UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ARTHUR DOE, *et al*.,

Plaintiffs,

v.

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

Defendants.

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

CLASS ACTION

Oral Argument Requested

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

BACKGROUND 2

I. Unnatural Intercourse Convictions Trigger Registration on the Mississippi Sex Offender Registry 2

II. The U.S. Supreme Court Bans Sodomy Prohibition 4

III. Application of the Sex Offender Registration Law Injures Plaintiffs 5

ARGUMENT 8

I. Summary Judgment Standard 8

II. There Can Be No Genuine Dispute of Material Fact that Mississippi Is Violating Plaintiffs' Rights to Due Process Under the Fourteenth Amendment 10

A. Mississippi's Unnatural Intercourse Statute Is Facially Invalid Under the Due Process Clause as a Matter of Law 10

B. Enforcement of Mississippi's Unnatural Intercourse Statute Through the Sex Offender Registry Is Invalid Under *Lawrence* 13

C. In the Absence of Enforceable Crimes or Registrable Out-of-State Offenses Triggering Registration Requirements, There Can Be No Issue of Material Fact that Plaintiffs' Placement on the MSOR Violates Their Due Process Rights 14

III. There Can Be No Dispute of Material Fact that Mississippi Is Violating Plaintiffs' Rights to Equal Protection Under the Fourteenth Amendment 17

A. Mississippi's Registration Law Creates an Arbitrary and Unlawful Classification, and This Classification Bears No Rational Relation To a Legitimate State Interest 18

B. Mississippi's Registration Law Creates an Arbitrary and Unlawful Classification by Treating Louisiana CANS Convictions Differently from Mississippi Prostitution Convictions, and This Classification Bears No Rational Relation to a Legitimate State Interest 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

A.W. v. Peterson, No. 8:14CV256, 2016 U.S. Dist. LEXIS 36077 (D. Ne. Mar. 21, 2016)..... 23

Alexander v. Johnson, 217 F. Supp. 2d 780 (S.D. Tex. 2001),
aff'd sub nom. Alexander v. Cockrell, 294 F.3d 626 (5th Cir. 2002) 16

Am. Gen. Life Ins. Co. v. Hannah, Civ. A. No. l:12-CV-00087-GHD-DAS,
2012 LEXIS 174494 (N.D. Miss. Dec. 10, 2012).....9

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 9

Arnoult v. CL Med. SARL, Civ. A. No. 1:14-CV-271-KS-MTP,
2015 LEXIS 125843 (S.D. Miss. Sept. 21, 2015)..... 9-10

Bowers v. Hardwick, 478 U.S. 186 (1986) 4, 11, 12, 14

Brown v. City of Houston, 337 F.3d 539 (5th Cir. 2003).....9

Campaign for Southern Equal. v. Bryant,
64 F. Supp. 3d 904 (S.D. Miss. 2014).....11

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9

City of Chicago v. Morales, 527 U.S. 41 (1999) 12, 13

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) 17

Coleman v. Dretke, 395 F.3d 216 (5th Cir. 2004) 16

Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).....17

Danforth v. Minnesota, 552 U.S. 264 (2008) 12

Daniels v. City of Arlington, 246 F.3d 500 (5th Cir. 2001) 9

Doe v. Caldwell, 913 F. Supp. 2d 262 (E.D. La. 2012)..... passim

Doe v. Jindal, 851 F. Supp. 2d 995 (E.D. La. 2012) ..... passim

Doughten v. State Farm Mut. Auto Ins. Co., No. 01-10269,
2002 U.S. Dist. LEXIS 29049 (5th Cir. Feb. 6, 2002).....10

Eisenstadt v. Baird, 405 U.S. 438 (1972) 8, 20, 21, 22, 24

Green v. Georgia, 51 F. Supp. 3d 1304 (N.D. Ga. 2014).....13, 16

Hang On, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995).....10, 19

Haymond v. State, 478 So. 2d 297 (Miss. 1985).....12, 13, 19

Hiett v. United States, 415 F.2d 664 (5th Cir. 1969).....16

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).....10

Lawrence v. Texas, 539 U.S. 558 (2003)..... passim

MacDonald v. Moose, 710 F.3d 154 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 200 (2013).....11, 12

Marathon Fin. Ins., Inc., RRG v. Ford Motor Co., 591 F.3d 458 (5th Cir. 2009).....9

