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

ARTHUR DOE, et al. **PLAINTIFFS**

VS. **CAUSE NO: 3:16-cv-789**

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

MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSED MOTION FOR DISCOVERY AND ENTRY OF A SCHEDULING ORDER

COME NOW Defendants, sued in their official capacities only, and submit this memorandum in support of their Motion for Discovery and Entry of a Scheduling Order as follows, to-wit:

NATURE OF ACTION

Plaintiffs brought this action on behalf of themselves and a putative class, challenging the constitutionality of Mississippi's unnatural intercourse statute, Miss. Code Ann. § 97-29-59, as well as the constitutionality of Plaintiffs' inclusion on the Mississippi Sex Offenders Registry ("MSOR") pursuant to the Mississippi Sex Offenders Registration Law, Miss. Code Ann. §§ 45-23-21, *et seq*.

PLAINTIFFS OPPOSE THIS MOTION

Plaintiffs have indicated that at this time they cannot consent to the instant Motion.

PROCEDURAL POSTURE

Plaintiffs served and filed their Complaint on October 7, 2016. Defendants timely filed their Answer on November 2, 2016. The next day, on November 3, 2016, Plaintiffs filed a Motion to Proceed under Pseudonyms and to File Documents under Seal, a motion for class certification, and a motion for summary judgment. Defendants oppose all three motions.

Pursuant to L. Unif. Civ. R. 7(b)(4), Defendants' responses to each of these motions are currently due to be filed on Monday, November 21, 2016. Defendants will be filing a timely response to Plaintiffs' Motion to Proceed Under Pseudonyms. However, until the Court sets the parameters of the playing field by ruling on Plaintiffs' confidentiality motion, Defendants cannot begin to meaningfully respond to the allegations in the pending motions for class certification and summary judgment. Furthermore, Defendants challenge the standing of the "named" Plaintiffs,[1] as it is unclear whether each actually has standing to assert all of the claims stated in the Complaint. However, discovery is needed to permit Defendants to develop evidence related to Plaintiffs' lack of standing.

Further, in order to fully and adequately respond to Plaintiffs' motions for class certification and summary judgment, Defendants reasonably need time for discovery to investigate and test the truth of the factual allegations made by Plaintiffs. Plaintiffs have taken the position that discovery is not needed because the issue of whether *Lawrence v. Texas*, 539 U.S. 558 (2003) facially invalidated all state unnatural intercourse statutes is purely a question of law common to the claims of all class members. Plaintiffs' argument simply begs the question. While that issue, considered purely in the abstract, is an issue of law, the procedural posture of the case and principles of fundamental fairness and due process, including adequate notice and opportunity to be heard, make resolution of that issue without discovery untenable and unfairly prejudicial to Defendants.

This is especially true as it is Defendants' position that *Lawrence v. Texas* must be

[1] We say "named" because Plaintiffs have offered pseudonyms only, and have asked the Court to permit them to proceed without disclosing their names or any other identifying information.

independently considered "as applied" to the individual details and unique circumstances of each affected person's underlying convictions, including not only the "named" Plaintiffs, but also each putative class member. Otherwise, granting the relief sought by Plaintiffs would very likely result in the removal of sexual predators from the MSOR, because such relief would encompass a great deal of sexual criminal misconduct that is not constitutionally protected.

DEVIATION FROM THIS COURT'S ROUTINE SCHEDULING PRACTICES AND PROCEDURES IS NOT WARRANTED

Plaintiffs have not shown good cause why this case should not be conducted in accordance with the regular practices and procedures of this Court, as set forth in the Local Uniform Civil Rules. Therefore, Defendants respectfully request that the Court enter a scheduling order setting forth a plan for discovery and a briefing schedule which permits Defendants adequate time to conduct discovery related to the two pending motions, and then to prepare and submit their responses and any evidence they anticipate presenting to the Court in opposition.

