subsequent characterizations of *Lawrence* and the holding of the only Circuit Court of Appeals to rule on the issue of *Lawrence*'s scope.

First, the plain language of Lawrence's holding makes clear that the Texas statute at issue was struck down on its face. At the very outset of the majority opinion, Justice Kennedy stated: "The question before the Court is *the validity* of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct" *Lawrence*, 539 U.S. at 562 (emphasis added). The Court concluded its decision in terms that unmistakably held the statute unconstitutional on its face and not just as applied to the conduct of the plaintiff in the case: "*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); *see also id*. at 579 (Justice O'Connor, concurring) ("I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional.").

Further, the Supreme Court made clear that its holding applied to all sodomy-only statutes, framing the issues presented as the validity of the statutes, not the ways in which they were applied. The Court granted *certiorari* on two questions related to the constitutionality of the Texas statute and a third question asking whether *Bowers v. Hardwick* should be overruled. *Lawrence*, 539 U.S. at 564 (framing the questions presented). *Bowers* was an unsuccessful facial challenge to Georgia's sodomy statute that criminalized consensual sodomy between same-sex and different-sex couples alike. *Bowers*, 478 U.S. at 190. The issue involved in *Bowers* was unquestionably broad: "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id*.

Lawrence reiterated that framing. 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). But *Lawrence* found that "*Bowers* was not correct when it was decided, and it is not correct today." *Id*. at 578. The decision rendered invalid "the *laws* involved in *Bowers*" and the "power of the State to enforce these *views* [targeting sodomy] on the whole society through operation of the criminal law." *Id*. at 567, 571 (emphases added). As the Court explained, when oral or anal sex "is made criminal by the law of the State, that declaration *in and of itself* is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id*. (emphasis added). Indeed, throughout its analysis, the Court addressed the constitutional deficiencies of *laws* targeted at intimate sexual behavior. *See, e.g*., *id*. at 567 ("*The laws* involved in *Bowers* and here are, to be sure, *statutes* that purport to do no more than prohibit a particular sexual act. Their *penalties* and *purposes*, though, have more far-reaching consequences. . . .") (emphases added). The opinion noted that "[t]he 25 States with laws prohibiting the relevant

conduct referenced in the *Bowers* decision are reduced now to 13 [including Mississippi], of which 4 enforce their laws only against homosexual conduct." *Id*. at 573.

The Court thus made clear that all state sodomy statutes analogous to the Texas law, whether between same-sex or different-sex partners, are invalid under the Due Process Clause. *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 938 and n.143, 948 and n.211 (2011); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1379-80 (2005) (explaining that the Court invalidated all sodomy-only laws to eradicate the stigma those laws engendered); Scott A. Keller and Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes In Toto*, 98 U. VA. L. REV. 301, 354 n.198 (2012) (citing *Lawrence* as example of when the Supreme Court "does invalidate statutes *in toto*").

Second, the Court ground its holding in substantive due process deliberately to effect this sweeping change. While Justice O'Connor advocated for a narrower remedy under the Equal Protection Clause that would have avoided overruling *Bowers*. *See* 539 U.S. at 579 (O'Connor, J., concurring in judgment, but dissenting from the Court's overruling of *Bowers*), the majority explicitly rejected this approach in favor of the broader ruling under substantive due process that reached not just same-sex sodomy prohibitions but all sodomy-only prohibitions: "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id*. 575.

The Court's choice to decide the case on due process rather than equal protection grounds thus voided all sodomy-only statutes and precluded the harms of leaving any such laws in force. The Court's opinion in *Lawrence* cannot be read to permit continued enforcement of sodomy-

only statutes given the Court's evident aim, set forth in unusually candid and explicit language, to remove these laws from the books and ameliorate their stigma.

Third, this reading is confirmed by the Supreme Court's own subsequent descriptions of the scope of *Lawrence*. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015), the case that invalidated same-sex marriage prohibitions (plural), both the majority and the dissent spoke of *Lawrence* in broad terms and of striking down more than just the Texas statute: "*Lawrence* invalidated *laws* that made same-sex intimacy a criminal act," 135 S. Ct. at 2600 (emphasis added); "Then in 2003, the Court overruled *Bowers*, holding that *laws* making same-sex intimacy a crime 'demea[n] the lives of homosexual persons.'" *id*. at 2596 (quoting *Lawrence*, 539 U.S. at 575) (emphasis added); "Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from *laws* making intimacy in the lives of gays and lesbians a crime against the State," *id*. at 2604 (emphasis added); "*Lawrence* relied on the position that criminal sodomy *laws*, like bans on contraceptives, invaded privacy by inviting 'unwarranted government intrusions' that 'touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home,'" *id*. at 2620 (Roberts, C.J., dissenting) (quoting *Lawrence*, 539 U.S. at 562, 567) (emphasis added).