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).....9

Obergefell v. Hodges, 135 S.Ct. 2584 (2015).....11

Patel v. City of Los Angeles, 135 S.Ct. 2443 (2015).....13

Pitts v. Shell Oil Co., 463 F.2d 331 (5th Cir. 1972).....4, 9

Plyler v. Doe, 457 U.S. 202 (1982).....19

Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).....12

Romer v. Evans, 517 U.S. 620 (1993).....17

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)..... 19-20

State v. Davis, 79 So. 2d 452 (Miss. 1955).....2, 19

State v. Hill, 176 So. 719 (Miss. 1937).....2

State v. Smith, 766 So.2d 501 (La. 2000).....23

Vacco v. Quill, 521 U.S. 793 (1997).....19, 20

Washington v. Allstate Ins. Co., 901 F.2d 1281 (5th Cir. 1990).....9

Statutes

Fed. R. Civ. P. 56 ..... 8, 9

La. Rev. Stat. § 14:89(A)(2) 6, 23

Miss. Code Ann. § 97-29-49 ..... 15, 18, 19, 23

Miss. Code Ann. § 97-29-59 ..... passim

Miss. Code Ann. § 45-33-21 2

Miss. Code Ann. § 45-33-23 ..... passim

Miss. Code Ann. § 45-33-25 ..... 3, 14

Miss. Code Ann. § 45-33-26 3

Miss. Code Ann. § 45-33-31 3

Miss. Code Ann. § 45-33-32 3

Miss. Code Ann. § 45-33-33 3-4

Miss. Code Ann. § 45-33-35 3

Miss. Code Ann. § 45-33-36 3

Miss. Code Ann. § 45-33-47 ..... 2-3, 13

Miss. Code Ann. § 45-33-55 3

Miss. Code Ann. § 45-33-59 3

Additional Authorities

Brief of Professors of History George Chauncey, Nancy F. Cotte, *et al.*, as Amici Curiae Supporting Petitioners in *Lawrence v. Texas*, 2003 WL 15235 (2003) 24

Charles Alan Wright *et al.*,
FEDERAL PRACTICE AND PROCEDURE § 2725 (3d ed. 2011) 10, 19

La. Sess. Law Rev. Act 223 (H.B. 141) 5 n.3, 6, 15 n.4

Nan Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L.L. REV. 531 24

Plaintiffs Arthur Doe, Brenda Doe, Carol Doe, Diana Doe, and Elizabeth Doe respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment.

PRELIMINARY STATEMENT

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. Plaintiffs – all of whom are required to register only for convictions under Mississippi's Unnatural Intercourse Statute or an out-of-state conviction Mississippi deems analogous – suffer significant restrictions on their public and personal lives through Mississippi's plainly unconstitutional conduct. Plaintiffs move for summary judgment and injunctive relief to stop Mississippi from enforcing its unconstitutional sodomy prohibition and to remove the Unnatural Intercourse statute or any purportedly analogous out-of-state law as offenses subject to the MSOR.

Plaintiffs are entitled to summary judgment. There can be no genuine issue of material fact that Mississippi is violating Plaintiffs' rights under the Fourteenth Amendment. First, Plaintiffs can demonstrate that the Supreme Court has long held that sodomy prohibitions are facially invalid, and that enforcement of the Unnatural Intercourse statute or out-of-state equivalents through the sex offender registry thus violates the Due Process Clause as a matter of law. Second, Defendants' classification of Plaintiffs as sex offenders – in marked contrast to its treatment of those with materially identical prostitution convictions, who are not required to register as sex offenders – can have no rational basis justifying a legitimate state end and thus

violates the Equal Protection Clause as a matter of law.

In short, there are no questions of fact necessary to resolve the purely legal claims this case presents. Plaintiffs are entitled to summary judgment, and Defendants must be enjoined from continuing to infringe Plaintiffs' constitutional rights by keeping them on the MSOR.

BACKGROUND

I. Unnatural Intercourse Convictions Trigger Registration on the Mississippi Sex Offender Registry.

Mississippi's Unnatural Intercourse statute criminalizes "the detestable and abominable crime against nature committed with mankind" [1] and subjects those convicted of it 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. Hill*, 176 So. 719 (Miss. 1937).

