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

BRIEF OF AMICI CURIAE, THE DKT LIBERTY PROJECT, THE AMERICAN CIVIL LIBERTIES UNION (ACLU), THE ACLU OF MISSISSIPPI, GLBTQ LEGAL ADVOCATES & DEFENDERS, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The DKT Liberty Project is a nonprofit organization founded to promote individual liberty against encroachment by all levels of government. The DKT Liberty Project advocates vigilance over government overreach of all kinds, especially regulation effected by use of penal laws. It has also been particularly involved in defending the right to privacy that is inherent in liberty. As demonstrated below, because of DKT Liberty Project's strong interest in privacy, and in protection of citizens from government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan, nonprofit, organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Mississippi is one of its state affiliates. The ACLU of Mississippi has approximately 1,000 members. The membership of the ACLU of Mississippi is diverse and includes many members who have been and are now in same-sex, loving, intimate relationships. The ACLU of Mississippi advocates for the equal rights of lesbian, gay, bisexual and transgender ("LGBT") people and for their freedom to live openly in a fair and just society. Through litigation, advocacy, and lobbying efforts, the ACLU of Mississippi has fought for the right of LGBT Mississippians to be free from discriminatory treatment and plans to continue this work. The organization is therefore well situated to provide this Court with additional context where state law appear to differently impact LGBT Mississippians.

Through strategic litigation, public policy advocacy, and education, since 1978 GLBTQ Legal Advocates & Defenders ("GLAD") has worked in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals,

and people living with HIV and AIDS. Throughout its history GLAD has represented individuals who have been charged with violating laws regulating intimate conduct. GLAD was an amicus in *Lawrence v. Texas*, 539 U.S. 558 (2003); GLAD challenged the Massachusetts sodomy law in *GLAD v. Reilly*, 436 Mass. 132 (2002), and the Rhode Island law in *State v. Lopes*, 660 A.2d 707 (R.I. 1995), and GLAD successfully challenged portions of the Massachusetts sex offender registry law in *Doe v. Attorney General*, 426 Mass. 136 (1997).

Founded in 1973, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of LGBT people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has extensive experience litigating cases affecting the rights of LGBT people, including serving as counsel for the Petitioners in *Lawrence v. Texas*, 539 U.S. 558 (2003). In addition to having litigated *Lawrence* itself, Lambda Legal also has participated as either party counsel or amicus curiae in many other cases addressing the validity of sodomy prohibitions, including submitting an amicus brief in *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), which held that *Lawrence* is a facial challenge that invalidated state sodomy prohibitions like the one at issue in this case. The issues pending before the Court are of acute concern to Lambda Legal and the community it represents, who stand to be directly impacted by the Court's ruling.

ARGUMENT

Plaintiffs argue forcefully that Mississippi's Unnatural Intercourse statute is facially invalid after the Supreme Court's landmark decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). Plaintiffs further argue that application of Mississippi's Sex Offender Registration ("MSOR") statute to those convicted of violating the Unnatural Intercourse statute (or comparable laws from

other jurisdictions) likewise is unconstitutional under *Lawrence* and its progeny. Amici curiae agree and submit this brief in support of that argument.

In *Lawrence*, the Supreme Court held that a criminal statute whose only element is the commission of oral or anal sex (*i.e.*, sodomy) is unconstitutional. The Court invalidated Texas's ban on sodomy between same-sex partners on due process grounds, but in so doing made clear that *all* state anti-sodomy statutes are invalid. Indeed, the Court expressly overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), stating that the Court in that case should have sustained the facial challenge to the Georgia sodomy statute: "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578.

Central to the Court's rationale was concern with the stigma and dignitary harm attendant with a criminal conviction for sodomy, as well as the severe legal collateral consequences of such a conviction. The Court specifically emphasized the harm from the requirement that a person convicted of sodomy register as a sex offender, which in the Court's view, "underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Id.* at 576. In ruling anti-sodomy laws unconstitutional, the Court found that states lack a sufficient interest in criminalizing sodomy to justify these harsh consequences.

