

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

ARTHUR DOE, ET AL. PLAINTIFFS
VS. CIVIL NO. 3:16CV789CWR-FKB
JIM HOOD, ET AL. DEFENDANTS

HEARING ON MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
OCTOBER 10, 2018
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFF: MS. GHITA SCHWARZ
MR. MATTHEW STRUGAR
MR. ROBERT B. MCDUFF
MR. SHAYANA D. KADIDAL
FOR THE DEFENDANT: MR. PAUL E. BARNES
MR. WILSON D. MINOR

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1 THE COURT: Call the case, please.

2 THE CLERK: U.S. District Court for the Southern
3 District of Mississippi, Northern Division, Civil Docket Number
4 3:16CV789CWR-FKB, Doe v. Hood, et al.

5 THE COURT: Good morning. The parties have filed
6 cross-motions for summary judgment, and the court entered an
7 order which sort of -- I think sort of tees up some questions
8 for us to talk about today. And, obviously, the parties could
9 criticize or talk about the order that the court entered as
10 well, but since we're here on cross-motions for summary
11 judgment, I mean, you can decide among yourselves who should go
12 first. I'll hear from the plaintiffs first. See, I changed my
13 mind so quick right then, didn't I?

14 MS. SCHWARZ: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MS. SCHWARZ: My name is Ghita Schwarz. I'm with The
17 Center for Constitutional Rights, and I represent Arthur Doe in
18 this action. I'm here with my colleagues, Robert McDuff,
19 Matthew Strugar and Shayana Kadidal.

20 I'm going to address the question that you posed in
21 the decision of October 1st, and then, with your permission,
22 Mr. Strugar will address some of the *Lawrence* issues, statutory
23 construction and related issues to that.

24 THE COURT: Okay. Thank you.

25 MS. SCHWARZ: As the court is aware, our client's case

1 arises out of a 40-year-old guilty plea under Mississippi's
2 unnatural intercourse statute. That plea was made 16 to 17
3 years before the enactment of the sex offender registration law
4 and 25 years before the Supreme Court's decision in *Lawrence v.*
5 *Texas*.

6 THE COURT: I'll just ask you just to slow down, not
7 for me but for the court reporter.

8 MS. SCHWARZ: Absolutely.

9 THE COURT: Uh-huh.

10 MS. SCHWARZ: That decision, *Lawrence v. Texas*,
11 declared unconstitutional unnatural intercourse or
12 anti-sodomy/sodomy-only statutes, that is, criminal statutes
13 whose only element is the commission of oral or anal sex.

14 In 1978, when Mr. Doe took that guilty plea, with no
15 inkling of the possibility of sex offender registration, he was
16 20. He's now 60. He's had no intervening arrests, much less
17 convictions for any sex offense. The central issue for our
18 client has been how can it be that a plea taken years before
19 sex offender registration was a consideration, decades before
20 the law under which he took that plea was declared
21 unconstitutional, how can that guilty plea be used now to
22 require him to continue to register as a sex offender, with all
23 the burdens and humiliations that that entails?

24 The court has asked us to address the question posed
25 in *Randell v. Johnson*, given that *Heck* may impose a bar to a

1 ruling here, does Mr. Doe have a procedural vehicle to
2 challenge his 1978 conviction in state court now? If he does
3 not have such a vehicle, *the Heck* bar should not apply.

4 The answer to that question is, there is no procedural
5 vehicle available. Mississippi's Uniform Post-Conviction
6 Collateral Relief Act does not allow someone past the first
7 five years of required registration to seek post-conviction
8 relief, even if, as here, he's alleging a violation of
9 fundamental constitutional rights.

10 I'm going to put up relevant portions of the 2009
11 version of the UPCCRA. I'll try to slow down. As Your Honor
12 can observe, these are Sections 1 and 2 of Mississippi Code
13 Annotated, Section 99-39-5. The first section deals with
14 jurisdiction to seek post-conviction relief, and the second
15 section deals with time bars and any exceptions to time bars.

16 So a little -- it's obvious from what we're looking at
17 on the screen, since 2009, the UPCCRA has given standing to any
18 person sentenced by a court of record in the state of
19 Mississippi, including a person currently incarcerated, civilly
20 committed, on parole or probation, or, crucially for our
21 argument today, subject to sex offender registration for the
22 period of registration or for the first five years of the
23 registration, whichever is the shorter period. That provision
24 provides jurisdiction for people to seek relief.

25 The second section provides the statute of limitations

1 for those who are taking appeal from the judgment of conviction
2 or where they have a guilty plea within three years of the
3 entry of the judgment of conviction.

4 A little background on the statute. The initial
5 UPCCRA was enacted in 1984. It only allowed prisoners in
6 custody to file a motion for PCR if their motion was based on
7 the claim that the statute under which the conviction or
8 sentence was obtained was unconstitutional. The initial
9 version of the UPCCRA was consistent with traditional federal
10 habeas rules that you needed to be in custody in order to make
11 a collateral attack on a conviction.

12 At the time, the statute of limitations on filing was
13 three years after a guilty plea unless there was an intervening
14 decision of the Supreme Court.

15 THE COURT: And if there was an intervening decision
16 of the Supreme Court, what did that do about the statute of
17 limitations under the old?

18 MS. SCHWARZ: Well, you could seek relief and claim
19 that you had equitable -- you could seek an equitable waiver of
20 the time bar, just as you can now. And just as *Rowland v.*
21 *State*, the state court decision, acknowledges, there's a
22 fundamental constitutional rights exception to the procedural
23 bars, including the time bar.

24 *Rowland v. State* is pretty clear that the
25 exception to -- that the fundamental constitutional rights

1 exception that it recognizes applies only to the procedural
2 bars of the UPCCRA, that is, Section 2. But Section 1, which
3 grants jurisdiction to people within the first five years of
4 the registration, and the UPCCRA did that for the first time in
5 2001, Section 1 doesn't -- *Rowland* doesn't apply to -- *Rowland*
6 or any equitable waiver doesn't apply to the provision on
7 jurisdiction or standing because if there's no standing to
8 bring a claim for relief, there's no fundamental constitutional
9 rights exception that can get a court to hear your claim. And
10 I think that's the fundamental issue that we're dealing with
11 here when we look at -- when we look at the UPCCRA and whether
12 our client, Mr. Doe, could have sought relief.

13 I'm going to switch this and show a timeline for our
14 client.

15 THE COURT: When you say *Rowland v. State*, can you
16 give the cite?

17 MS. SCHWARZ: Sorry about that.

18 THE COURT: That's all right. And spell that just for
19 the record.

20 MS. SCHWARZ: The cite is *Rowland*, R-O-W-L-A-N-D, and
21 it's 42 So.3d 503 Mississippi 2010.

22 THE COURT: Thank you.

23 MS. SCHWARZ: Up here I'm going to show where Mr.
24 Doe -- the timeline of events that relates to Mr. Doe's
25 standing to seek post-conviction relief to explain why he does

1 not have standing to seek relief nor did he ever.