Mississippi established the MSOR in 1995 through the enactment of the Mississippi Sex Offender Registration Law, Miss. Code Ann. § 45-33-21 *et seq*., which mandates registration for a series of sex offenses. *Id*. § 45-33-23(h)(i-xxiv). This includes convictions under the Unnatural Intercourse statute. *Id*. § 45-33-23(h)(xi). It also requires registration for a conviction in another jurisdiction which Mississippi deems the equivalent of a Mississippi Unnatural Intercourse conviction. *Id*. § 45-33-23(h)(xxi). Additionally, it requires registration for any conviction in another jurisdiction which requires registration in that jurisdiction. *Id*. § 45-33-23(h)(xxii).

Individuals with one conviction under the Unnatural Intercourse statute or an out-of-state 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-

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

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.

The requirement to register burdens numerous aspect 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 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.

II. The U.S. Supreme Court Bans Sodomy Prohibitions.

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.

Despite the Supreme Court's unequivocal ruling, Mississippi's Unnatural Intercourse statute, including the provision outlawing a "crime against nature committed with mankind," remains on the books. More than thirteen years after the Supreme Court issued its clear command, Mississippi continues to enforce its requirement that individuals with sodomy convictions be subjected to the MSOR. Unnatural Intercourse remains a registrable offense, Miss. Code Ann. § 44-33-23(h)(xi), and the state continues to require individuals with Unnatural

Intercourse convictions, including those that predate the enactment of the MSOR, to register. *See* Ex. A (Agathocleous Decl.) ¶ 3.[2]

The state also continues to require individuals with out-of-state convictions that are purportedly analogous to Unnatural Intercourse and who move to Mississippi to register as sex offenders, pursuant to Miss. Code Ann. § 45-33-23(h)(xxi)'s registration requirement for individuals convicted of an offense, which, if committed in Mississippi, would be deemed a registrable sex offense. Ex. A (Agathocleous Decl.) ¶¶ 4, 5, 6, 7. Mississippi considers a conviction under Louisiana's Crime Against Nature by Solicitation ("CANS") statute – a prostitution provision which is no longer a registrable offense in Louisiana[3] – to be the equivalent of a conviction for Unnatural Intercourse, and thus requires individuals with CANS convictions to register in Mississippi. Mississippi does not, however, require individuals with prostitution convictions under Miss. Code Ann. § 97-29-49, including sexual conduct for money involving oral or anal sex, to register. Miss. Code Ann. §§ 45-33-23(h)(i-xxiv).

III. Application of the Sex Offender Registration Law Injures Plaintiffs

Plaintiff Arthur Doe is registered as a sex offender solely as a result of an Unnatural Intercourse conviction in Mississippi. *See* Ex. A (Agathocleous Decl.) ¶ 3. Plaintiffs Brenda Doe,

[2] A redacted version of this declaration accompanies the present Motion for Summary Judgment. Plaintiffs are simultaneously submitting a Motion to Proceed Under Pseudonyms and to File Documents Under Seal, for reasons explained in that motion, and will supply the Court with an unredacted version of the declaration upon the Court's order on that motion.

[3] In 2012, the U.S. District Court for the Eastern District of Louisiana struck down the registration requirement under Louisiana's "Crimes Against Nature by Solicitation" statute pursuant to the Fourteenth Amendment. *See Doe v. Jindal,* 851 F. Supp. 2d 995 (E.D. La. 2012) (finding the registration requirement to violate the Equal Protection Clause). Moreover, the Louisiana legislature formally repealed the registration requirement for CANS convictions in 2011. La. Sess. Law Rev. Act 223 (H.B. 141). While Mississippi does require individuals with registrable offenses in other jurisdictions to register as sex offenders in Mississippi, regardless of whether the offense is registrable in Mississippi, Miss. Code Ann. §§ 45-33-23(h)(xxii), the fact that CANS is no longer a registerable offense in Louisiana means that this provision cannot be the reason individuals with Louisiana CANS convictions are required to register in Mississippi.

Carol Doe, Diana Doe, and Elizabeth Doe were all convicted of CANS in Louisiana – a prostitution-related conviction involving solicitation of sodomy in exchange for compensation, and they too are required to register in Mississippi – but not in Louisiana – as sex offenders. *See* Ex. A (Agathocleous Decl.) ¶¶ 4, 5, 6, 7.

The MSOR places overwhelming and onerous burdens on Plaintiffs, who face significant constraints on their daily lives. *See supra*. The sole reason that Plaintiffs are required to register with the MSOR is a conviction for Unnatural Intercourse or a crime that Mississippi deems to be an out-of-state equivalent such as Louisiana's CANS. No Plaintiff has any other conviction that would trigger Mississippi's registration requirements.