Lawrence is dispositive with respect to the constitutionality of the two statutes at issue: the Unnatural Intercourse statute, Miss. Code Ann. § 97-29-59, and application of the MSOR statute to require registration of individuals whose only predicate crimes arise under the Unnatural Intercourse statute or analogue criminal statutes from other jurisdictions, *id.* § 45-33-23(h)(xi); *id.* § 45-33-23(h)(xxi). In short, the Unnatural Intercourse statute is facially unconstitutional, and the challenged applications of the MSOR statute cannot be reconciled with *Lawrence*. Furthermore, the Court cannot and should not effectively rewrite the Unnatural Intercourse statute or seek to

preserve applications of the MSOR statute to those convicted of that or comparable laws from other states. To do so, among other things, would be flatly inconsistent with fundamental principles of the separation of powers and due process, and would serve no non-discriminatory, legitimate interest that could justify the intrusion into the personal and private lives of individuals.

No set of facts permits a state to prosecute a person under a facially unconstitutional law. The State of Mississippi must reckon with *Lawrence*, and doing so means acknowledging that Mississippi's own anti-sodomy law is a dead letter.

I. *Lawrence v. Texas* Compels the Conclusion that Mississippi Is Violating Plaintiffs' Rights to Due Process Under the Fourteenth Amendment.

The Supreme Court's landmark decision in *Lawrence v. Texas* struck down as unconstitutional a Texas law prohibiting sodomy between same-sex partners. The Court described the relevant liberty interest protected by the Due Process Clause of the Fourteenth Amendment as follows:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . [T]here are . . . spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of . . . certain intimate conduct. . . . [A]dults may choose to enter upon this relationship in the confines of their . . . own private lives and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.

539 U.S. at 562, 67. Texas's sodomy law, "to be sure, [was] but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remain[ed] a criminal offense with all that imports for the dignity of the persons charged[,]" including the imposition of collateral consequences. *Id.* at 575. Because the Texas statute "further[ed] no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual[,]" *id.* at 578, it was held to be facially unconstitutional.

Lawrence controls the outcome in this case. As explained below, *Lawrence* invalidated not only the Texas law at issue, but *all* anti-sodomy laws on the books in other states as well. And *Lawrence*'s facial ruling cannot be side-stepped or frustrated through application of sex offender registration statutes.

A. *Lawrence* Facially Invalidates *All* Statutes that Criminalize Sodomy, Including Mississippi's Unnatural Intercourse Statute.

The Court's opinion in *Lawrence* felled not just the Texas statute at issue in that case, but all anti-sodomy laws in this nation. The Court's own language makes clear that it was invalidating a class of criminal statutes, not considering an as-applied challenge.

Justice Kennedy's opinion makes clear at the outset that *Lawrence* involves a facial challenge: "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 opinion proceeds to discuss the constitutional deficiencies of *laws*—plural—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." (emphasis added)); *id.* ("*The statutes* do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." (emphasis added)); *id*. at 571 ("The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."). Furthermore, central to the Court's ruling was its recognition that gay, lesbian, and bisexual people in particular suffer collateral harms when sodomy statutes remain on the books, even without direct prosecutions for private conduct, and that such laws must be fully invalidated because otherwise

their "stigma might remain." *Id*. at 575.[1] Anything other than a facial invalidation would not cure the stigma animating the Court's decision.

Additional evidence that *Lawrence* invalidated all state anti-sodomy laws may be found in the Court's grant of certiorari. While the Court could have opined solely on the constitutionality of the Texas law, it purposefully addressed a separate and additional question: whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled. As the Court itself noted, the question *Bowers* had addressed was "'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.'" *Lawrence*, 539 U.S. at 566-67 (emphasis added) (quoting *Bowers*, 478 U.S. at 190)). While *Bowers* had not invalidated those laws, *Lawrence* did. Thus the Court invalidated not just the Texas law as applied to the petitioners, but "the laws of the many States that still make such conduct illegal." *Id.* at 566.