Thus, when characterizing its own decision, the Supreme Court speaks of *Lawrence* in sweeping terms and as involving laws nation-wide, not as an as-applied ruling to the *Lawrence* petitioners or even limited to a facial invalidation of just Texas' sodomy prohibition. S*ee also Campaign for Southern Equal. v. Bryant*, 64 F. Supp. 3d 906, 915 (S.D. Miss. 2014) (noting that *Lawrence* invalidated state sodomy laws as unconstitutional). Indeed, the only federal appellate court to evaluate the continuing validity of a sodomy-only law in the wake of *Lawrence*

confirmed that the *Lawrence* invalidated all such laws. In *MacDonald v. Moose*, the Fourth Circuit declared Virginia's sodomy prohibition invalid on its face in the context of a challenge to a conviction for solicitation to commit sodomy. 710 F.3d 154. Like the Georgia statute addressed in *Bowers*, Virginia's "Crimes Against Nature" statute barred oral or anal sex between same-sex and different-sex partners and "applie[d] without limits," *id*. at 165, that is, regardless of whether the underlying conduct involved adults, was consensual or noncommercial, or occurred in private. The Court held that "prohibiting sodomy between two persons without any qualification, is facially unconstitutional" no matter the underlying conduct, *id*. at 166; indeed, the petitioner had engaged in conduct with a minor. "[B]ecause the invalid Georgia statute in *Bowers* is materially indistinguishable from the anti-sodomy provision being challenged here, the latter provision likewise does not survive the *Lawrence* decision." *Id*. Mississippi's Unnatural Intercourse statute likewise cannot survive.

B. Mississippi's Unnatural Intercourse Statute Is Unconstitutional and the State Cannot Enforce It.

Like Georgia's sodomy prohibition, the Unnatural Intercourse statute prohibits acts of oral and anal sex and requires no additional elements to constitute a crime. There 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. Thus Mississippi has required individuals with Unnatural Intercourse convictions to register where there is no conviction for force, commerce, public conduct, or involvement with a minor.

Where "enforcement of [a] statute" has properly been invalidated as unconstitutional, "then so is enforcement of all identical statutes in other states, whether occurring before or after our decision." *Danforth v. Minnesota*, 552 U.S. 264, 286 (2008). Federal constitutional rights by definition cannot mean one thing in one state and something different in another state, and if

enforcement of one State's statute is struck down as unconstitutional (as enforcement of Texas' sodomy statute was in *Lawrence*), then enforcement of another state's substantively identical statute would also be unconstitutional. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 347-49 (1816) (holding Constitution requires "uniformity of decisions throughout the whole United States, upon all subjects within [its] purview"); *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 201 (1990) ("Either enforcement of the statute at issue in [a prior case] . . . was unconstitutional, or it was not; if it was, *then so is the enforcement of all identical statutes in other States* . . . .") (Scalia, J., concurring) (some emphases added).

Because the sodomy provision of Mississippi's Unnatural Intercourse law is unconstitutional, any enforcement of it is invalid under *Lawrence*. The State thus must be enjoined from enforcing the collateral consequences of Unnatural Intercourse convictions, including the 25-year requirement to register for one conviction, and the lifetime requirement to register for two or more. Miss. Code Ann. § 45-33- 47(2)(a-d). The Unnatural Intercourse statute cannot be enforced not only for any future charge, but also for past convictions for which the State has continued to impose collateral consequences in many cases decades after the conviction.

The State's requirement that people convicted of Unnatural Intercourse register with the MSOR cannot stand as a matter of law. A criminal statute that has been declared unconstitutional can be given no effect. *Alexander v. Johnson*, 217 F. Supp. 2d 780, 802 (S.D. Tex. 2001) *aff'd sub nom. Alexander v. Cockrell*, 294 F.3d 626 (5th Cir. 2002) (invalidating collateral consequences of a conviction when original conviction was based on an unconstitutional criminal statute); *Hiett v. United States*, 415 F.2d 664, 666 (5th Cir. 1969) ("[A]n unconstitutional statute in the criminal area is to be considered no statute at all."). *See also*

Coleman v. Dretke, 395 F.3d 216, 222 (5th Cir. 2004) (*Coleman I*), *reh'g and en banc denied*, 409 F.3d 665 (5th Cir. 2005) (*Coleman II*) (where individual was not convicted of a registrable offense, imposing "sex offender conditions" was invalid under the Due Process Clause). The State cannot continue to enforce Mississippi's unconstitutional Unnatural Intercourse statute against Plaintiff. Under Mississippi law, a duty to register can only be supported by a conviction for a registrable offense. Miss. Code Ann. § 45-33-23(h)(xxi) ("'Sex Offense' or 'registrable offense' means . . . [a]ny other offense resulting in a conviction which . . . would be deemed to be such a crime"). Consequently, the Unnatural Intercourse statute cannot be invoked to perpetuate the collateral consequences of an unconstitutional conviction.