Arthur Doe

Plaintiff Arthur Doe was convicted of Unnatural Intercourse, Miss. Code Ann. § 97-29-59, and has no other convictions that would trigger registration under the MSOR. *See* Ex. A (Agathocleous Decl.) ¶ 3. He was required to start registering as a sex offender in 2008 and again in 2011, upon termination from probation for a non-violent, non-sex offense.. *Id.*

Brenda Doe

Brenda Doe was convicted under Louisiana's Crime Against Nature by Solicitation (CANS) statute, La. Rev. Stat. § 14:89(A)(2). *See* Ex. A (Agathocleous Decl.) ¶ 4. While she was formerly required to register as a sex offender in Louisiana as a result of that conviction, the Louisiana legislature subsequently removed CANS convictions from the list of registrable offenses in Louisiana in 2011. *See* La. Sess. Law Rev. Act 223 (H.B. 141). In 2012, a federal court declared the statute's requirement that those with CANS convictions register as sex offenders unconstitutional. *Doe v. Jindal*, 851 F. Supp. 2d 995 (2012). In 2012, Brenda Doe became a named plaintiff in a subsequent class action lawsuit challenging the registry

requirement for people with CANS convictions, *see Doe v. Caldwell*, 913 F. Supp. 2d 262 (E.D. La. 2012), and was removed from the Louisiana registry in 2013. She has no other convictions that require registration. *See* Ex. A (Agathocleous Decl.) ¶ 4. Despite her removal from the Louisiana registry and the fact that CANS convictions were no longer registrable offenses in Louisiana, Mississippi requires Brenda to register on the MSOR because it deems her CANS conviction to be an offense analogous to Mississippi's Unnatural Intercourse statute.

Carol Doe

Like Plaintiff Brenda Doe, Carol Doe has a Louisiana conviction under the CANS statute, which initially required her to register in Louisiana before that requirement was struck down. *Id.* ¶ 5; *see also supra*. She was required to register under the MSOR due to her CANS conviction when she moved to Mississippi. *Id*. She has no other convictions that would trigger registration with the MSOR. *Id.*

Diana Doe

Like Plaintiffs Brenda and Carol Doe, Diana Doe is also registered as a sex offender in Mississippi (but not Louisiana) solely as a result of a Louisiana CANS conviction. *Id.* ¶ 6. She has no other convictions that would trigger registration with the MSOR. *Id.*

Elizabeth Doe

Like Plaintiffs Brenda, Carol, and Diana Doe, Elizabeth Doe is also forced to register as a sex offender in Mississippi (but not Louisiana) solely as a result of two convictions under Louisiana's CANS statute. She has no other convictions that would trigger registration with the MSOR. *Id.*

ARGUMENT

Plaintiffs seek summary judgment and injunctive and declaratory relief enjoining Defendants from enforcing Mississippi's unconstitutional sodomy prohibition and compelling Defendants to remove Plaintiffs from the MSOR and expunge all records signaling their past inclusion on the registry. There is no genuine issue of material fact that Mississippi is in direct violation of Plaintiffs' Fourteenth Amendment rights to due process pursuant to the Supreme Court's decree in *Lawrence v. Texas*, 539 U.S. 558 (2003), that criminal sodomy statutes are facially unconstitutional; indeed, that is purely a question of law. Mississippi is also in violation of Plaintiffs' Fourteenth Amendment rights to equal protection as a matter of law. There can be no genuine dispute that individuals convicted of Unnatural Intercourse or CANS are subject to a classification: though they are situated identically to individuals convicted under Mississippi's Prostitution statute (which prohibits *precisely* the same conduct), they alone have been forced to register as sex offenders. As *Eisenstadt v. Baird*, 405 U.S. 438 (1972), makes clear, there can be no genuine dispute that this classification bears no rational relationship to a legitimate governmental interest. Where the Prostitution statute covers identical conduct yet imposes no registration requirement, no rational basis can exist for the disparate consequences imposed on individuals convicted under Unnatural Intercourse or CANS as a matter of law. Thus, Plaintiffs are entitled to summary judgment on both claims.