2 So on this graph, we have the 40 years between 1978
3 and now. And the top portion above the line shows changes in
4 the law, the Mississippi statute, the Supreme Court decision.
5 And below that line are events related to Mr. Doe. I'm going
6 to try to focus it a little bit.

7 THE COURT: I can see it fine.

8 MS. SCHWARZ: You can see it all right?

9 THE COURT: I can see it fine.

10 MS. SCHWARZ: Okay. I apologize for the smallness of
11 the writing of the footnotes. These are just citations to
12 facts and -- facts and cases in the record.

13 So in 1978, as can you see, Doe pleaded guilty to
14 unnatural intercourse. Six years later, the UPCCRA was enacted
15 for the first time. It provided standing only to those in
16 custody.

17 In 1994, the Mississippi Sex Offender Registration Act
18 was first enacted, and it applied to people who had had
19 convictions prior to the enactment of the law. At that time,
20 Mr. Doe was living out of state.

21 In November of 2002, Mr. Doe --

22 THE COURT: Let me interrupt you.

23 MS. SCHWARZ: Sure.

24 THE COURT: So you said the -- when the MSOR was
25 enacted in 1994, it applied to all those who had been

1 previously convicted who would have qualified. So persons like
2 Doe and others who might have been convicted of crimes that
3 were subject to be registered, even though they were convicted
4 20, 30, 40 years prior to 1994, they would have to comply with
5 whatever the requirements were in the new statute?

6 MS. SCHWARZ: That's exactly right, Your Honor. Even
7 if you took a plea, never litigated your case, as many people
8 with unnatural intercourse charges did, you were required, in
9 Mr. Doe's case, 16 and a half years later, to register with the
10 Mississippi Sex Offender Registry, even though that had never
11 been part of the plea deal. It hadn't existed and hadn't
12 really occurred to anybody.

13 And as Mr. Strugar will point out later, most of the
14 people who would be affected by a ruling here took pleas prior
15 to -- prior to the passage of *Lawrence v.* -- excuse me, prior
16 to the issuance of *Lawrence v. Texas* and many prior to the
17 enactment of the Mississippi Sex Offender Registry.

18 THE COURT: Do we know -- I know what the current
19 statute requires, as far as registration and all of that. In
20 1994, under that statute -- you know, there were
21 restrictions -- at least today there are restrictions on where
22 people can live, for example, within 3,000 feet, I believe, of
23 various recreational places, day cares and other things. In
24 1994, a person who was like Doe, who had been convicted, pled
25 guilty or otherwise been convicted of a registered offense, in

1 1994, were there restrictions on where they could live and/or
2 visit and things of that sort, so if, in 1993, Doe lived in a
3 neighborhood where he had lived since 1978, and his neighbors
4 across the street decided to open up a day care, would Doe
5 be -- was Doe -- was Doe or anyone who had been previously
6 convicted, were they required to move?

7 MS. SCHWARZ: Your Honor, I don't for certain know the
8 answer to that now, but I'm happy to provide it later. Most of
9 the restrictions in the statute continue from 1994 until today.
10 My understanding is that many of the amendments to the statute
11 added criminal offenses that could be counted under the
12 statute, but I'd like to check back and look at the 1994
13 version before answering that in full.

14 THE COURT: Okay. All right.

15 MS. SCHWARZ: So, in 1994, the law was enacted, and in
16 2003, *Lawrence v. Texas* was decided, which struck down
17 anti-sodomy or sodomy-only statutes, like the unnatural
18 intercourse statute.

19 So right before that happened, a few months before
20 that happened, Mr. Doe was residing in Mississippi and subject
21 to registration. When the 2003 decision comes down, he's no
22 longer in custody on the unnatural intercourse conviction, but
23 he does have to register. There's a registration requirement
24 that's imposed on him.

25 At that time, there is no ability for him or anyone

1 else subject to sex offender registration for an unnatural
2 intercourse statute to go to state court and seek
3 post-conviction relief, and that's because, at that time, the
4 UPCCRA did not provide standing for people in the first five
5 years of sex offender registration to seek post-conviction
6 relief. There was nothing that they could do.

7 So until 2009, which is the first point at which the
8 state legislature makes a limited expansion of jurisdiction to
9 out of custody -- to out-of-custody registrants in the first
10 five years of registration, that's the first time that someone
11 with a sex offender registration requirement who's not in
12 custody can seek post-conviction relief. But because that
13 small expansion of jurisdiction is limited to people who are in
14 the first five years of the requirement to register, and the
15 first five years of the requirement to register, which is
16 attached to when Mr. Doe reentered Mississippi in November of
17 2002, those five years had passed in -- by November of 2007,
18 and that's the final note on the bottom of the timeline. So
19 when those five years had elapsed, Mr. Doe had no ability to
20 seek post-conviction relief, even though *Lawrence v. Texas* had
21 already come down.

22 And then by the time the UPCCRA was amended and the
23 jurisdiction was expanded, the first five years of the
24 registration requirement had passed. So Mr. Doe never had the
25 ability to seek post-conviction relief because that was not

1 granted by the legislature in the statute. And *Rowland v.*
2 *State*, which provides waivers, equitable waivers to the time
3 bars, the procedural bars, just doesn't apply to the
4 jurisdictional bar that's in Section 1 of the UPCCRA.

5 And the reason we know that is there's a case, *Purvis*
6 *v. State*, *P-U-R-V-I-S v. State*. The citation is 240 So.3d 468,
7 2017, and I'm going to put the relevant portion of it up here.
8 So *Purvis v. State* is a post-*Rowland* case. It's -- of the 211
9 post-*Rowland* cases that we looked at, it's one of a couple of
10 cases where the people filing are out of custody and the only
11 one where the person has -- is filing because he's required to
12 register as a sex offender.

13 And in *Purvis v. State*, the court of appeals very
14 clearly states Mr. Purvis does not have standing. The court
15 doesn't have jurisdiction to hear his post-conviction relief
16 motion because five years have passed since his requirement to
17 register as a sex offender. And that's the last paragraph of
18 that decision. "Prisoners cannot collaterally attack their
19 convictions if they lack standing. Purvis had no standing
20 before the trial court, as he was never incarcerated. His PCR
21 motion was filed after he had fully served his probation and
22 more than five years after his registration as a sex offender."

23 And then footnote 1 makes clear that the trigger of --
24 the trigger to -- what triggers the requirement to register
25 is -- excuse me -- what triggers the five years is when the

1 person is required to register. And Mr. Purvis was required to
2 register in 2001. He never had a chance to use the UPCCRA.
3 And that's the situation for Mr. Doe as well.

4 Mr. Doe was required to register in 2002. And the
5 registration requirement kept running, as it does until today,
6 but by the time the UPCCRA was amended, his five years to
7 challenge his conviction, due to the change in intervening
8 Supreme Court law, had passed. So Mr. Doe never had the
9 opportunity to seek post-conviction relief, and he certainly
10 does not have the opportunity to seek post-conviction relief
11 now.

12 So that's our -- that's a short version of the answer
13 to the question the court posed. There is no procedural
14 vehicle for Mr. Doe to seek relief, and there never was. But
15 with your permission, I'd like to take a step back.