Notably, *Lawrence* addressed sex offender registries in general – and Mississippi's in particular – as an unacceptable collateral consequence of unconstitutional sodomy convictions: "The stigma . . . [the] statute imposes, moreover, is not trivial . . . . [T]he convicted person would come within the [sex offender] registration laws of at least four States were he or she to be subject to their jurisdiction." 539 U.S. at 575 (citing the sex offender registration laws of four states, including Mississippi). The registration requirements that attend sodomy convictions "underscore[] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Id*. at 576. As *Lawrence* made clear, enforcement of a such a law, whether by prosecution or by forced registration, violates the Fourteenth Amendment.

The conviction Mississippi has relied on in compelling Mr. Doe to register for at least 25 years, beginning thirty years after his conviction, is for a violation of a statute that is "*substantive*[*ly*] ... defective (by conflicting with a provision of the Constitution)." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (emphasis in original). Fifteen years have passed since the Supreme Court issued *Lawrence* and specifically highlighted Mississippi's

sodomy ban and its accompanying sex offender registration requirement. Yet the State continues to operate as if *Bowers v. Hardwick* were valid law and the Unnatural Intercourse statute enforceable. This position cannot be sustained. Because Plaintiff is required to register as sex offender pursuant to a statute the Supreme Court has already declared unconstitutional, his substantive due process rights are being violated. Accordingly, Plaintiff has demonstrated that Miss. Code Ann. §§ 45-33-23(xi) and 97-29-59 violate his due process rights in the clearest way possible, are unconstitutional, and must be enjoined from further enforcement.

C. Defendants Cannot Salvage the Unnatural Intercourse Statute by Pointing to Dicta in *Lawrence*.

The core holding of *Lawrence* was that sodomy-only statutes "further[] no legitimate state interest." 539 U.S. at 578. The State cannot explain why that holding does not control here. Instead, it has argued that *Lawrence* did not invalidate all sodomy-only laws, contending instead that *Lawrence*'s ruling was as-applied to facts identical to those of the Texas plaintiffs and restricted to "private activity between consenting adults." *See, e.g.*, State's Memorandum in Opposition to Plaintiffs' [First] Motion for Summary Judgment, ECF No. 32, at 3. As demonstrated above, *Lawrence* is not so narrow.

To be sure, *Lawrence*'s dictum indicates that states are not prohibited from enacting laws that seek to protect minors from sexual exploitation or that proscribe public sex or prostitution. 539 U.S. at 578 ("The present case does not involve minors. . . . [or] persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. . . . [or] public conduct or prostitution"). Mississippi's legislature can, if it chooses, enact constitutionally appropriate laws regarding decency, prostitution, sexual assault, and polygamy. Unsurprisingly, the State has already done so. Miss. Code Ann. §§ 97-29-31 (Indecent exposure); 97-29-49 (Prostitution); 97-5-23 (Touching, handling, etc., child, mentally defective

or incapacitated person or physically helpless person); 97-3-95 (Sexual battery); 97-3-71 (Rape; assault with intent to ravish); 97-29-43 (Polygamy).

But the fact that *Lawrence* recognizes situations where hypothetical laws that reach sodomy in narrowly tailored circumstances might withstand constitutional scrutiny is not at all in tension with the proposition that *Lawrence* announced a broad facial ruling. *See MacDonald*, 710 F.3d at 165 (rejecting the same argument that State advances here and explaining that *Lawrence* dictum as "reserving judgment on more carefully crafted enactments yet to be challenged"). Indeed, other states have recognized *Lawrence*'s mandate and passed narrowly tailored laws that include prohibitions on sodomy in certain situations. Kansas, Missouri, and Virginia have each either repealed their unconstitutional laws or amended them to comport with *Lawrence*'s mandate. Mississippi has not, and the Unnatural Intercourse statute as written cannot survive *Lawrence*'s holding.

Further, the State cannot continue to enforce a facially unconstitutional law in a manner that it believes would fit within the confines of narrower, hypothetical enactments, such as those that would limit the statute's application to public conduct or force. Enacting laws is the province of the Legislature, not the Executive. Nor can the Court take the "drastic action" of "'rewrit[ing]'" the Unnatural Intercourse statute "'to conform it . . . to constitutional requirements.'" *MacDonald*, 710 F.3d at 166 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884-85 (1997)). Courts are prohibited from tinkering with overly broad statutes to fulfill the legislative duty that branch has abdicated. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006). *Ayotte* cautioned against rewriting a law to conform to constitutional requirements "even as we strive to salvage it." *Id*. at 329 (citing *Virginia v. Am.*

Booksellers Ass'n, Inc., 484 U.S. 383, 397 (1988)). This concern is especially acute when legislative "line-drawing" is more appropriate. *Ayotte*, 546 U.S. at 330.