At this point, the Court has not yet even entered a routine initial scheduling order pursuant to Loc. U. Civ. R. 16(a). No deadline for conducting the formal Rule 26(f) conference of the parties has been set. No case management conference has been set. No core disclosures have been exchanged. Typically, the Rule 16(a) initial scheduling order notifies the parties that at the case management conference, the Court and the parties will resolve such matters as identification of the principal factual and legal issues in dispute; determine whether early filing of any motions might significantly affect the scope of discovery or other aspects of the litigation, or provide for the staged resolution or bifurcation of issues; determine the plan for the first stage of discovery, including limitations on each discovery tool, time limits, and other appropriate

matters; and setting other appropriate scheduling deadlines. Further, Rule 26(f) requires the parties to discuss such issues at the conference of the parties prior to the case management conference.

Pursuant to Fed. R. Civ. P. 26(d)(1), discovery is forbidden prior to the 26(f) conference. Therefore, by filing their motions only one day after Defendants filed their answer, Plaintiffs have short-circuited the routine practices and procedures of this Court, and have foreclosed any opportunity for Defendants to conduct discovery related to the motions for class certification and summary judgment. Because Plaintiffs have filed their motions so early, Defendants' responses would be due before the Rule 26(f) conference has even been conducted. However, there is no justification for such a deviation from the routine practices and procedures governing discovery and scheduling as set forth in the Local Rules and the Federal Rules of Civil Procedure.

SUMMARY JUDGMENT

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*.

Before the claims of putative class members may even be considered, it must be noted that the claims of the named Plaintiffs differ and are not controlled by the same legal principles. Four of the named Plaintiffs are on the sex offender registry for convictions of Lousiana's "Crimes Against Nature By Solicitation" statute ("CANS"), *i.e.*, prostitution, one of the constitutional applications of state unnatural intercourse laws that *Lawrence* distinguished from the private, consensual sex between adults at issue in that case. Further, based on the allegations in the complaint, it appears that the convictions of the CANS Plaintiffs relate to heterosexual prostitution, not homosexual prostitution.

Thus, the CANS Plaintiffs' claims are not controlled by *Lawrence*, a fact expressly

recognized by the district court in *Doe v. Jindal*, 851 F. Supp. 2d 995, 1000 n.11 (E.D. La. 2012) ("*Much* of the Crime Against Nature statute has been held unconstitutional by the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L.Ed.2d 508 (2003). *Lawrence* does not speak to the solicitation of sex for money, and has little precedential force here.") (emphasis added).

So the proposition that *Lawrence v. Texas facially* invalidated all state unnatural intercourse laws, and that *Lawrence* is the overriding common legal issue in this case as to all putative class members, is fundamentally flawed and inconsistent. Only one of the named Plaintiffs, Arthur Doe, even sets out a potentially arguable *Lawrence* claim, as he alleges he is on the sex offender registry solely because of a Mississippi conviction for unnatural intercourse in 1979 (pre-*Lawrence*). However, Arthur Doe has not alleged, nor at this time have the Defendants had the opportunity to discover, whether Arthur Doe's unnatural intercourse conviction was actually for conduct protected by *Lawrence*, *i.e.*, private, non-commercial, sexual activity between consenting adults, or whether that conviction was based on sexual activity falling outside the scope of constitutional protection recognized by *Lawrence*. In point of fact, at this early stage of the proceedings, no evidence has been offered to indicate that *any* person on the MSOR is on the registry solely for sexual conduct of the type protected by *Lawrence*.

Defendants are entitled to discovery regarding both the named Plaintiffs as well as the putative class members, to determine whether any, and how many, of the named Plaintiffs and prospective class members are actually on the registry solely for conduct recognized as constitutionally protected by *Lawrence*.

In their Memorandum in Support of their Summary Judgment Motion, Plaintiffs further

request that the Court "order all just and necessary relief as set forth in Plaintiffs' Prayer for Relief and Proposed Order." Pl.'s Memo in Supp. of S.J. [Doc. 16 at 25]. A short excerpt from the Prayer for Relief in the Complaint reflects the extreme overbreadth of the putative class of individuals on whose behalf Plaintiffs seek relief:

> b) Declaring that Miss. Code Ann. § 97-29-59 is unconstitutional on its face as it relates to *activity between human beings*;
>
> c) Declaring that Miss. Code Ann. § 45-33-23(h)(xi) is unconstitutional insofar as it requires individuals convicted of Unnatural Intercourse involving *activity between human beings* to register as sex offenders[.]