There is no tenable reading of *Lawrence* other than as a facial constitutional ruling. Indeed, no federal court to have evaluated this question has successfully found a state anti-sodomy law to have survived *Lawrence*. The lone court to have initially concluded so—a district court in Virginia—was reversed by the Fourth Circuit Court of Appeals, which held that the district court had erred in finding Virginia's anti-sodomy provision to be constitutional as applied to an individual who had been convicted of criminal solicitation predicated on Virginia's anti-sodomy

[1] Indeed, it was concern with the stigmatizing effects of sodomy laws and their collateral consequences that compelled Justice Kennedy and a majority of the Court to rule on due process grounds, rather than on the equal protection grounds relied upon by Justice O'Connor in concurrence. *Compare id.* at 575 ("If 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."), *with id.* at 579 ("Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.").

law. *MacDonald v. Moose*, 710 F.3d 154, 162 (4th Cir. 2013). As the Fourth Circuit explained, under *Lawrence*'s facial rule, "the anti-sodomy provision is unconstitutional when applied to any person." *Id*.

This understanding of *Lawrence* as a facial ruling accords with the public statements by numerous state Attorneys General following the decision, recognizing that their states' anti-sodomy laws were now invalid. *See, e.g.*, Charles Lane, *Justices Overturn Texas Sodomy Ban; Ruling Is Landmark Victory for Gay Rights*, Wash. Post, June 27, 2003, at A1 ("Virginia Attorney General Jerry W. Kilgore (R) expressed disappointment with the ruling, which he said invalidates a state statute banning oral and anal sex between consenting gay and heterosexual couples."); Elizabeth Neff, *Laws on Consensual Sodomy, Premarital Sex Targets of Suit*, Salt Lake Trib., July 17, 2003, at C3 ("Utah Attorney General Mark Shurtleff readily admits a U.S. Supreme Court ruling issued last month has already nullified both [sodomy and premarital sex] laws.").

Mississippi's Unnatural Intercourse statute is thus null and void. Its prohibition of the "detestable and abominable crime against nature committed with mankind" is indistinguishable from the sodomy prohibitions at issue in *Bowers*, *Lawrence*, and *MacDonald*—and declared facially unconstitutional in *Lawrence*. Moreover, it is not just the direct consequences following from conviction under the Unnatural Intercourse statute, or the collateral consequences including via the MSOR statute, discussed at greater length below, that render the Unnatural Intercourse statute unconstitutional. The mere *existence* of the statute on the Mississippi books effectuates a cognizable due process harm by codifying stigmatization and discrimination. *Lawrence*, 539 U.S. at 575. There is no countervailing state interest that justifies the retention of a law that is tantamount to an imposed disadvantage "born of animosity." *Id.* at 574. And it would violate

these dignity interests, protected by the Due Process Clause of the Fourteenth Amendment, to deny the relief Plaintiffs seek.

B. Enforcement of Mississippi's Anti-Sodomy Law Through the Sex Offender Registry Is Invalid Under *Lawrence*.

When the Supreme Court invalidated anti-sodomy laws in *Lawrence*, it was motivated in large part by the harm caused by the collateral effects of a conviction under those laws. Indeed, the Court had in mind exactly the circumstances at issue in this case. As Justice Kennedy explained, state anti-sodomy laws impose a "stigma" that "is not trivial" because persons convicted under those laws are required to register as sex offenders in certain states, including Mississippi. *Id.* at 575-76 (citing, *inter alia*, Miss. Code Ann. §§ 45-33-21 to 45-33-57 (Lexis 2003)). Plaintiffs persuasively demonstrate the many burdens registration imposes: restricting where a person can live, work, and travel, and widely publicizing a person's status as a sex offender in a manner designed to stigmatize and humiliate. *See* Memo. in Supp. of Pls.' Mot. for Summ. J. at 3-4, ECF No. 16. To the Supreme Court, the fact that a sodomy conviction would require registration as a sex offender "underscore[d] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Lawrence*, 539 U.S. at 576.[2] In finding anti-sodomy laws unconstitutional, *Lawrence* was aimed at ending such condemnation. *Lawrence*

[2] Even Justice O'Connor, who declined to join the *Lawrence* majority, found that 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 id.* at 581 (O'Connor, J., concurring) ("[W]hile the penalty imposed on petitioners in this case 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)).

itself thus fully resolves that sodomy laws cannot serve as a predicate for sex-offender registration, as contemplated by the MSOR statute.