The judiciary's role is to let the legislature define the offenses and punishments, and then weigh in on whether the legislature acted constitutionally — it is not to enact the offenses and punishments in the first place. *See* Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 MD. L. REV. 292, 336-37 (1996) (holding a statute to be "facially unconstitutional can be viewed as respecting democratic choice by inviting lawmakers to reformulate their policy in narrower terms, free from judicial predetermination of the constitutionality of alternative approaches.").

Mississippi's state courts have made clear that the Unnatural Intercourse statute bars oral or anal sex without any other element. *State v. Mays*, 329 So. 2d 65 (Miss. 1976); *State v. Davis*, 79 So. 2d 452 (Miss. 1955); Notably, efforts to secure a limiting interpretation of the scope of the Unnatural Intercourse statute prior to *Lawrence* were rejected by the courts. In *Contreras v. State*, 445 So. 2d 543 (Miss. 1984), a defendant accused of Unnatural Intercourse argued that it criminalized common sexual activity and that the statute should be limited to activity criminalized by the State's sexual battery statutes. *Id*. at 545. The state Supreme Court rejected this argument, declaring that "the courts interpret statutes and decide the law. The enactment, modification, amendment or repeal of statutes are for the legislature." *Id*. Likewise, federal courts "have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court." *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999).[4]

[4] The prohibition on judicial rewriting of broadly unconstitutional statutes has been firmly established for a century. For example, the U.S. Supreme Court has held that a statute cannot broadly proscribe an entire category of activity that includes constitutionally protected conduct,

It is particularly inappropriate for courts to insert words (here, presumably, "with minors"; "not in private"; "without consent""") into a criminal sodomy statute that has no such language. If, in order to make a statute constitutional, a court "would be required not merely to strike out words, but to insert words that are not now in the statute," the court then is "'mak[ing] a new law, not . . . enforc[ing] an old one. This is no part of [the judiciary's] duty.'" *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (quoting *Reese*, 92 U.S. at 221); *Butts v. Merch. & Miners Transp. Co.*, 230 U.S. 126, 135 (1913) ("To do this would be to introduce a limitation where Congress intended none, and thereby to make a new penal statute, which, of course, we may not do."). In short, if the Mississippi legislature wishes to prohibit oral and anal sex under certainly narrowly tailored circumstances, it should do so. *See, e.g.*, *People v. Uplinger*, 447 N.E.2d 62, 63 (N.Y. 1983) (rejecting state's attempt to save New York's statute against loitering for the purpose of engaging in oral or anal sex by adding elements to the language of the statute.); *Macdonald* 710 F.3d at 165 (reading the *Lawrence* dictum to find that "although the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor, it has not seen fit to do so," and ruling that it could not

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and then leave it for the judicial system to decide who can be charged. *See United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) ("[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."); *see also Eubanks v. Wilkinson*, 937 F.2d 1118, 1125 (6th Cir. 1991) (A court may not "'dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court.'") (quoting *Hill v. Wallace*, 259 U.S. 44, 70 (1922); *State v. Newstrom*, 371 N.W.2d 525, 529 (Minn. 1985) ("Courts cannot save a penal statute by imposing post facto limitations on official discretion through case by case adjudications where no such restraints appear on the face of the legislation."); *State v. Hill*, 369 P.2d 365, 373 (Kan. 1962); *Pacesetter Homes, Inc. v. Vill. of S. Holland*, 163 N.E.2d 464, 467 (Ill. 1959) ("'[T]he relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again.'") (quoting *United States v. Ju Toy*, 198 U.S. 253, 262 (1905)).

usurp that legislative power to rewrite the statute in the way the state requested). It is not for the courts to write Mississippi's criminal law.

II. Taken to Its Logical Conclusion, The State's Reliance on *Lawrence's* Dicta Would Require a Post-Hoc Factual Inquiry That Would Violate Mr. Doe's Procedural Due Process Rights.

Even if the Court could rewrite the statute to limit its application to scenarios contemplated in *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.