16 The question that we have from *Randell v. Johnson*
17 suggests that if we can show there's no procedural vehicle to
18 challenge the conviction in state court, the 1983 case should
19 be allowed to proceed. But that argument assumes that there's
20 a *Heck* bar here at all, and we don't think there is.

21 *Heck* is traditionally about those in custody. It's
22 clear that once someone is out of custody and not on parole or
23 probation but only subject to sex offender registration, he's
24 not in custody for habeas purposes. And although the state
25 UPCCRA expands that a little bit for people within the first

1 five years of the registration requirement, Mr. Doe has never
2 been part of that group.

3 Our position is that the *Heck* bar should not apply in
4 out-of-custody cases per the five justices in *Spencer v. Kemna*,
5 but we acknowledge that the issue is not settled, and we
6 recognize that in *Randell*, the Fifth Circuit declined to apply
7 the *Spencer v. Kemna* position in a 1983 damages case, in a 1983
8 damages case where the plaintiff could have filed for habeas
9 but did not.

10 In *Randell*, the plaintiff was seeking damages for an
11 illegal sentence for lack of credit for earlier time that he
12 had served. But he had never filed the habeas while he was in
13 custody, and so he never took the opportunity to try to reduce
14 his illegal sentence while he was incarcerated. Instead, he
15 waited until he was out and then sought damages, monetary
16 damages, for that illegal sentence. In other words, he didn't
17 mitigate his damages in any way.

18 The harm that *Randell* had suffered was the custody
19 itself, but by failing to seek relief and instead seeking
20 damages, it really -- he caused a lot of problems for the court
21 because it seemed that's not really what you're supposed to do
22 here. You can't -- the whole purpose of *Heck* is to make sure
23 that people don't use 1983 to get around the requirements of
24 habeas, and that seems to be what Mr. *Randell* did.

25 But here Mr. Doe is seeking prospective relief, not

1 damages. Unlike Mr. Randell, he could never have filed the
2 habeas petition on his substantive due process claim because
3 *Lawrence* came down after he was released. And he now can't
4 seek post-conviction relief because five years of standing to
5 file for post-conviction relief has passed and, in fact, never
6 existed for him.

7 Without the ability to seek prospective injunctive
8 relief here in this 1983 action, his harm will continue for
9 years to come, even though *Lawrence v. Texas* has, in effect,
10 struck down the Mississippi statute that requires him to
11 register. It's just manifestly unjust for the *Heck* bar to
12 apply in this situation, and this is not what the *Heck* bar
13 envisioned.

14 A ruling here that would say that Mr. Doe is barred
15 from seeking prospective injunctive relief because he had not
16 sought it, even though he couldn't, is many steps beyond
17 which -- beyond what *Heck* envisioned. *Randell* is already
18 stretching the *Heck* bar because it knocks out 1983 damages
19 claims made by those who are out of custody but who could have
20 filed a habeas petition. This court would have to rule that
21 the *Heck* bar applies to an even broader set of cases, to 1983
22 claims, not just -- not just, one, when you're out of custody;
23 but also, two, never had habeas available; three, have no other
24 procedural vehicle available, never had that procedural vehicle
25 available because of a quirk in the timing of the state law;

1 and crucially, five, when you're not seeking damages but rather
2 removal of a serious life-constraining burden. No court has
3 ruled that the *Heck* bar stretches to this set of circumstances.
4 This has just never occurred in any federal court that we have
5 seen.

6 Also, this wasn't really the problem that *Heck* had
7 sought to solve. *Heck* is concerned with competing findings
8 where a 1983 case may imply the invalidity of a state court
9 conviction. But here the statute is unconstitutional. The
10 conviction cannot be enforced. There's just no reason that a
11 person in Mr. Doe's position would have to go back to state
12 court to have it restate what has already been made clear by
13 the Supreme Court.

14 So plaintiffs argue that this court can rule on the
15 1983 claim. First, there's no procedural vehicle for Mr. Doe
16 to return to state court, and *Rowland v. State* can't give it to
17 him. Second, there never was, because the UPCCRA amendments
18 passed too late to help him. Third, there's no case stretching
19 the *Heck* bar to encompass the 1983 claims of people who are out
20 of custody with no habeas availability who are required to
21 register and are seeking only equitable relief.

22 The court could also rule for our client without
23 addressing *Heck* at all. And our substantive due process claim
24 gets to the validity of the unnatural intercourse statute and
25 the validity of the sex offender registration requirement for

1 people with UI convictions. Our equal protection claim just
2 deals with the validity of the sex offender registration
3 requirement, and it doesn't require the court to analyze the
4 *Heck* bar or the UPCCRA.

5 We've briefed this and the court didn't have any
6 questions in the order, but I did want to answer defendants'
7 position in their briefing, that the UI statute and the
8 prostitution statute are apples and oranges.

9 The two statutes are apples and apples, as the
10 defendants put it. Mr. Doe faces a collateral consequence of a
11 conviction under a statute that bars oral or anal sex. That
12 statute is silent as to consent. The prostitution statute bars
13 oral and anal sex for money and is also silent as to consent.
14 It's not enough to argue, as the state does, that some people
15 with UI convictions, and it's certainly not all, may have some
16 forcible underlying conduct and that the transactional nature
17 of prostitution suggests it's not forcible. For the sex
18 worker, that's very unlikely to be the case.

19 But in any case, as Your Honor has recognized in the
20 *Lawrence* discussion in your order and as defendants concede,
21 the only trigger for registration is the conviction. There's
22 no mechanism in the sex offender registration statute to look
23 at any underlying facts. Both statutes are silent as to
24 consent. That is what we have to look at for equal protection
25 purposes.

1 Your Honor, unless you have more questions about it,
2 I'm going to step aside, and with your permission, I'd like
3 some chance to rebut and to answer any questions that may come
4 up in the defendants' briefing.

5 THE COURT: Let me ask you this. Doe was convicted
6 for having sex -- we don't know whether it was consensual or
7 nonconsensual sex -- with another inmate while he was
8 incarcerated. That's the underlying context of the crime. He
9 pled guilty to that particular crime.

10 I don't know if the plea colloquy -- I don't think it
11 was ever part of the record or anything of that to sort of
12 ferret out what the evidence was. And even if there is
13 evidence, is the court required to look at whatever evidence
14 that might have existed to which this defendant pled guilty?
15 The plea itself is for having sex with another inmate, and that
16 inmate happened to have been of the same sex, obviously, and
17 that was the -- I guess that was the conviction. Right?

18 MS. SCHWARZ: Uh-huh, yes. Sodomy.

19 THE COURT: Sodomy.

20 MS. SCHWARZ: Yes.

21 THE COURT: And that required the post-registration
22 requirements.

23 MS. SCHWARZ: That's right.

24 THE COURT: And maybe you'll address it or the state
25 or your counterpart. Should we not give the state court a

1 first opportunity to deal with this issue rather than the
2 federal courts here? And I realize you're traveling under
3 1983, so, obviously, this court has jurisdiction under 1983,
4 but with respect to the -- we -- the case that you cited,
5 *Purvis v. State*, suggests it would be futile, I guess. I mean,
6 because a circuit court would have to defer to what the court
7 of appeals has said in construing the UPC -- I guess. But
8 shouldn't we give the -- since the court of appeals is not the
9 court of highest jurisdiction, shouldn't we give the state
10 courts the opportunity to deal with this issue?