I. Summary Judgment Standard

Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted where the moving party "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). Once the moving party has shown that there is an absence of evidence to support the non-moving party's

case, the non-movant must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986); *see also Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). To defeat a motion for summary judgment, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts"; it "must come forward with 'specific facts showing that there is *a genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)) (emphasis in original). "An issue is material if its resolution could affect the outcome of the action." *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir. 2001). The non-movant cannot resist summary judgment through "unsubstantiated assertions, improbable inferences, and unsupported speculation," *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003), nor through affidavits amounting to "self-serving statements." *Pitts v. Shell Oil Co.*, 463 F.2d 331, 335 (5th Cir. 1972). If the non-movant fails to make a sufficient showing with respect to an element upon which it "bear[s] the burden of proof at trial[,] . . . the moving party is 'entitled to a judgment as a matter of law[.]'" *Marathon Fin. Ins., Inc., RRG v. Ford Motor Co.*, 591 F.3d 458, 466-67 (5th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

Moreover, Rule 56 of the Federal Rules of Civil Procedure "does not require that any discovery take place before summary judgment can be granted." *Washington*, 901 F.2d at 1285. Summary judgment is appropriate when discovery "is not likely to produce the facts needed . . . to withstand [the] motion for summary judgment." *Id.; see also Am. Gen. Life Ins. Co. v. Hannah*, Civ. A. No. l:12-CV-00087-GHD-DAS, 2012 LEXIS 174494, at *4 (N.D. Miss. Dec. 10, 2012) (Davidson, J.) (granting summary judgment without discovery); *Arnoult v. CL Med. SARL*, Civ. A. No. 1:14-CV-271-KS-MTP, 2015 LEXIS 125843, at *26 (S.D. Miss. Sept. 21,

2015) (Starrett, J.) (granting summary judgment prior to the close of discovery). A facial challenge to a statute "do[es] not depend upon the development of a 'complex and voluminous' factual record," and therefore is particularly amenable to adjudication on summary judgment without discovery. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987)) (affirming grant of summary judgment and noting that further discovery was unnecessary to adjudicate a facial challenge to an ordinance); *see also Doughten v. State Farm Mut. Auto Ins. Co.*, No. 01-10269, 2002 U.S. Dist. LEXIS 29049, at *7 (5th Cir. Feb. 6, 2002) ("Courts should resolve disputed legal issues at summary judgment. . . ."); 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.").

II. There Can Be No Genuine Dispute of Material Fact that Mississippi Is Violating Plaintiffs' Rights to Due Process Under the Fourteenth Amendment.

A. Mississippi's Unnatural Intercourse Statute Is Facially Invalid Under the Due Process Clause as a Matter of Law.

In *Lawrence v. Texas*, the Supreme Court 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, holding that the criminalization of intimate sexual conduct through "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. The decision thus struck down the Texas statute on its face, emphasizing that 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." *Id.* at 562 (emphasis added).

Lawrence v. Texas explicitly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a Georgia law criminalizing consensual sodomy between same-sex and different-sex couples alike. *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today."). *Lawrence* 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 (emphasis added). 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. As the Supreme Court recently emphasized in *Obergefell v. Hodges*, "*Lawrence* invalidated *laws* that made same-sex intimacy a criminal act." 135 S. Ct. 2584, 2600 (2015) (emphasis added). *See 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).

By overruling *Bowers*, a facial challenge, *Lawrence* left no doubt that that all similar sodomy prohibitions are facially unconstitutional. Indeed, *Lawrence* recognized that total invalidation of sodomy statutes was the only way to avoid collateral harm, including the "stigma this criminal statute imposes." 539 U.S. at 575. As the Court explained, when sodomy "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).

The Fourth Circuit Court of Appeals, the only federal appellate court to rule on the facial validity of state sodomy bans after *Lawrence*, declared Virginia's sodomy prohibition invalid on its face in the context of a challenge to a conviction for solicitation to commit sodomy. *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 200 (2013). 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*. When "enforcement of [a] statute" has been invalidated as unconstitutional, "then so is enforcement of all identical statutes in other States." *Danforth v. Minnesota*, 552 U.S. 264, 286 (2008) (citation omitted). The mandate of *Lawrence* thus unquestionably applies to Mississippi's Unnatural Intercourse statute, which is materially indistinguishable from the Texas and Georgia statutes declared unconstitutional in *Lawrence* and the Virginia statute struck down in *MacDonald v. Moose*.