The MSOR's statutory scheme simply does not provide for any post-hoc investigation into underlying charges or even evidence introduced at trial. Registration operates based on the conviction, not the facts alleged to underlie a conviction. Miss. Code Ann. § 45-33-25(1)(a) (requiring registration for "[a]ny person . . . who has been *convicted of a registrable offense*") (emphasis added); *id.* § 45-33-23(h) (defining "registrable offense" by a variety of convictions for specific statutes). Thus, an individual who is convicted of or pleads guilty to rape, Miss. Code Ann. § 97-3-65, must register. Miss. Code Ann. §§ 45-33-23(h)(ii). An individual who is indicted for the same charge on the same or similar facts, but who accepts a plea to or is convicted only of aggravated assault, Miss. Code Ann. § 97-3-7(2), does not register. *See* Miss. Code Ann. §§ 45-33-23(h). The statute under which a conviction is obtained is the *sole* operative condition. SUMF ¶ 38.

As Plaintiff's expert witness details, "'conviction' is the only factor that triggers the registration requirement." A 40-year-old male who is indicted under Miss. Code Ann. § 97-3-95 for committing sexual battery against a 12-year-old girl—which is registrable offense, 45-33-23(h)—can reach a plea for simple assault—which is not a registrable offense. SUMF ¶ 38. Even

though the man would be charged with a registrable sex offense for facts that, if proven, would support a conviction for the charged registrable sex offense, the man avoids registration by avoiding conviction for a registrable offense, as defined by Miss. Code Ann. § 45-33-23(a). *Id.* The Mississippi Office of State Public Defenders trains public defenders in the state to attempt to avoid convictions for registrable offenses by either dismissal of the charge, pleas to a lesser nonregistrable offense, acquittal on the registrable offense at trial, or going to trial with the goal of limiting the conviction to a lesser nonregistrable offense. SUMF ¶ 40.

This common practice conforms to the statutory scheme: MSOR registration requirements are not triggered by the facts giving rise to a criminal charge, but rather by the offense for which an individual is convicted. Engagement in oral or anal sex is the sole element of the portion of the Unnatural Intercourse statute addressing "crimes against nature with mankind." Miss. Code Ann. § 97-29-59. No matter what the underlying allegations of an indictment, prosecutors have to prove only that single element for a conviction, and juries can convict only on that single element. The state lacks any authority to conduct a post-hoc review of facts that a jury never found, or an accused never pleaded to, in the hopes of supporting its unconstitutional registration regime for Unnatural Intercourse convictions.

Moreover, even if such an investigation and post-hoc determination were contemplated by the MSOR law – which it is not – such a scheme would create an independent constitutional violation if not accompanied by constitutionally sufficient notice and a hearing to determine whether an individual's conviction had been rendered invalid by *Lawrence*. The State may not deprive an individual of life, liberty, or law without adequate procedures. Procedural due process claims involve a two-step analysis: First, the Court determines whether the plaintiff has a liberty interest that the State interfered with; second, the Court examines whether the procedures (if any)

the State provided were constitutionally sufficient. *Kentucky Dep't. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted).

Fifth Circuit precedent is explicit that individuals have "a liberty interest in being free from being required to register as a sex offender." *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010); *accord Gwinn v. Awmiller*, 354 F.3d 1211, 1217 (10th Cir. 2004); *Kirby v. Siegelman*, 195 F.3d 1285, 1291-92 (11th Cir. 1999); *Neal v. Shimoda*, 131 F.3d 818, 829-30 (9th Cir. 1997). It is difficult to "'conceive of a state's action bearing more "stigmatizing consequences" than the labeling of a prison inmate as a sex offender.'" *Meza*, 607 F.3d at 402 (quoting *Neal*, 131 F.3d at 829 (9th Cir. 1997)). Because *Lawrence* rendered unconstitutional the enforcement of criminal statutes barring oral or anal sex, to require individuals to register for Unnatural Intercourse convictions post-*Lawrence*, the State should have provided Mr. Doe, whose conviction pre-dates Lawrence by twenty-five years, with notice of the liberty interest at stake and an opportunity to be heard.

In *Meza*, the Fifth Circuit examined the procedures due to a parolee who challenged a court's requirement to register as a sex offender where the statute under which he was convicted did not require it. 607 F.3d at 395. The Fifth Circuit determined that even a parolee is entitled to procedural protections that include, "at a minimum: (1) written notice that sex offender conditions may be imposed as a condition of his mandatory supervision, (2) disclosure of the evidence being presented against [him] to enable him to marshal the facts asserted against him and prepare a defense, (3) a hearing at which [him] is permitted to be heard in person, present documentary evidence, and call witnesses, (4) an impartial decision maker, and (5) a written statement by the factfinder as to the evidence relied on and the reasons it attached sex offender conditions to his mandatory supervision." *Id*. at 409.