Compl. at 27 [Doc. 1]. As a further example, Plaintiffs do not limit the relief they seek to individuals who are on the MSOR *solely* because of an unnatural intercourse conviction, instead describing the class as including "dozens of individuals statewide who must register as sex offender solely *or in part* because of a conviction for Unnatural Intercourse or a conviction considered to be an out-of-state equivalent." Compl. at 15 [Doc.1].

"Activity between human beings" encompasses sex acts with children as well as forcible, coercive, and other non-consensual sex acts. Thus, Plaintiffs are asking the Court to order Defendants to remove from the MSOR an entire class of individuals that would include child molesters, rapists, and other sexual predators, including individuals with multiple registrable offenses, so long as at least one of those offenses is unnatural intercourse ("solely *or in part*"). None of this conduct is constitutionally protected, under *Lawrence v. Texas* or otherwise. Removal of sexual predators from the MSOR would put the public at risk. Defendants are entitled to conduct discovery to obtain pertinent information and evidence concerning not only the named Plaintiffs, but other members of the putative class as well, to ensure that sexual predators who have committed sex offenses involving children, forcible sodomy, or other non-

consensual sexual activity are not removed from the Mississippi Sex Offenders Registry.

Allegations are not facts. At the summary judgment stage, Plaintiffs cannot rely on the allegations in the complaint, but must produce evidence that could be admissible at trial that establishes the facts relied upon, and that those facts are undisputed. *See,* e.g., *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir.1996) ("[P]leadings are not summary judgment evidence."); Fed. R. Civ. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . ."). Plaintiffs have supported their motion with a redacted declaration of one of their attorneys to which they attached copies of documents they allege are the sex offender registry profiles of the "named" Plaintiffs printed from the Mississippi Sex Offender Registry public website --- but with all identifying information heavily redacted. Plaintiffs have also attached copies of a limited number of court documents they allege relate to the named Plaintiffs, but have again redacted all identifying information. *See* Declaration of Alexis Agathocleous in Support of Plaintiffs' Motion for Summary Judgment [Doc. 17]. The scope of discovery needed and requested by Defendants is based on the scope of Plaintiffs' pending motions and the sweeping relief sought therein.

To counter such factual allegations, Defendants must submit affidavits and/or other potentially admissible evidence to establish that genuine issues of material fact exist. Fed. R. Civ. P. 56(c). At this time Defendants cannot present evidence of facts essential to justify its opposition due to the total denial of any opportunity to conduct discovery. Fed. R. Civ. P. 56(d). At this point, Plaintiffs have not even disclosed their identities to Defendants, much less the facts of the underlying criminal offenses for which each is on the MSOR.

CLASS CERTIFICATION

Plaintiffs are asking the Court to certify a putative class consisting of "all current and future individuals subjected (sic) the Mississippi Sex Offender Registry for Unnatural Intercourse convictions or convictions considered to be out-of-state equivalents." Pl.'s Motion for Class Cert. at 1 [Doc.20].

Rule 23 contains mandatory *prerequisites* for maintenance of a class action, including numerosity, commonality, typicality, and adequate representation of the class by proposed lead Plaintiffs. Defendants are entitled to class-related discovery to determine whether potential class members actually are too numerous for individual actions; whether the claims asserted by the named Plaintiffs are actually common to the class; whether those claims are typical of the claims that would be presented by the class members in individual challenges, and therefore, whether the proposed lead Plaintiffs would, in fact, adequately represent and protect the interests of all class members. Neither the Court nor Defendants should be required to take the Plaintiffs' class-related allegations at face value. *See, e.g.*, *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982) ("Our prior decisions make it clear, however, that in most cases 'a certain amount of discovery is essential in order to determine the class action issue and the proper scope of a class action.'"). (quoting *Pittman v. E. I. duPont de Nemours & Co.*, 552 F.2d 149, 150 (5th Cir. 1977)); *Carver v. Velocity Exp. Corp.*, No. 1:07CV407, 2008 WL 1766629, *2 (W.D. N.C. Apr. 14, 2008) ("Rule 23 certification is typically addressed after the close of all discovery, with considerations going well beyond whether the plaintiffs and the putative class members are similarly situated.").