In light of the foregoing, it is axiomatic that requiring individuals to register with the MSOR for the predicate crime of violating the Unnatural Intercourse statute violates the Due Process Clause of the Fourteenth Amendment. To hold otherwise would vitiate the Court's decision in *Lawrence*. *See* 539 U.S. at 575 ("If 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.").

As one federal district court has explained in an analogous context, "[t]he State cannot give legal effect to a conviction under an unconstitutional criminal statute." *See Green v. Georgia*, 51 F. Supp. 3d 1304, 1313 (N.D. Ga. 2014).[3] In that case, Green was convicted for failure to register as a sex offender; the conviction that supposedly required him to register was a 1997 conviction for sodomy under Georgia's anti-sodomy law. As the court explained in granting his petition, "Convicting Green for failing to register as a sex offender solely because he was previously convicted under the unconstitutional anti-sodomy statute would amount to 'state-sponsored condemnation' of constitutionally-protected behavior." *Id.*

In effect, Mississippi Code § 45-33-25(h)(xi) contemplates that, by operation of a facially unconstitutional criminal statute (*i.e.*, the Unnatural Intercourse statute), *see id.* § 97-29-59, the State may impose tremendous negative consequences on individuals who have engaged in purely constitutional conduct. Irrespective of whether Plaintiffs could be required to register with the

[3] The State of Georgia appealed this decision, and oral argument was held on May 18, 2016. No decision has been issued yet.

MSOR under other enacted or hypothetical criminal statutes, addressed at greater length below, that incongruity must be corrected by granting Plaintiffs summary judgment. *See 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 MacDonald*, 710 F.3d at 162 (explaining that consequence of *Lawrence*'s facial ruling is that sodomy prohibitions are unconstitutional in all applications).

C. Requiring Persons With Out-of-State Convictions Under Analogous Laws to Register as Sex Offenders in Mississippi Is Also Unconstitutional.

Mississippi fares no better in requiring persons with out-of-state convictions for sodomy to register as sex offenders in Mississippi. Mississippi Code § 45-33-23(h)(xxi) requires individuals to register with the MSOR based on convictions in other jurisdictions which would be deemed registrable crimes if committed in Mississippi. As Plaintiffs explain, Mississippi has been utilizing this statute to require persons convicted of sodomy in others states, and specifically in Louisiana, to register as sex offenders in Mississippi. This application of the statute is unconstitutional.

The Louisiana Crimes Against Nature by Solicitation ("CANS") statute prohibits "the solicitation by a human being of another with the intent to engage in any *unnatural* carnal copulation for compensation." La. Rev. Stat. §14:89.2(A) (emphasis added). This provision is no longer a registrable offense in Louisiana, having been removed from the list of registrable offenses by the legislature after having been ruled unconstitutional. *See Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012).[4]

[4] In *Doe v. Jindal* , the District Court for the Eastern District of Louisiana held that the disparate treatment of individuals convicted under the Louisiana CANS statute (for which registration on the Louisiana sex offender registry was required), and individuals convicted under the prostitution statute (for which registration was not required), violated the Equal Protection Clause.

Requiring persons with Louisiana CANS convictions to register in Mississippi can be understood only as a sleight-of-hand enforcement of Mississippi's own unconstitutional Unnatural Intercourse statute, because Mississippi does not treat prostitution—a crime which includes oral and anal sex, *see* Miss. Code Ann. § 97-29-49(1)—as a registrable offense. Accordingly, the "offense" for purposes of Mississippi Code § 45-33-23(h)(xxi) that makes a prior Louisiana CANS conviction registrable is not the exchange of compensation for sexual conduct; it is the purportedly "unnatural" character of the sexual conduct. That is precisely what *Lawrence* prohibited the states from doing, *i.e.*, "us[ing] the power of the State to enforce these views on the whole society through operation of the criminal law." 539 U.S. at 571.