Here, Defendants have never provided Mr. Doe, with any of these procedures. The State simply does not have any mechanism for doing so. SUMF ¶ 38. Indeed, because Mr. Doe's guilty plea pre-dated the enactment of the current sex offender registration statute by 17 years, he did not even have the notice required by Mississippi law, which requires courts to "provide written notification to any defendant charged with a sex offense" and to include such notification on "guilty plea forms and judgment and sentence forms." Miss. Code. Ann. § 45-33-39. "[D]ue process demands more than no hearing at all." *Bowlby v. City of Aberdeen*, 681 F.3d 215, 221 (5th Cir. 2012) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). The 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.

* * *

In sum, *Lawrence*'s invalidation of statutes that criminalize oral and anal sex on their face precludes Defendants from continuing to enforce the Unnatural Intercourse statute through the MSOR. Mr. Doe is entitled to summary judgment on his due process claim.

IV. Requiring Registration for Unnatural Intercourse Convictions Violates Plaintiff's Equal Protection Rights By Creating an Arbitrary and Unlawful Classification That Bears No Rational Relation to a Legitimate State Interest.

In addition to requiring registration for a facially invalid law, Miss. Code Ann § 45-33-23(h)(xi) (mandating registration for Unnatural Intercourse convictions) also violates the Equal Protection Clause because it is an arbitrary classification that has no rational relation to any legitimate state interest. The Equal Protection Clause of the Fourteenth Amendment requires that "all persons similarly situated be treated alike." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). A legislative classification that does not target a suspect class

or burden a fundamental right can pass constitutional scrutiny only "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Mississippi's Unnatural Intercourse statute and the MSOR provisions requiring registration for Unnatural Intercourse cannot withstand rational basis review as a matter of law, because they create an impermissible classification that has no rational relation to any legitimate government interest.

While an Unnatural Intercourse conviction requires registration, a conviction for identical conduct under Mississippi's materially indistinguishable Prostitution statute does not. The Prostitution statute, Miss. Code Ann. § 97-29-49, bars the performance of sexual intercourse or sexual conduct for money, and states that "'sexual conduct' includes cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object or body part of the genital or anal opening of another." Prostitution between adults is not a registrable offense in Mississippi. *See* Miss. Code Ann. § 45-33-23(h)(i-xxiv). Yet the Unnatural Intercourse Statute, which contains no element of solicitation but also bans oral and anal intercourse, Miss. Code Ann. § 97-29-59, does require registration. This is so even though the two statutes contain the same elements and target the same conduct (except that the Prostitution statute requires an additional element: exchange or offer of exchange of money or property).

To illustrate, the elements of the two statutes are set forth below:

	Prostitution (Miss. Code Ann § 97-29-49)	**Unnatural Intercourse (Miss. Code Ann. § 97-29-59)**
Element No. 1	Knowingly or intentionally performs, or offers or agrees to perform	Commission
Element No. 2	Sexual intercourse or sexual conduct (which includes cunnilingus, fellatio, masturbation of another, and anal intercourse)	Of the detestable and abominable crime of nature (defined as oral intercourse, *see State v. Davis*, 79 So. 2d 452 (Miss. 1955) or anal intercourse, *see State v. Mays*, 329 So. 2d 65 (Miss. 1976).
Element No. 3	For money or other property	[None]

As this table illustrates, no conduct is encompassed by the Unnatural Intercourse statute that is not encompassed by the Prostitution statute. The statutes are materially indistinguishable (save the Prostitution statute's additional requirement of pecuniary gain). Yet the consequences of a conviction under the two statutes are starkly disparate and thus work to treat similarly-situated individuals differently.

The classification of those convicted of Unnatural Intercourse as sex offenders is arbitrary where individuals convicted under the Prostitution statute are not so classified. And because "[s]tates must treat like cases alike," *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)), this classification is impermissible. Indeed, the Supreme Court held as early as 1942 that imposing different restrictions on those who committed the same type of offense violates the Equal Protection Clause. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. . . . The equal protection clause would . . . be a formula of empty words if such conspicuously artificial lines could be drawn.").

Further, the classification has no rational relation to any legitimate state interest. Defendants assert that a legitimate interest in registering people with Unnatural Intercourse convictions and not those with Prostitution convictions because anal sex carries higher risk of transmission of sexually transmitted diseases or infections. SUMF ¶10. This justification fails for multiple obvious reasons: 1) it says nothing of the Unnatural Intercourse's prohibition on oral sex; 2) the Prostitution statute also prohibits anal sex; and 3) the MSOR does not exist to inform the public about people who may be more likely to have or contract and sexually transmitted

disease or infection—it supposedly exists to inform the public of sexual predators. Miss. Code Ann. § 45-33-21 (Legislative findings and declaration of purpose). The State's purported interest is illegitimate.[5]