11 MS. SCHWARZ: Well, we don't know how Mr. Doe can get
12 to court. I mean, it's very clear from the statute, the
13 UPCCRA, that the only way to get to court, the only way to have
14 standing to seek post-conviction relief, apart from any
15 procedural issues, is if he is either in custody in some way on
16 the original conviction or within the first five years of the
17 registration requirement.

18 THE COURT: Because we figure that if he files this
19 lawsuit in state court, the state will respond by -- the answer
20 would be dismissed for lack of jurisdiction because the
21 defendant lacks -- excuse me, because the plaintiff lacks
22 standing?

23 MS. SCHWARZ: That's right, Your Honor. And that
24 makes sense because the UPCCRA, I believe it's another case,
25 *Brown v. State*, the UPCCRA didn't expand standing to a huge

1 universe of people. It made a limited expansion based on the
2 legislative history, based on the sort of development at that
3 time of DNA evidence that might provide people another avenue
4 to challenge their convictions that they hadn't had before.

5 But it's not possible for the fundamental
6 constitutional rights exception to get him around the
7 jurisdictional bar. The state court doesn't have the ability
8 to hear every claim, and the legislature has made clear that --
9 the legislature and the courts interpreting the legislation
10 have made clear jurisdiction to hear post-conviction relief is
11 limited to people in custody and custody-like situations and
12 people within the first five years of sex offender
13 registration. And it's hard to imagine the state court opening
14 the jurisdiction to the many hundreds of people on the sex
15 offender registry who could conceivably come back and say,
16 *Well, I have another case that I'd like to bring, and I'm post*
17 *the five years, but this case, Doe v. State, suggests that I*
18 *can come back and have my post-conviction relief motion heard.*
19 There's just no way to get around the jurisdictional bar.
20 There's no -- it's not possible to waive the standing
21 requirement.

22 THE COURT: And the jurisdictional bar or the standing
23 requirement, you have to meet that first. If Doe can meet
24 that, there might be other bars, but Doe could, in a habeas
25 context, he could possibly argue this is a miscarriage of

1 justice and, therefore, I'm entitled to habeas relief.

2 MS. SCHWARZ: Yes, Your Honor.

3 THE COURT: And sort of navigate it through that. But
4 I guess there is no door for him to initially walk through to
5 make any other arguments.

6 MS. SCHWARZ: That's right, Your Honor. There's no
7 procedural vehicle now, and there never was.

8 THE COURT: All right. Thank you. Mr. Barnes?

9 MR. BARNES: Can I be heard on these issues?

10 THE COURT: Yes, we're going to separate it in that
11 way for this compartmentalized brain of mine.

12 MR. BARNES: Good morning. May it please the court.

13 THE COURT: You may proceed.

14 MR. BARNES: Your Honor, we disagree with several
15 parts of counsel opposite's argument. First and foremost is
16 the concept that *Heck* does not bar this action. The Fifth
17 Circuit has spoken clearly in *Randell* that *Heck* -- the *Heck* bar
18 applies regardless of whether there are procedural vehicles to
19 assert a claim in state court, regardless of the type of relief
20 that has been sought, and it just simply doesn't matter whether
21 or not there is a procedural vehicle in state court.

22 The Fifth Circuit has indicated in its cases, has
23 noted at times, that many of the plaintiffs, when this
24 situation came up, they said, *Well, actually, this plaintiff*
25 *says he doesn't have a vehicle, but actually he's entitled to*

1 seek habeas -- federal habeas relief. Or This person --

2 THE COURT: In this instance, he has -- assuming he
3 has no vehicle, no habeas, he cannot -- well, let me ask the
4 state this. Can this defendant seek habeas relief?

5 MR. BARNES: First of all, Your Honor.

6 THE COURT: Excuse me. It's plaintiff. Excuse me.

7 MR. BARNES: Your Honor, first of all, and I'll come
8 back to this, but it doesn't matter under binding Fifth Circuit
9 precedent. However, it appears unlikely that he would have an
10 avenue to relief today because we do agree that the Mississippi
11 courts have interpreted the PCR statute, the Section 1 to be a
12 standing requirement, Section 2 to involve -- to include the
13 statute of limitations, the three-year statute of limitations,
14 which does have exceptions for intervening case law. However,
15 you've got to pass the standing bar first. Now -- and we also
16 agree that prior to the amendment in 2009, the PCR statute only
17 granted standing to people who were in custody. But in 2009,
18 that category was expanded to include people subject to the
19 probation, et cetera, and the specific language concerning sex
20 offender registrants, people who are subject to sex offender
21 registration for the period of the registration or for the
22 first five years of the registration, whichever is the shorter
23 period.

24 So we agree that Mr. Doe would have only had standing
25 for five years if this statute applied to him. Now, plaintiffs

1 say it never applied to him. He never had a chance to assert
2 it. We disagree. And that's why regardless of whether there's
3 a procedural vehicle now, there was a procedural vehicle
4 available to Mr. Doe, and he simply did not take it, because
5 plaintiffs say that Mr. Doe first became subject to
6 registration requirement in 2002. Then he left the state.
7 Then he came back to the state in 2008, when he registered
8 again. They say I think 2007 maybe he became subject to the
9 requirement, but they say the statute wasn't amended until
10 2009. Therefore, he never had a chance. But that's not the
11 way the sex offender registration works in Mississippi. In
12 Mississippi, the time of registration only -- the clock only
13 ticks off when you're in state and not in custody.

14 Under Mississippi law, if someone goes out of state --
15 like here, 25 years is the registration time for an unnatural
16 intercourse conviction. There's three tiers: 15 years, 25
17 years or life. This is a 25-year, a tier 2 offense. So if a
18 person is in the state out of custody for five years, that
19 counts as five years of their registration requirement. If
20 they move to Florida for 20 years and then come back to
21 Mississippi, only then does the clock start ticking again,
22 ticking off year six, seven, et cetera.

23 So when Mr. Doe -- even if he was subject to
24 registration in 2002 but left the state in 2003, the clock
25 stopped. That only counted as one year of his registration

1 requirement. That's a straightforward analysis of the
2 Mississippi statute and the way time is computed.

3 THE COURT: So --

4 MR. BARNES: And then when he came back, when he got
5 out of federal prison and he registered in 2008 -- again, now,
6 at that time the statute had not been amended -- he didn't have
7 standing. But in 2009, when the legislature amended the
8 statute, that has one of two effects, and it has not been
9 addressed by the court. Either, one, he had five years from
10 2009, i.e., to 2014, he had those five years of standing when
11 he could have sought relief, he had a procedural vehicle, or in
12 2009, at the minimum, he had the time remaining of his first
13 five years of registration, which, again, 2002 to 2003 is one
14 year. He registered in 2008. He had four years left of --
15 four years left. Bare minimum -- I realize this is getting a
16 little complicated -- he had at least three years after 2009.