Just as Mississippi may not require persons convicted under its own facially unconstitutional anti-sodomy law to register as sex offenders, it also may not require persons convicted under *another* state's facially unconstitutional law to register. Imposing the burdens and stigma of the sex offender registry on persons without a valid predicate offense violates due process irrespective of where the invalid predicate conviction was obtained.

II. This Court Cannot and Should Not Rewrite the Unnatural Intercourse Statute in Order to Apply It More Narrowly to Plaintiffs.

It is both true and irrelevant that *Lawrence* "d[id] not involve minors" or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused"; nor did it involve "public conduct or prostitution." 539 U.S. at 578. That Justice Kennedy acknowledged those facts is not a basis for preserving the Unnatural Intercourse statute or the challenged applications of the MSOR statute. To the contrary: the Court in *Lawrence* did

not attempt to save limited applications of the Texas statute directly under challenge; instead, the Court addressed the "validity" of the statute as a whole. *Id.* at 562.

As the Fourth Circuit Court of Appeals explained in *MacDonald*, this section of the *Lawrence* opinion is better interpreted as leaving room for legislatures to enact future targeted legislation that might cover some amount of the same conduct prohibited under traditional sodomy laws. *MacDonald*, 710 F.3d at 165.[5] It was not an invitation for courts to perform interpretive acrobatics to preserve laws, the existence of which codifies discrimination and dehumanization against a class of individuals. Such "drastic action" would be contrary to Supreme Court precedent. *Id.* at 166; *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329-30 (2006); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884-85 (1997). In short, this Court cannot and should not attempt to save Mississippi's unconstitutional statute by judicially rewriting it.

A. This Court Cannot Judicially Rewrite the Unnatural Intercourse Statute.

Judicially rewriting Mississippi's anti-sodomy law to apply only to certain plaintiffs and certain sets of facts would vitiate two constitutional principles.

First, separation of powers problems would arise from a court's tinkering with a constitutionally problematic statute to save it from facial invalidity. These concerns trump the general principle that a court should nullify no more of a legislature's work than is necessary:

> [M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewriting state law to conform it to constitutional requirements" even as we strive to salvage it. . . . [M]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" then we ought to undertake.

[5] The constitutionality of such laws is not presented in this case and would of course have to be litigated and defended by a state that enacted them.

Ayotte, 546 U.S. at 329-30. Following these principles, for example, the Fourth Circuit Court of Appeals concluded that "[t]he Court's ruminations [in *Lawrence*] concerning the circumstances under which a state might permissibly outlaw sodomy . . . no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary." *MacDonald* 710, F.3d at 165.[6] This Court should take the same approach.

Second, and relatedly, the Supreme Court has warned that when a court saves an overly broad and otherwise unconstitutional criminal statute through creative interpretation, it creates dangerous incentives for legislatures:

> [W]e are wary of legislatures who would rely on our intervention, for "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. "This would, to some extent, substitute the judicial for the legislative department of the government."

Ayotte, 546 U.S. at 330 (citation omitted).

Because of these concerns, the Supreme Court has made clear that a court generally should refrain from saving a facially unconstitutional statute by applying it more narrowly. *See Reno*, 521 U.S. at 884-85 ("This Court 'will not rewrite . . . law to conform it to constitutional requirements.'" (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988))); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) (recognizing "[o]ur obligation to avoid judicial legislation"); *Aptheker v. Sec'y of State*, 378 U.S. 500, 515 (1964) (warning against judicial rewriting of statute to "save it against constitutional attack"); *cf. Skilling*