Where the State is targeting precisely the same conduct under different statutes – that is, where the targeted "evil, as perceived by the state, [is] identical" – it must do so equally, otherwise its actions are arbitrary and offend the Equal Protection Clause. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (invalidating the criminalization of contraceptive distribution to unmarried persons, but not to married persons). As the Supreme Court concluded:

> [N]othing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. *Eisenstadt* explains exactly why the state may not, as a matter of law, require individuals convicted of Unnatural Intercourse to register as sex offenders where it has not required the same of those convicted of Prostitution. The two statutes include the same elements and prohibit, in all material respects, the same conduct. The "evil, as perceived by the state, [is] identical." *Id*. at 454. As Justice O'Connor found in her concurrence in *Lawrence*, the collateral consequences of a conviction, including registration on Mississippi's sex-offender registry, magnified the equal protection infirmity that she would have relied on to strike down the statute. *See Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring) ("[W]hile the penalty imposed on petitioners in this case

[5] Defendants' only additional rationale for such a classification is based not on the language of the statutes themselves, but only on a claim that "most" individuals on the MSOR for Unnatural Intercourse convictions or out-of-state equivalents but because they "engaged" in coercive conduct, a claim not borne out by the evidence. In fact, at least 29 individuals who have Louisiana CANS convictions, which involve no allegations of force or coercion of any kind, are required to register on the MSOR. Further, numerous convictions for Unnatural Intercourse, including that of Plaintiff Arthur Doe, were obtained via plea agreement rather than trial. SUMF ¶25. This rationale is thus likewise illegitimate.

was relatively minor, the consequences of conviction are not. It appears that petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement. *See, e.g.*, Miss. Code Ann. § 45-33-25.") (further citations omitted). Where Mississippi has never asserted an interest in registering those convicted of Prostitution in Mississippi as sex offenders, it simply cannot legitimately claim such an interest with respect to those convicted of the materially-indistinguishable Unnatural Intercourse statute. To do so would contravene the principles laid out by the Supreme Court in *Skinner*, *Vacco*, and *Eisentstadt*.

The disparities in the State's penalties for Unnatural Intercourse as opposed to Prostitution are especially suspect given its basis in a wholly illegitimate statute that purports to make felons of everyone who engages in oral or anal sex. This harsher treatment perpetuates the condemnation of nonprocreative sex and of conduct particularly associated with homosexuality held by the Supreme Court in Lawrence to be impermissible bases for criminal law. *See Lawrence*, 539 U.S. at 570 (sodomy prohibitions reflect historical "condemnation of nonprocreative sex"); *id*. at 571 ("for centuries there have been powerful voices to condemn homosexual conduct as immoral"). As *Lawrence* held, the state may not "enforce these views on the whole society through operation of the criminal law." *Id*.

Thus, in *Kansas v. Limon*, 122 P.3d 22 (Kan. 2005), the Kansas Supreme Court similarly held that that state's more severe penalties — including a much lengthier prison sentence and sex offender registration, *id*. at 22-23 — for same-sex as opposed to different-sex sexual conduct by a young adult with a minor violates the guarantee of equal protection. Earlier in the litigation, the defendant's equal protection challenge had been rejected and his conviction upheld by the

Kansas courts; the day after ruling in *Lawrence*, the Supreme Court granted certiorari, vacated the state court ruling, and remanded the case to the Kansas courts "for further consideration in light of" *Lawrence*. *Limon v. Kansas*, 539 U.S. 955 (2003); *see also Limon*, 122 P.3d at 24-26. The Supreme Court's remand in *Limon* thus intimated that even where a minor is involved, imposing harsher penalties on sexual conduct between same-sex couples than on sexual conduct between similarly aged different-sex partners gives rise to significant equal protection concerns. On remand, the Kansas Supreme Court concluded that the differential treatment was unjustified by even a rational government objective, 122 P.3d at 46-55, noting, for example, that the legitimate government interest in deterring teenage pregnancy was actually ill-served by a statutory regime imposing less punishment on heterosexual intercourse than on sexual conduct that cannot result in pregnancy, *id*. at 53. The court held that the state's purported justifications expressed only "moral disapproval," an illegitimate basis for the differential sanction. *Id*. at 55.

More recently, the U.S. District Court for the Eastern District of Louisiana analyzed the applicability of Louisiana's sex offender law to those convicted of Crime Against Nature by Solicitation ("CANS") but not to those convicted under Louisiana's materially-indistinguishable Prostitution statute. The Court held that Louisiana's sex offender registry law, "which mandates sex offender registration by individuals convicted of violating the State's Crime Against Nature by Solicitation statute, but not those convicted for the identical sexual conduct under the Prostitution statute, deprived individuals of Equal Protection of the laws[.]" *Doe v. Caldwell*, 913 F. Supp. 2d 262, 265 (E.D. La. 2012); *Doe v. Jindal*, 851 F. Supp. 2d 995, 1009 (E.D. La. 2012) (finding plaintiffs entitled to judgment as a matter of law under the Equal Protection Clause because, *inter alia*, "the straightforward comparison for the plaintiffs, for Equal Protection purposes, is with those convicted of solicitation of Prostitution").

