

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

ARTHUR DOE, et al.

PLAINTIFFS

VS.

CAUSE NO: 3:16-cv-789

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

DEFENDANTS

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

COME NOW Defendants, sued in their official capacities only, and submit this memorandum in opposition to Plaintiffs' Motion for Summary Judgment [Doc. 15] as follows, to-wit:

Plaintiffs' Motion for Summary Judgment should be denied. As Defendants have set forth in detail in their Opposed Motion for Discovery and Entry of a Scheduling Order [Doc. 25], the Memorandum in Support of Motion for Discovery [Doc. 26], and the Declaration of Paul E. Barnes in Support [Doc. 27], Defendants have been provided no opportunity to conduct discovery related to Plaintiffs' Motion for Summary Judgment, Motion for Class Certification, and the factual issues raised by those motions.

Further, as set forth in the referenced filings [Doc. 25-27], Plaintiffs are seeking an order granting summary judgment to the named Plaintiffs and all class members:

[E]njoining enforcement of the registration requirement, requiring removal of Plaintiffs and class members from the registry, expunging all records signaling Plaintiffs' and class members past inclusion in the registry, and declaring that enforcement of the Unnatural Intercourse statute is unconstitutional.

Pl.'s Motion for S.J. at 1-2 [Doc. 15].

Plaintiffs assert that *Lawrence v. Texas* facially invalidated all state unnatural intercourse laws, such that the application of section 97-29-59 to any person, and/or the inclusion of any

person on the sex offender registry pursuant to section 45-33-23(h), “solely or in part” for an unnatural intercourse conviction involving “[sexual] activity between human beings,” is unconstitutional. *See* Compl. at 27 [Doc. 1]. To the contrary, *Lawrence* specifically delineated the scope of the liberty interest protected by the constitution:

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

Lawrence, 539 U.S. at 568.

In *Lawrence*, police entered a private residence in response to a reported weapons disturbance, and arrested two men who were having anal sex. *Id.* at 563-64. In *Bowers v. Hardwick*, 478 U.S. 186, 187-88 (1986), Hardwick was charged with violating a Georgia statute criminalizing sodomy after he was found “committing that act with another adult male in the bedroom of respondent’s home.” No evidence has been offered to show that this case has anything to do with private sexual conduct between consenting adults. This case is not *Lawrence*. This case is not *Bowers v. Hardwick*.

The Fourth Circuit’s decision in *McDonald v. Moose*, 710 F.3d 154 (2013) is not controlling, and contains flawed analysis which should not be relied on by this Court. *See Toghill v. Commonwealth*, 289 Va. 220, 768 S.E.2d 674, 676-82 (2015) (holding Virginia anti-sodomy statute did not violate substantive due process “as applied” to person convicted of soliciting sodomy from a minor); *see also State v. Music*, 193 Wash. App. 1039, 2016 WL 1704687 (Apr. 28, 2016) *pet. for review continued*, 380 P.3d 484 (table) (*Lawrence v. Texas* did not support facial challenge to Washington’s former sodomy statute). The United States military courts have also

concluded that *Lawrence* did not facially invalidate sodomy statutes, and must be considered on an as-applied basis. *See, e.g., U.S. v. Marcum*, 60 M.J. 198, (U.S. Ct. App. Arm. For. 2004) (sodomy prohibition in Uniform Code of Military Justice was constitutional under *Lawrence v. Texas* “as applied” to superior convicted of non-forcible sodomy with subordinate in a military position where consent might not easily be refused).

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

In the alternative, pursuant to Fed. R. Civ. P. 56(d)(1), the Court should defer consideration of the Motion for Summary Judgment or deny said Motion. In the further alternative, in accordance with Fed. R. Civ. P. 56(d)(2) the Court should enter a scheduling order establishing a plan for discovery that permits sufficient time for Defendants to conduct discovery, both as to the class certification requirements of Fed. R. Civ. P. 23, and the factual issues raised in Plaintiffs’ Motion for Summary Judgment and supporting documentation, and that further provides an appropriate briefing schedule for Defendants to file responses to those motions.

Respectfully submitted this the 21st day of November, 2016.

JIM HOOD, Attorney General of the
State of Mississippi; ALBERT SANTA CRUZ,
Commissioner of the Mississippi Department of
Public Safety; CHARLIE HILL, Director of the
Mississippi Sex Offender Registry; COLONEL
CHRIS GILLARD, Chief of the Mississippi
Highway Patrol; and LIEUTENANT COLONEL
LARRY WAGGONER, Director of the Mississippi
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CERTIFICATE OF SERVICE

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

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THIS, the 21st day of November, 2016.

s/Paul Barnes
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