[6] Indeed, as discussed at greater length below, the Mississippi legislature has enacted such statutes. For example, the State's prostitution provision encompasses oral and anal sex. Critically, however, a conviction under this law does *not* trigger MSOR registration. It therefore would be an even greater usurpation of the legislative function (and a further violation of the Equal Protection Clause) for a court to preserve the Unnatural Intercourse statute's reach with respect to prostitution, end-running Mississippi Code § 45-33-23, by requiring some, but not all, individuals convicted of exchanging oral or anal sex for compensation to register as sex offenders.

v. United States, 561 U.S. 358, 415-16 (2010) (Scalia, J., concurring) ("A statute that is constitutionally vague cannot be saved by a more precise indictment, nor by judicial construction that writes in specific criteria that its text does not contain." (citation omitted)); *see also Serafine v. Branaman*, 810 F.3d 354, 369 (5th Cir. 2016) ("We decline to give [an unconstitutional state law] an additional extra-textual limiting construction in a frantic attempt to rescue it.").

These concerns are especially significant in the context of criminal prohibitions. The Supreme Court has admonished that a statute cannot broadly proscribe an entire category of activity that includes constitutionally protected conduct, 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 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."); *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))).

It is particularly inappropriate for courts to insert words into a criminal sodomy statute that has no such language. Here, the Unnatural Intercourse law prohibits only "the detestable and abominable crime against nature committed with mankind," and so narrowing it only to certain

applications would effectively require the addition of other elements, such as solicitation, age, or coercion. Miss. Code Ann. § 97-29-59. 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 our duty.'" *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (citation omitted); *Butts v. Merchs. & 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 legislature wishes to include" certain "sexual acts" within a statute's reach, "it should do so with specificity since [it] is a criminal statute." *State v. Richardson*, 300 S.E.2d 379, 381 (N.C. 1983).

This Court may not uphold a law that Mississippi never enacted. The Unnatural Intercourse law does not target commercial activity (nor sex with minors, nor nonconsensual sex). And for a court to find that it does, because the activity the law does target may not constitutionally be criminalized, would run afoul of the separation of powers principles discussed above. Furthermore, such a ruling would frustrate the Supreme Court's reasoning for invalidating such laws in *Lawrence*. Because the statute criminalizes only "the detestable and abominable crime against nature committed with mankind," no judicial decision attempting to save the statute could possibly provide adequate notice to defendants of what conduct remains criminal and what conduct is permitted. Such a decision would therefore create a looming specter of uncertainty for persons at risk of being convicted, and would ensure an enduring stigma that *Lawrence* sought to eliminate.

Finally, the fact that *Lawrence* recognizes situations where narrowly tailored sodomy laws might hypothetically withstand constitutional scrutiny is not at all in tension with the proposition that *Lawrence* announced a broad facial ruling. To hold otherwise would be to misapprehend the

traditional rule that a facial challenge will lie only where the plaintiff establishes that a law is unconstitutional in all of its applications. *See, e.g.*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). As the Supreme Court recently clarified, "when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015). Thus, for example,

> when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.

Id. at 2451.

Here, the operative question is whether there is any constitutional application of the challenged Mississippi statutes that performs independent work in furtherance of a legitimate state interest. There is not. The criminalization of sodomy involving adults and minors, prostitution, or coercion does not require operation of the Unnatural Intercourse statute or the challenged applications of the MSOR. *See* Miss. Code Ann. §§ 97-3-95 to 97-3-97 (prohibiting sexual penetration, including oral and anal sex, without consent or in situations involving adults and minors); Miss. Code Ann. § 97-29-49(1) (prohibiting prostitution including involving oral and anal sex). Even if there were holes in the Mississippi law, the legislature should be the one to fix them, within constitutional bounds. But Mississippi's existing criminal provisions nevertheless undermine any claim that the Unnatural Intercourse statute serves some historically legitimate purpose. *Cf. Lawrence*, 539 U.S. at 569 (explaining that an historical and but now untenable

"purpose for [state sodomy] prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law").

B. Even If It Could, This Court Should Not Attempt to Preserve Either the Unnatural Intercourse Statute or the Challenged Applications of the MSOR Statute.