The Louisiana district court held that the arbitrary classification of those convicted of CANS as targets of the sex offender registration law had no rational basis, because "the State cannot have a legitimate interest in imposing a sanction on one group of people and not another when the 'evil, as perceived by the State, [is] identical.'" *Jindal*, 851 F. Supp. 2d at 1006, (quoting *Eisenstadt*, 405 U.S. at 454). The court reasoned:

> First, the State has created two classifications of similarly (in fact, identical) situated individuals who were treated differently (only one class is subject to mandatory sex offender registration). Second, the classification has no rational relation to any legitimate government objective: there is no legitimating rationale in the record to justify targeting only those convicted of Crime Against Nature by Solicitation for mandatory sex offender registration.

Id. at 1007. Thereafter, the Louisiana district court ordered Louisiana officials to "cease and desist from placing any individuals convicted of Crime Against Nature by Solicitation" on the sex offender registry and to "remove Plaintiffs from any and all municipal, city and state databases which indicate that Plaintiffs were included on the [registry]." *Doe v. Caldwell*, 913 F. Supp. 2d at 266.

Like Louisiana's sex offender registry, Mississippi's Sex Offender Registry has classified those convicted of Unnatural Intercourse, but not those convicted of Prostitution, as sex offenders—even though the relevant elements of the two statutes are materially indistinguishable. As a matter of law, the state cannot have an interest in requiring identically-situated groups to be treated differently. This classification has no rational basis to any legitimate governmental interest, treats groups of similarly situated individuals differently, and thus deprives Plaintiffs of equal protection of the laws. *Eisenstadt*, 405 U.S. at 454; *Doe v. Jindal*, 851 F. Supp. 2d at 1007.

* * *

In the concurrence to the majority opinion in *Lawrence*, Justice O'Connor addressed the invalidity of the Texas anti-sodomy statute under Equal Protection principles. Because Texas targeted "conduct that was closely correlated with being homosexual . . . . . it [was] directed toward gay persons as a class." *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring); *see also* Brief of Professors of History George Chauncey, Nancy F. Cotte, et al., as Amici Curiae Supporting Petitioners in *Lawrence v. Texas*, 2003 WL 15235 at *3 (2003) (sodomy laws "reflect [an] historically unprecedented concern to classify and penalize homosexuals as a subordinate class of citizens"); Nan Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L.L. REV. 531, 542 (1992) ("New social understandings have converted sodomy into a code word for homosexuality, regardless of the statutory definition."). Whether Mississippi's Unnatural Intercourse statute is animated by anti-gay animus is, however, not dispositive. There can be no rational basis for the State to classify Mr. Doe as a sex offender on account of his Unnatural Intercourse conviction because identical conduct is not treated as a sex offense requiring registration if prosecuted under the materially identical Prostitution statute. *See Jindal*, 851 F. Supp. 2d at 1006.

Because the classification at issue can be readily discerned from the face of the Unnatural Intercourse and Prostitution statutes and the Sex Offender Registration Law, and because Mississippi has classified Plaintiff as a sex offender in the absence of any rational relation to a legitimate state end, no other evidence is required to resolve this question of law and Plaintiff is entitled to summary judgment on his equal protection claim. *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995); 10A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2725 (3d ed. 2011).

CONCLUSION

Fifteen years after *Lawrence*, the Unnatural Intercourse statute not only remains on the books but is actively enforced through the State's sex offender registry. This enforcement results in myriad, daily injuries to Plaintiff and others. Identical conduct criminalized in the Prostitution statute carries no such consequences, an arbitrary result that cannot be justified under Equal Protection principles.

Because continued enforcement of the Unnatural Intercourse statute through the MSOR violates Plaintiff's substantive and procedural due process rights, as well as his right to equal protection of the law, Plaintiff respectfully requests that this Court grant Plaintiff's Motion for Summary Judgment, order Defendants to cease requiring him to register on the MSOR, declare the "crime against nature with mankind" portion of the Unnatural Intercourse statute and its enforcement through the MSOR unconstitutional, and order all just and necessary relief as set forth in Plaintiff's Prayer for Relief.

Respectfully submitted this 8th day of May 2018,

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CERTIFICATE OF SERVICE

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

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In addition, the Proposed Order accompanying this Motion was sent to the above email addresses.

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THIS, the 8th day of May 2018.

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