Further, a court may not 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). 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). Mississippi's state courts have defined "unnatural intercourse" as nothing more than anal or oral sex. *See, e.g., Haymond v. State*, 478 So. 2d 297, 299 (Miss. 1985). The statute thus plainly reaches conduct protected by *Lawrence*. Because the Unnatural Intercourse statute makes no "distinction between innocent conduct and conduct calculated to cause harm," it is

"unconstitutionally vague." *City of Chicago*, 527 U.S. at 51 (striking down loitering statute). Facial challenges are appropriate "under a diverse array of constitutional provisions," *Patel v. City of Los Angeles*, 135 S. Ct. 2443, 2449 (2015) (collecting cases), and a statute that "infringes on constitutionally protected rights" must be invalidated where it "authorize[s] and even encourages arbitrary and discriminatory enforcement." *City of Chicago*, 527 U.S. at 55-56.

Mississippi's prohibition of a "crime against nature with mankind" is an incontrovertible violation of due process rights as a matter of law, and it must be struck down.

B. Enforcement of Mississippi's Unnatural Intercourse Statute Through the Sex Offender Registry Is Invalid Under *Lawrence*.

Any enforcement of the sodomy provision of the Unnatural Intercourse statute is invalid under *Lawrence*. Defendants 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. As a federal district court in Georgia has held in the context of sex offender registration requirements for sodomy convictions, "[t]he state cannot give legal effect to a conviction under an unconstitutional criminal statute." *Green v. Georgia*, 51 F. Supp. 3d 1304, 1313 (N.D. Ga. 2014).

Notably, *Lawrence* addressed sex offender registries in general – and Mississippi's in particular – as an unacceptable result 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, any enforcement of a sodomy ban, whether by prosecution or by forced registration, violates the Fourteenth Amendment.

Thirteen years have passed since the Supreme Court issued *Lawrence* and specifically highlighted Mississippi's sodomy ban and its accompanying sex offender registration requirement. Yet Defendants have continued to operate as if *Bowers v. Hardwick* were valid law and the Unnatural Intercourse statute enforceable. This position cannot be sustained. Because Plaintiffs are required to register as sex offenders pursuant to a statute the Supreme Court has already declared unconstitutional, their substantive due process rights are being violated. Accordingly, Plaintiffs have demonstrated that there can be no genuine dispute that Miss. Code Ann. §§ 45-33-23(xi) and 97-29-59 violate their due process rights in the clearest way possible, are unconstitutional, and must be enjoined from further enforcement.

C. In the Absence of Enforceable Crimes or Registrable Out-of-State Offenses Triggering Registration Requirements, There Can Be No Issue of Material Fact that Plaintiffs' Placement on the MSOR Violates their Due Process Rights.

There can be no dispute that Plaintiffs are registered as sex offenders solely pursuant to Mississippi's Unnatural Intercourse statute. All Plaintiffs were convicted of Unnatural Intercourse or CANS, a Louisiana state statute that Mississippi deems equivalent to Unnatural Intercourse. *See* Ex. A (Agathocleous Decl.) ¶¶ 3-7. No Plaintiff has any other registrable offense. *Id*. Under Mississippi's registry law, the fact of an Unnatural Intercourse conviction or its purported out-of-state equivalent, with nothing else, triggers sex offender registration. Miss. Code Ann. §§ 44-33-23(h)(xi), (xxi), 45-33-25(1)(a). Because Plaintiffs have been classified as

sex offenders under an unconstitutional statute, the state cannot require them to register without violating due process.

Plaintiff Arthur Doe was convicted of Unnatural Intercourse and is required to register as a sex offender solely as a result of that conviction. *See* Ex. A (Agathocleous Decl.) ¶ 3. The remaining Plaintiffs were all convicted of Crime Against Nature by Solicitation (CANS) in Louisiana, and are required to register as sex offenders because Mississippi treats such convictions as though they are the equivalent of an Unnatural Intercourse conviction. There are no offenses in Mississippi that cover the conduct criminalized by the CANS statute (i.e. solicitation of sodomy for compensation) that require sex offender registration. *See* Miss. Code Ann. § 45-33-23(h). Indeed, the only Mississippi statute that specifically criminalizes solicitation of sodomy (among other sex acts) for compensation is Prostitution, and that statute does not require sex offender registration. *Id.* §§ 97-29-49, 45-33-23(h). This therefore cannot be the reason the CANS Plaintiffs are required to register. Nor do the Plaintiffs with Louisiana CANS convictions have any obligation to register in Louisiana.[4] Thus, they have no registrable offense that could qualify with regard to Miss. Code Ann. § 45-33-23(h)(xxii) ("'Sex Offense' or 'registrable offense' means . . . Any offense resulting in a conviction in another jurisdiction for which registration is required in the jurisdiction where the conviction was had"). Thus, the only