In addition to the constitutional principles and Supreme Court precedent which preclude this Court from "saving" Mississippi's anti-sodomy law by rewriting it, compelling prudential arguments augur against that approach.

Most obviously, there is no practical need for the Court to engage in the risky legislative business of trying to save the Unnatural Intercourse statute. That statute is unnecessary to achieve any interests the Mississippi legislature might have in criminalizing sodomy in cases of prostitution, between an adult and a minor, and in other cases of sexual battery—all of which are already prohibited under Mississippi law, and even if they were not, could be. *See supra* at Part II.A & n.6.

The same is doubly true for the challenged applications of the MSOR statute. First, the inclusion of the Unnatural Intercourse statute as a predicate offense to MSOR registration, Miss. Code Ann. § 45-33-23(h)(xi), is unnecessary. The Mississippi legislature has, for example, evinced its clear intent in the MSOR statute as to which sexual batteries should give rise to registration with the MSOR. *See* Miss. Code Ann. § 45-33-23(h)(iv). There is thus no need for this Court to preserve an application of the MSOR based on the Unnatural Intercourse statute to create any hypothetically valid collateral consequences for such conduct. Second, the provision of the MSOR statute covering "offense[s] resulting in a conviction in another jurisdiction, which, if committed in this state, would be deemed to be . . . a [registrable] crime" is unnecessary for the same reason—*i.e.*, certain sexual batteries committed in other states might still be registrable without recourse to the Louisiana CANS statute or the Unnatural Intercourse statute. Moreover,

because Louisiana itself has ruled its CANS statute unconstitutional as a predicate crime for registration, there are certainly no concerns with respect to comity. *See Doe v. Caldwell*, 913 F. Supp. 2d 262, 265 (E.D. La. 2012); *Jindal*, 851 F. Supp. 2d 995.

Finally, narrowing the Mississippi sodomy statute through judicial rewriting would result in a fatal Equal Protection problem. Because conviction under the Unnatural Intercourse statute is a registrable offense, whereas conviction under the Mississippi prostitution statute—which includes oral and anal sex, *see* Miss. Code Ann. § 97-29-49(1)—is not, application of the MSOR statute to Plaintiffs under a judicially rewritten statute would impose harsher consequences on same-sex prostitution than opposite-sex prostitution without any justification. This would pose a serious violation of the Equal Protection Clause of the Fourteenth Amendment, creating a new constitutional problem in an effort to cure the existing one.[7]

In the absence of any affirmative reason to rewrite the Unnatural Intercourse statute or the MSOR statute, this Court should recognize that the continued existence of the Unnatural Intercourse statute and the continued challenged applications of the MSOR codify and invite discrimination and stigmatization. *Lawrence*, 539 U.S. at 575. They constitute an intrusion on the personal liberty of citizens that the Supreme Court could not abide. Thirteen years after *Lawrence*, this Court should echo the Supreme Court's clarion call that sodomy prohibitions and their

[7] Although beyond the focus of this Brief, *Amici* endorse Plaintiffs' argument that the operation of Mississippi Code § 45-33-23(h)(xxi), which requires registration for Louisiana CANS convictions but not for substantively identical Mississippi prostitution convictions, creates an arbitrary and unlawful classification, without any rational relationship to a legitimate state interest, and is therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *See generally United States v. Windsor*, 133 S. Ct. 2675 (2013). This is a separate and fatal flaw with both statutes, irrespective of whether the operation of these laws is tantamount to an intrusion into the personal and private lives of individuals under the Due Process Clause of the Fourteenth Amendment. *Doe v. Jindal*, 851 F. Supp. 2d 995 (2012).

attendant collateral consequences facially violate the Due Process Clause of the Fourteenth Amendment, and accordingly may not be given legal effect.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully urge this Court to grant Plaintiffs' motion for summary judgment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Oliver Diaz, do hereby certify that on November 10, 2016, I electronically filed the foregoing *Brief of Amici Curiae* with the Clerk of the Court using the ECF system to:

All counsel of record registered with the ECF system.

This 10th day of November, 2016.

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