Further, if the Court were to rule on any of the legal issues presented by the Plaintiffs'

motions prior to deciding whether to certify the class, such a ruling would not be binding on the absent class members, who could refile and reallege the same or similar claims against Defendants in another forum. Defendants could thus be unfairly prejudiced by a premature and untimely ruling on the "facial" vs. "as applied" scope of *Lawrence*. Further, if Defendants convince the Court that Plaintiffs' claims must be considered as "as applied" challenges under *Lawrence* and obtains a favorable ruling to that effect, such a ruling would not bind any absent class members. *See, e.g.*, *Bertrand v. Maram*, 495 F.3d 452, 455 (7th Cir. 2007) ("Class-action status must be granted (or denied) early . . . to clarify who will be bound by the decision."). Also, if the Court were to deny Plaintiffs' motion for class certification, it would streamline this case, leaving only the "as applied" challenges of each of the named Plaintiffs ripe for resolution.

Therefore, in order to fully and adequately respond to Plaintiffs' motions, Defendants need, and hereby request, adequate and reasonable time to complete discovery related to:

1. Standing, both as to each individual "named" Plaintiff and to the members of the putative class;

2. Rule 23's requirements for maintenance of a class action, including, but not limited to the prerequisites of numerosity, commonality, typicality, and fair and adequate protection of the interests of the class; and

3. Plaintiffs' affidavit and documentation concerning material facts submitted in support of their Motion for Summary Judgment.

It is in the best interests of all concerned to create as full, accurate, and complete a record as practical, both for the Court's consideration in connection with the pending motions for class certification and summary judgment, as well as for any necessary appellate review. Defendants have been provided no opportunity for any discovery concerning the named Plaintiffs or their registrable offenses, much less discovery of information concerning putative class members on

whose behalf the named Plaintiffs also seek relief. Therefore, at this time, and under these circumstances, Defendants are unable to present facts essential to justify their opposition to Plaintiffs' Motion for Summary Judgment, and need a reasonable opportunity for discovery related thereto pursuant to Fed. R. Civ. P. 56(d).

CONCLUSION

Based on the foregoing, Defendants therefore respectfully request that the Court 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 Rule 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 18th 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 Bureau of Investigation

By: *s/Paul Barnes*

PAUL E. BARNES, MSB No. 99107
WILSON MINOR, MSB No. 102663
Special Assistant Attorneys General
STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, MS 39205
Telephone No. (601)359-4072
Facsimile: (601)359-2003
pbarn@ago.state.ms.us
wmino@ago.state.ms.us

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:

Robert B. McDuff
MCDUFF & BYRD
767 North Congress Street
Jackson, MS 39202
rbm@McDuffLaw.com

Jacob W. Howard
MCDUFF & BYRD
767 N. Congress
Jackson, MS 39202
jake@McDufflaw.com

Alexis Agathocleous - PHV
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
aagathocleous@ccrjustice.org

Ghita Schwarz - PHV
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
gschwarz@ccrjustice.org

ATTORNEYS FOR PLAINTIFFS

Elliot Tarloff - PHV
JENNER & BLOCK, LLP - Washington, DC
1099 New York Avenue, N.W., Suite 900
Washington, DC 20010-4412
etarloff@jenner.com

Lindsay Harrison - PHV
JENNER & BLOCK, LLP - Washington, DC
1099 New York Avenue, N.W., Suite 900
Washington, DC 20010-4412
lharrison@jenner.com

Oliver E. Diaz , Jr.
OLIVER DIAZ LAW FIRM
P. O. Box 946
Madison, MS 39031
oliver@oliverdiazlaw.com

ATTORNEYS FOR *AMICI CURIAE*

THIS, the 18th day of November, 2016.

s/Paul Barnes
PAUL E. BARNES