17 His first five years of registration did not expire
18 until, at earliest, 2012. 2002 to 2003, 2008 to 2012. The
19 statute providing standing to Mr. Doe was in effect in 2009.
20 He had at least three years. And I said it has one of two
21 effects. It could be argued that he had five years from the
22 time the statute first gave him that standing.

23 Now, it is true that the Mississippi Supreme Court or
24 the Mississippi courts have held that procedural bars don't
25 apply when you're talking about the statute of limitations,

1 intervening law, fundamental rights. The Mississippi Supreme
2 Court has never spoken to the effect of the expanded standing.

3 Now, the Mississippi Court of Appeals, which has
4 rendered almost every case that we -- that we've been able to
5 find on this, the Mississippi Court of Appeals -- and yes, the
6 courts do follow them, but as we all know, the Mississippi
7 Supreme Court has the final word and can certainly disagree
8 with the court of appeals decision and overturn it. The court
9 of appeals has said to treat this statute just the way you did
10 the old one: Section 1 is standing; Section 2 is statute of
11 limitations and exceptions. So -- but whether or not the
12 Mississippi Supreme Court would agree with that, we don't know.

13 Would the state assert that he lacked standing at this
14 time? Yes. I have no doubt that that's what our criminal
15 division would assert. I don't want to put words in their
16 mouth, don't want to limit what they might say, but candidly, I
17 believe they would say he doesn't have standing. However, if
18 Mr. Doe had filed this within the time allowed by the statute,
19 when he had standing, he could have gotten a ruling up or down
20 in the lower court, and then there would have been an appeal.
21 The Mississippi Supreme Court can reverse a lower court, a
22 lower court decision on a PCR motion.

23 If he was to bring it now, yes, the state would say
24 he lacked standing. There would be a ruling on that that Doe
25 still has -- would have available the opportunity to appeal

1 that to the Mississippi Supreme Court and to get a definitive
2 ruling, one, whether or not he had standing or not, and if the
3 court determined he had standing -- and the Mississippi Supreme
4 Court, you know, can do pretty much -- it has broad powers --
5 the court might well rule on the merits of his conviction, the
6 impact on Doe. As the court indicated in its order, that is
7 one way that the statute could be preserved, the way Virginia
8 did it was a limiting construction. That would provide the
9 Mississippi Supreme Court with a vehicle to do that.

10 However, this is why we do not think that that is
11 appropriate and why we think it is -- the court should simply
12 rule thumbs up or thumbs down at this point.

13 First of all, *Heck* says you dismiss. A stay or
14 abstention, as I understand the *Heck* doctrine, is only
15 appropriate when you have -- when the actual state proceedings,
16 the trial, the appeal, et cetera, are ongoing. That's when a
17 court -- it might be appropriate for a federal court to say,
18 *I'm going to wait and see whether or not this person gets*
19 *relief from the state.* However, *Heck* says you dismiss, period.
20 *Heck* says, first, any action -- any 1983 action that would
21 imply the invalidity of a conviction cannot be brought unless
22 one of those requirements, i.e., the conviction is overturned,
23 it's reversed, et cetera, happens first. And in *Randell*, the
24 Fifth Circuit said -- first of all, *Randell* was no longer in
25 custody. He was not entitled to -- so he had no habeas remedy

1 in federal court, because federal habeas is only available to
2 people in custody. And then, as you see in this paragraph,
3 Mr. Randell says, *I can't file a habeas, but I don't have to*
4 *prove that because I can no longer seek habeas relief.* The
5 Fifth Circuit said *He's barred, it doesn't matter.*

6 The next paragraph, the Fifth Circuit addressed the
7 conclusions and reasoning of other circuits. And admittedly,
8 there's a disagreement between the Fifth Circuit and other
9 circuits regarding the breadth of the *Heck* doctrine. Fifth
10 Circuit says, you know, "Three circuits have concluded that the
11 Supreme Court -- if presented with the question -- would relax
12 *Heck's* universal favorable termination requirement for
13 plaintiffs who have no procedural vehicle to challenge their
14 conviction. Randell has not shown that such a procedural
15 vehicle is lacking; he speaks only of inability to obtain
16 habeas relief."

17 So that statement by itself would seem to imply that
18 perhaps the availability of a procedural vehicle would change
19 the outcome, but the next paragraph eliminates that
20 possibility. "In the alternative, we decline to announce for
21 the Supreme Court that it has overruled one of its decisions."

22 The court then quotes the First Circuit with approval
23 of saying even if a Supreme Court decision has been brought
24 into question, even by members of the Supreme Court, we're
25 still bound to apply the Supreme Court ruling until it is

1 changed.

2 And the Fifth Circuit has said, and the cases are
3 unreported in some extent, but the Fifth Circuit has said,
4 *We're bound by Randell*. The Fifth Circuit has said in several
5 cases, unreported decisions, which indicates that the panels of
6 the Fifth Circuit find this to be -- believe this to be settled
7 law that a panel cannot overturn, they say, *We're bound by*
8 *Randell*. Whether we think *Muhammad* is further evidence that
9 the Supreme Court might be moving away, we still can't change
10 that for two reasons: One, we can't tell the Supreme Court
11 that when it calls into question a ruling, that the ruling --
12 that the ruling -- the holding simply is gone, has no longer --
13 no longer has any effect. Second is the Fifth Circuit rule
14 that one panel cannot overturn another panel. So unless and
15 until the Fifth Circuit, sitting en banc, were to reverse
16 *Randell*, it remains binding circuit precedent.

17 And in *Muhammad v. Close* --

18 THE COURT: Let me ask you this. Is there a fine line
19 to suggest that because *Randell* was seeking monetary damages,
20 that he was seeking damages -- and I realize *Heck* has been --
21 talked about equitable relief, civil commitments and everything
22 else, but because *Randell* was seeking monetary damages, that
23 there can be a slight distinction -- that we could -- that the
24 court could use that as a way to distinguish *Randell*.

25 MR. BARNES: I don't think so, Your Honor.

1 THE COURT: Okay.

2 MR. BARNES: I think that the *Wilkinson v. Dotson* case
3 that the court cited in its order precludes that, because
4 *Dotson* pretty clearly says a 1983 action is barred, absent
5 prior invalidation, as the court said in the order, no matter
6 the relief sought, damages or equitable relief, no matter the
7 target of the prisoner's suit, if success in that action would
8 necessarily demonstrate the invalidity of confinement or its
9 duration. So where we're not talking about confinement or
10 duration.

11 The Fifth Circuit decisions interpreting *Heck* we think
12 do not leave that loophole open. We recognize the court, the
13 reason for asking that and saying is there a distinction under
14 the Fifth Circuit precedent, we think the answer is no. And,
15 you know, the answer might be different if we were in the Ninth
16 Circuit or the Seventh Circuit or another circuit, but in this
17 circuit, we believe that binding Fifth Circuit precedent says
18 *Heck* applies regardless of whether a procedural vehicle ever
19 existed. And we think in this case, the analysis shows that
20 Mr. Doe had a procedural vehicle at least for several years but
21 failed to take advantage of it. I realize the plaintiffs
22 disagree, but we think our position is the better reasoned one.