[4] As discussed *infra*, Louisiana no longer requires those with CANS convictions to register as sex offenders, *see* La. Sess. Law Rev. Act 223 (H.B. 141), and the U.S. District Court for the Eastern District of Louisiana found the registration requirement for CANS convictions unconstitutional. *See Doe v. Jindal,* 851 F. Supp. 2d 995, 1009 (E.D. La. 2012) (holding that with regard to CANS convictions, "the Court finds that the plaintiffs have demonstrated that the record . . . leads to no rational basis for what the state legislature has done [and] the plaintiffs have shown that they . . . have been deprived of equal protection of the laws in violation of the Fourteenth Amendment to the U.S. Constitution."); *Doe v. Caldwell*, 913 F. Supp. 2d at 265 (stating that in *Doe v. Jindal* the "Court declared 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"). Mississippi has nonetheless classified Louisiana CANS convictions as sex offenses in Mississippi.

possible reason that these Plaintiffs have been required to register is because Mississippi treats a CANS conviction as an Unnatural Intercourse conviction under Miss. Code Ann. § 45-33-23(h)(xxi) (requiring registration for "[a]ny other offense resulting in a conviction in another jurisdiction which, if committed in this state, would be deemed to be such a crime without regard to its designation elsewhere.").

This 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."); *Green*, 51 F. Supp. 3d at 1313 (vacating conviction for failure to register as a sex offender where basis for registration was "convict[ion] under … unconstitutional anti-sodomy statute."). *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). Defendants cannot continue to enforce Mississippi's unconstitutional Unnatural Intercourse statute against Plaintiffs. 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, Louisiana's Crimes Against Nature by Solicitation statute, and other purportedly out-of-state equivalents cannot be invoked to perpetuate the collateral consequences of a sodomy conviction.

The convictions that Mississippi has relied on in compelling Plaintiffs' registration are for violations of statutes that are "*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). Given the Supreme Court's express invalidation of sodomy prohibitions, and a federal district court's express invalidation of the requirement to register under CANS, there cannot be any sufficient justification for a continuing duty to register in Mississippi. Because the Unnatural Intercourse statute is facially invalid, there is no genuine issue of material fact that the requirement that Plaintiffs continue to register directly violates their due process rights. Plaintiffs are entitled to summary judgment on their due process claim.

III. There Can Be No Dispute of Material Fact that Mississippi Is Violating Plaintiffs' Rights to Equal Protection Under the Fourteenth Amendment.

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 or purportedly equivalent convictions cannot withstand rational basis review as a matter of law, because it creates impermissible classifications that have no rational relation to any legitimate government interest. There can be no genuine dispute of material fact that, when compared to the materially-indistinguishable Prostitution statute, the differential consequences imposed for an Unnatural Intercourse conviction create a classification. Moreover, such a classification bears no rational relation to a legitimate state interest as a matter of law. Thus, Plaintiffs are entitled to summary judgment on their equal protection claim.

A. Mississippi's Registration Law Creates an Arbitrary and Unlawful Classification, and this Classification Bears No Rational Relation to a Legitimate State Interest.

The text of the relevant statutes alone demonstrates an arbitrary classification that has no rational relation to any legitimate state interest. Mississippi's sex offender registration law provides a list of offenses for which registration is required. *See* Miss. Code Ann. § 45-33-23(h)(i-xxiv). The offenses include Unnatural Intercourse. *Id.* § 45-33-23(h)(xi). As explained above, Mississippi considers Louisiana CANS convictions to be equivalent to Mississippi Unnatural Intercourse convictions.

While convictions under these statutes require registration, convictions for *identical conduct* under Mississippi's materially indistinguishable Prostitution statute do 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." The MSOR does not include Miss. Code Ann. § 97-29-49 in its list of registerable offenses. *See* § 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 Haymond v. State*, 478 So. 2d 297, 299 (Miss. 1985))
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 thus 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. Because the classification at issue can be readily discerned from the face of the Unnatural Intercourse and Prostitution statutes, and the MSOR, there is no genuine issue of fact regarding the existence of a classification, and summary judgment is therefore appropriate. *See Hang On, Inc.*, 65 F.3d at 1253; 10A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2725 (3d ed. 2011).