23 And this is why the no procedural vehicle requirement
24 would be a serious problem if it was adopted as the law. If
25 that was the case, all a plaintiff would have to do to avoid a

1 Heck bar would be wait until you're out of confinement, you're
2 no longer in custody, so you no longer have federal habeas
3 relief available. Then whatever remedies any state gives you
4 to challenge your conviction, you just wait until the time
5 expires. Then you come to federal court and file a 1983 action
6 and say, *Heck doesn't bar my claim. Why doesn't Heck bar your*
7 *claim? Well, because I no longer have a procedural vehicle to*
8 *challenge my conviction.* So that would totally gut the Heck
9 doctrine if that was the case because, again, all you would
10 have to do is wait out the state remedy.

11 Now --

12 THE COURT: Let me --

13 MR. BARNES: Yes, sir.

14 THE COURT: -- pose this hypothetical. Let me ask
15 this question. Suppose the defendant -- I think Mississippi
16 has tinkered with over the years its -- who might be classified
17 as a minor or who might be -- at what point in time one might
18 give consent. And I realize the consent ages have probably
19 increased over the years. And I'm talking off the top of my
20 head, Mr. Barnes. I don't know. The age of consent might be
21 16 now, or so -- 17 -- 16, 17. And I'm pretty sure in
22 Mississippi, at one time it was younger than that.

23 MR. BARNES: There's a sliding scale now, Your Honor,
24 and we can -- again, we can cite you to the appropriate
25 statute. Off the top of my head, it appears now that it's 17

1 under some circumstances. I do know that when I was growing
2 up, it was 16. I just happen to know that. They drilled it
3 into our heads.

4 But in Mississippi now, because of cases involving
5 injustice with, like, young couples, where there was only, say,
6 a two-year time span difference between them, and where one --
7 like the girlfriend was 15 and the boyfriend was 18,
8 Mississippi, like many states, said, *You know, we don't think*
9 *that that sort of statutory rape conviction is something that's*
10 *fair and just and should follow a person the rest of their*
11 *life, and so it is limited.*

12 Now, if you're over 18, and you're more than a certain
13 number of years older than the victim, then it's plain ole
14 regular statutory rape that's just forever. Same thing, I
15 believe, if -- the other exception is if the victim is under a
16 certain age. I believe if the victim is 14 or under 14, it
17 doesn't matter, as long as the offender is, like, more than a
18 year or two older. So there's some relief. But, Your Honor,
19 that simply goes to show, we think, that you have to look at
20 the circumstances of a person's conviction.

21 THE COURT: No, my question, though, is suppose
22 somebody had been convicted under that statute, pled guilty
23 under a particular statute, say that he had -- that they were
24 within the time period of being -- of fully being able to be
25 prosecuted and found guilty of the certain charge, but the

1 state later amends the statute and -- to show that the
2 conviction today -- there could be no conviction today. The
3 person has completed that particular sentence and is out of
4 custody and may be subject to some sort of registration
5 requirement because, at the time, it was a full and complete
6 conviction. What is that person supposed to do?

7 MR. BARNES: I think that person has the same option
8 now that Mr. Doe did when the statute was changed. I think
9 that person would have five years, if they were under a
10 registration requirement, to come forward and challenge that --
11 they would have standing to challenge the conviction.

12 And if it was something like statutory rape, then they
13 would have to convince the court that they met one of the
14 exceptions to the three-year statute of limitations. But I
15 think that's exactly -- would be exactly the same case. They
16 would have exactly the same options if they were required to
17 register because that conviction involved a minor. And that
18 could vary, depending on the type of crime, whether or not
19 there's a registration requirement or not.

20 THE COURT: And in looking at the cases in the other
21 circuits and other things, isn't the underlying -- isn't one of
22 the underlying problems how the courts, including the Supreme
23 Court, had looked at habeas in a context and what Section
24 1983 -- and not to use everybody else's words, but the text and
25 context and all that kind of stuff, why 1983 was enacted.

1 Isn't there some tension between that, when 1983 talks about
2 the deprivation of any right and how broad we should look at
3 the relief that 1983 might provide vis-a-vis some habeas
4 statute or otherwise?

5 MR. BARNES: Well, I think there might be some
6 tension, Your Honor, but I don't think we're the ones that get
7 to decide that. I think the Supreme Court has to decide that,
8 especially -- of course, it's obvious the Supreme Court has to
9 decide that; we can't. But in light of the language of *Heck*
10 itself, you know, the Supreme Court has sort of -- has looked
11 at *Heck*, and in *Muhammad* they sort of said it's an exhaustion
12 requirement. That was a per curiam opinion, *Muhammad v. Close*.
13 And, of course -- well, it's a habeas exhaustion requirement.

14 COURT REPORTER: Spell that.

15 MR. BARNES: *Muhammad v. Close*, C-L-O-S-E. I
16 apologize. You know me. Just tell me to slow down. I
17 apologize.

18 But *Muhammad v. Close* called it a habeas exhaustion
19 requirement. But if you go back to *Heck*, Justice Scalia in
20 *Heck* said, *We are not talking about exhaustion. We're talking*
21 *about claims not being cognizable under Section 1983.*

22 So I agree that there's tension in the way that the
23 Supreme Court, you know, has talked about *Heck*, but what is not
24 intentioned is what the Fifth Circuit has said about *Heck*. And
25 again, we just think that no matter where we go, we think the

1 Fifth Circuit, if it looks at this case, it's going to look at
2 this and say *Heck* bars this, and that's the end of the story.
3 We don't get to the merits, we don't get to the *Lawrence* issue,
4 because we're bound by circuit precedent to apply *Heck* to all
5 these cases.

6 Now, the court could change its mind. You know, the
7 Fifth Circuit sitting en banc could say there's an exception to
8 *Randell*, but no three-judge panel of the Fifth Circuit could
9 say that. They might say, we disagree with this. You know,
10 you've obviously read decisions where a panel might say, we
11 disagree, or we don't think this panel's reasoning is still
12 correct, but we're bound by it unless the court en banc rules,
13 you know, inviting, basically begging, saying, *We really think*
14 *the whole court should take this up. We think that's exactly*
15 *where we are with regards to Heck in this case.*

16 So that's our analysis of *Heck*. Those are the points
17 I wanted to make about *Heck*. Those are the points I wanted to
18 make about the availability to Mr. Doe of a procedural vehicle.
19 And if the court has any questions, I'll be happy to try to
20 answer them. But otherwise, I don't want to start veering into
21 other subjects.

22 THE COURT: Okay. I don't think -- I don't -- it
23 may -- it probably does force you to veer into another subject,
24 but this court has no authority to sort of certify a question.
25 I mean, I imagine if this court rules in a way that

1 ultimately -- whichever way the court rules, I would imagine
2 nobody's going to be satisfied until the Fifth Circuit speaks
3 to the issue, regardless of whether the Fifth Circuit says,
4 we're bound by *Heck*. I guess it could certify the other
5 question to the State Supreme Court, saying, *Look, you have a*
6 *statute that -- you have a person who's been convicted of a*
7 *crime that does not exist anymore. Based on our interpretation*
8 *of what Lawrence versus Texas said, he has no procedure -- your*
9 *statute appears to be overbroad. Will you address that? Is*
10 that something that might happen down the road?

11 MR. BARNES: Well, certainly the Fifth Circuit would
12 have the prerogative to ask. As we know, famously there's at
13 least one occasion where the Supreme Court said, No, we're not
14 going to accept the certified -- we're not going to answer the
15 question. But yes, the Fifth Circuit could ask. Whether it
16 would, of course, is the Fifth Circuit's decision.

17 I certainly -- obviously, that would be available for
18 any issue of state law. It could be available if the court
19 wanted to use it as to the standing question, or they could --
20 if they decided that *Heck* did not require dismissal of this
21 action outright, if the Fifth Circuit en banc was to reverse
22 *Randell*, I guess the court could certify the question of
23 whether there's a limiting construction that the Mississippi
24 Supreme Court might apply to the statute a la Virginia.

25 The problem -- and I do agree, and one point I did

1 want to make, and I see in my notes I didn't mention before, is
2 that we do think that it's appropriate for a state court in the
3 first instance, you know, to have the opportunity to speak on
4 an issue like this, an issue of state law, the interpretation
5 of the statute, but unfortunately, because Mr. Doe did not
6 bring that action, you know, it very well may be foreclosed.

7 However, there is nothing that bars Mr. Doe from
8 filing such an action, regardless of what this court does. You
9 know, parallel state and federal actions are perfectly
10 permissible. But he could file that action. He could -- and
11 then regardless of the ruling, if he's not happy with the
12 ruling of the lower court, doesn't have standing, et cetera, or
13 the merits, he could appeal that. And certainly I expect that
14 if that went up, we would certainly ask the Supreme Court, you
15 know, to reach all of those questions. But the state would
16 certainly say he lacked standing.

17 And so I don't want to -- I don't want to -- I don't
18 want to quibble or seem like -- I don't want to be disingenuous
19 with the court. Yes, I think that would be the position of the
20 state, that he lacked standing. But he had a remedy. He did
21 have standing. He didn't take advantage of it.

22 THE COURT: Okay. Thank you, Mr. Barnes. I
23 appreciate it. Ms. Schwarz.

24 MS. SCHWARZ: Thank you, Your Honor. So I think I
25 first want to turn to the actual language in *Randell*, which is

1 a per curiam case brought by a pro se individual who did not
2 have counsel when he was litigating his claim.

3 The actual language of *Randell* says, "Because *Randell*
4 is seeking damages pursuant to Section 1983 for
5 unconstitutional imprisonment and has not satisfied the
6 favorable termination requirement of *Heck*, he is barred from
7 any recovery and fails to state a claim upon which relief can
8 be granted."

9 The nature of the case, a per curiam decision where
10 the person bringing the case had no opportunity for guidance
11 from counsel, all militates in favor of reading *Randell*
12 narrowly. But what the defendants want to do is not just read
13 *Randell* broadly but actually expand *Randell* to this universe of
14 sex offender registration that it just -- *Heck* was never
15 contemplated to attack.

16 THE COURT: But what about the Supreme Court's -
17 excuse me, the Fifth Circuit's later stances on expanding *Heck*?
18 I think even in *Smith v. Hood*, they say now it applies to civil
19 commitment proceedings, I believe, which again challenges the
20 underlying sort of conviction -- whatever that was, a
21 conviction or whatever. It was a civil commitment. They said
22 you know, *Heck* governs, and therefore, you know, you cannot
23 challenge it. I mean, they've gone on to expand what type of
24 relief someone -- any type of relief someone may be looking at
25 calls into question the underlying conviction or -- I guess the

1 original *Heck* thing is to sort of stay any sort of -- we see it
2 all the time in the context of Fourth Amendment cases,
3 excessive force cases, where someone might be under indictment
4 for assault and battery or something like that, and they file
5 an excessive force claim and they say, *You know, either stay*
6 *the underlying thing until we ferret out whether or not this*
7 *person is going to be determined to be guilty for the assault*
8 *charge in state court.* That was the impetus behind *Heck*.
9 Right? So -- but the Fifth Circuit seems to use *Randell* and
10 others to broadly say -- and they recognize that *Randell* was a
11 pro se defendant or plaintiff.

12 MS. SCHWARZ: Well, Your Honor, yes, *Heck* initially is
13 a case for -- a 1983 case for damages for malicious
14 prosecution, and that context has been expanded slowly over the
15 years. But it's never been expanded to sex offender
16 registration.

17 My understanding of *Smith v. Hood* is that it just
18 treats civil commitment as custody. But several circuits have
19 held that sex offender registration is not custody. It's not
20 custody. It's not analogous to incarceration or civil
21 commitment. It is only this quirk of Mississippi state law
22 that provides a small window for some people with sex offender
23 registration requirements to challenge the underlying
24 conviction, and a lot of that came about because of the
25 developments in the technology. They wanted to give the

1 ability to a limited number of people for the period -- for a
2 small amount of time to challenge their underlying convictions,
3 presumably based on the biological evidence that they could
4 find.

5 But taking a step back and looking at what *Heck* is
6 for, and Your Honor's examples of, you know, Fourth Amendment
7 findings that can end up calling into question a finding that a
8 state court made, we're not in a situation where the federal
9 court here could imply that Mr. Doe's conviction was
10 unconstitutional. The statute under which he is convicted has
11 been declared unconstitutional, so this is really a very
12 different context and a very different concern from what *Heck*
13 was originally grappling with. *Heck* has, you know, four --
14 *Heck* contemplates four ways that a statute -- that a proceeding
15 can be terminated favorably, and it's recovering damages
16 for alleged -- sorry -- where -- "in order to recover damages,"
17 *Heck* says, "for allegedly unconstitutional conviction or
18 imprisonment --

19 THE COURT: Make sure you're speaking into the
20 microphone.

21 MS. SCHWARZ: Thank you -- "the plaintiff must prove
22 that the conviction or sentence has been reversed on direct
23 appeal" -- we don't have that -- "expunged by an executive
24 order, declared invalid by a state tribunal authorized to make
25 such a determination, or called into question by a federal

1 court's issuance of a writ of habeas corpus."

2 Now, we don't fit into any of those four categories,
3 but it can't be that the *Heck* bar -- the favorable termination
4 rule is met where a state court declares a statute invalid but
5 not where the Supreme Court of the United States declares a
6 statute invalid. *Heck* just does not contemplate the situation
7 that we're facing here. There's no implication to be made.
8 The statute is invalid.

9 And getting sort of less philosophical about it, I did
10 want to address some of the factual arguments and arguments
11 about the working of the state registration law. The state is
12 arguing that because the Mississippi sex offender registration
13 requirements have numerous ways for the requirement to register
14 to be tolled, if you leave the state for three years, if you
15 start registering in 2000, you leave the state in 2003 for
16 seven years, and you come back in 2010, ten years has not
17 passed for the purpose of your 25-year registration
18 requirement.