The classification of those convicted of Unnatural Intercourse or out-of-state equivalents 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. 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*, 405 U.S. at 454 (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* thus 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. 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 (or an out-of-state statute it deems analogous). To do so would contravene the principles laid out by the Supreme Court in *Skinner*, *Vacco*, and *Eisentstadt.*

Facing nearly identical circumstances, the federal 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 or out-of-state equivalents, 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.

B. Mississippi's Registration Law Creates an Arbitrary and Unlawful Classification by Treating Louisiana CANS Convictions Differently from Mississippi Prostitution Convictions, and This Classification Bears No Rational Relation to a Legitimate State Interest.

Defendants' classification is doubly irrational for Brenda Doe, Carol Doe, Diana Doe and Faith Doe (collectively the "CANS Plaintiffs"), all of whom must continue to register in Mississippi even though they are no longer required to do so in Louisiana. Because Louisiana no longer requires registration for CANS convictions, Defendants cannot justify the CANS Plaintiffs' inclusion on the sex offender registry by pointing to Miss Code Ann. § 45-33-23(h)(xxii), which requires registration only for an "offense resulting in a conviction in another jurisdiction for which registration is required in the jurisdiction where the conviction was had[.]" Instead, Defendants view CANS as the out-of-state equivalent of Unnatural Intercourse, and have continued to require that the CANS Plaintiffs register with the MSOR.

Defendants impose this requirement even though individuals with Mississippi Prostitution convictions bear no such burden. The CANS and Mississippi Prostitution statutes

include the same elements, require proof of the same intent, and outlaw identical conduct, and the CANS statute includes no element or aggravating factor that the Mississippi Prostitution statute does not. Individuals charged and convicted under the two statutes are thus identically situated, as illustrated below:

	Prostitution (Miss. Code Ann § 97-29-49)	**CANS (La. Rev. Stat. § 14:89.2(A))**
Element No. 1	Knowingly or intentionally performs, or offers or agrees to perform	Solicitation of one human being by another
Element No. 2	Sexual intercourse of sexual conduct (which includes cunnilingus, fellatio, masturbation of another, and anal intercourse)	With the intent to engage in unnatural carnal copulation (oral or anal intercourse, *see State v. Smith*, 766 So.2d 501, 504-05 (La. 2000) (defining unnatural carnal copulation as oral or anal intercourse))
Element No. 3	For money or other property	For compensation

In other words, Plaintiffs are required to register as sex offenders for a Louisiana conviction that prohibits solicitation of sodomy for compensation, but would not be required to register for a conviction for *identical* conduct under an *identical* Mississippi statute. Again, all the evidence required to establish this classification appears on the fact of these statutes.

This distinction has no rational relation to any legitimate government interest. *See A.W. v. Peterson*, No. 8:14CV256, 2016 U.S. Dist. LEXIS 36077 (D. Ne. Mar. 21, 2016) ("If A.W. had done exactly what he did in Minnesota but performed that act in Nebraska, he would not have been required to register as a sex offender and he would not be stigmatized as such. It therefore makes no sense to believe that the Nebraska statutes were intended to be more punitive to juveniles adjudicated out of state as compared to juveniles adjudicated in Nebraska"). This is precisely the same classification that the *Doe v. Jindal* court found unconstitutional, and it is no less so here. The "'evil, as perceived by the State, [is] identical[,]'" *Jindal*, 851 F. Supp. 2d at

1006, (quoting *Eisenstadt*, 405 U.S. at 454), yet the outcome is entirely different. Mississippi's requirement that people with CANS convictions from Louisiana register as sex offenders in Mississippi thus violates the Equal Protection Clause as a matter of law. *See also supra*.

* * *

In the concurrence to the majority opinion in *Lawrence*, Justice O'Connor addressed 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 Defendants classifying any Plaintiff as a sex offender on account of an Unnatural Intercourse or equivalent 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 there is no genuine issue of material fact that Mississippi has classified those with convictions under Mississippi's Unnatural Intercourse statute and Louisiana's CANS statute as sex offenders in the absence of any rational relation to a legitimate state end, Plaintiffs are entitled to summary judgment on their equal protection claim.

CONCLUSION

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

Respectfully submitted this 3rd day of November, 2016

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