19 The way the state treats that, and this came out in
20 the record, is that you've only served three -- you've only --
21 I know they don't consider it served, but, in effect, you've
22 only done the time of three years, and at year ten, you have to
23 start all over again with another 22 years left. That is how
24 the sex offender registration statute works, and it's extremely
25 onerous, and it's why so many people are on the registry for

1 years, and years, and years, even if they are only tier 1, ten
2 years, or tier 2, 25 years, like the unnatural intercourse
3 convictions require.

4 But that way of looking at the registration
5 requirement does not get automatically imported into the small
6 window of jurisdiction provided by the UPCCRA. The courts
7 don't look at that five years that way. They clearly say it's
8 from the time the person was required to register. *Purvis v.*
9 *State* is a 9-0 decision by the court of appeals. Cert was
10 denied. It's just sort of mixing two different ways of looking
11 at the time.

12 And, in effect, what the defendants are arguing is
13 that actually post-conviction relief should be available to
14 people on the sex offender registry, you know, in some cases
15 for decades after the registration requirement began because if
16 they depart the state or they are not on the registry, that
17 would expand their ability to seek relief. I don't think the
18 state is going to argue that in state court when we bring our
19 jurisdictional -- if we're told to bring our claim, that we
20 need to seek post-conviction relief in state court.

21 And I also wanted to correct a couple of facts. The
22 record that we have, Mr. Doe was in Mississippi in 2002. It's
23 Exhibit 1 of the defendants' motion for summary judgment, Bates
24 Number MSOR389. But it's pretty clear that Mr. Doe is in
25 Mississippi at least through October of '06, based on the

1 records that they have given us. So we think the five years
2 had elapsed any way you slice it.

3 But I want to return again to this idea that *Randell*
4 can be read so broadly as to exclude Mr. Doe from Section 1983
5 relief where he is forced to register under a statute that the
6 Supreme Court declared invalid 15 years ago. That can't be
7 what *Heck* requires. That's certainly not what *Randell*
8 contemplated. And this court would not be just applying
9 *Randell* here if it ruled that way. It would be dramatically
10 expanding the *Heck* bar to reach sex offender registration
11 requirements in a way that none of the cases have ever
12 contemplated. Thank you, Your Honor.

13 THE COURT: Okay.

14 MR. BARNES: Your Honor, may I raise a couple points?

15 THE COURT: Yes.

16 MR. BARNES: Thank you, Your Honor. Very briefly.

17 First of all --

18 THE COURT: Raise the mic. You're a little bit taller
19 than she is.

20 MR. BARNES: I apologize.

21 THE COURT: That's all right.

22 MR. BARNES: First of all, the concept that plaintiffs
23 are not challenging Mr. Doe's conviction and that the concept
24 that if a Supreme Court case declares a conviction
25 unconstitutional, that that's not the same thing as implying

1 the constitution -- the conviction is unconstitutional. *Heck*
2 says anything that brings it into doubt. Anything that is --
3 could be a collateral attack on the conviction is barred, and
4 plaintiff's amended complaint seeks a declaration that the
5 unnatural intercourse statute -- one, that's the conviction
6 they are challenging when they challenge the unnatural
7 intercourse statute. They are also challenging the
8 registration requirement, a separate statute -- as both
9 facially unconstitutional and, quote, unconstitutional and
10 unenforceable as applied to -- we have "all" -- his conviction,
11 closed quotes. That's on page 25 of our memorandum in support
12 of our motion for summary judgment. So plaintiffs specifically
13 say, *We're saying his conviction is invalid.*

14 Now, the court pointed out in the order that the Fifth
15 Circuit case or cases that we had cited on the broader effect
16 of *Heck* were, in fact, Federal Appendix cases, that those are
17 unreported and, therefore, under Fifth Circuit rules, have no
18 precedential effect, but as I mentioned earlier, we know that
19 that generally means, the Fifth Circuit, when it doesn't
20 publish cases, it's because they think there's settled law,
21 that fact situation has been presented.

22 In 2015, as the court I'm sure is well aware, in *Black*
23 *v. Hathaway*, which is 616 Federal Appendix 650, the panel
24 included a good discussion, a lengthy discussion about *Muhammad*
25 and about the panel overruling another panel rule and concluded

1 that Muhammad failed to effect a change in the law that would
2 allow this panel to revisit the court's decision in *Randell*.

3 But then I also wanted to bring to the court's
4 attention one other case in the Federal Appendix, *Collins v.*
5 *Ainsworth*. This is a 2005 case, but I want to bring it to the
6 court's attention because it does go specifically to the issue
7 before the court.

8 In that case -- let me fold this over because I've got
9 a note scribbled at the top there that I don't want to be in
10 the record. While counsel opposite was speaking, I scribbled a
11 little note. But the convicted plaintiff -- sorry. Paragraph
12 2, page 379, "The district court properly rejected the
13 convicted plaintiff's 1983 claim seeking injunctive relief
14 against the Copiah County defendants based on the doctrine of
15 *Heck v. Humphrey*. The convicted plaintiffs contend that
16 because each were only fined, and not confined, as a result of
17 their convictions, neither habeas nor any other procedural
18 avenue is available for challenging their convictions, and
19 consequently, their situation presents exception to the *Heck*
20 doctrine. This contention is barred by *Randell* -- or *Randell*
21 *v. Johnson*."

22 And the reason I wanted to point that out is -- again,
23 if I can do it without -- the judges on that panel, Jolly,
24 Higginbotham and Smith, certainly Judges Jolly and
25 Higginbotham, are certainly not known to be firebrand

1 conservatives. They certainly are fair jurists who would not
2 reach that decision if they were not convinced it was
3 necessary.

4 So they are challenging the conviction. And, Your
5 Honor, if you look at the PCR statute itself, one of the
6 grounds for seeking relief, post-conviction relief, is the
7 conviction is unconstitutional under the law, federal or state
8 constitution. So that's exactly what they're doing here, not
9 just challenging the registration.

10 THE COURT: But if they don't -- do they -- would they
11 have -- I can think of a type of case where people may have
12 been convicted in the past. And this is, again, just a
13 hypothetical and something separate and apart from
14 registration. At one time Mississippi had miscegenation
15 statutes. People were prosecuted under those, I would imagine.

16 MR. BARNES: Unfortunately so.

17 THE COURT: And after *Loving v. Virginia* in 1967, the
18 Supreme Court said that no longer should be a basis for a
19 crime. Now, for those persons who might have been convicted of
20 that -- they were felons, I believe -- what happened to them?
21 Did those convictions sort of evaporate? Did the designation
22 as a felon end in 1967 when the mandate came down on *Loving v.*
23 *Virginia*, or were they required to go through some process to
24 sort of have this felony conviction removed? They go to a
25 governor and say, *Please expunge this*, or go to the Mississippi

1 Legislature, please file, you know, something that would -- and
2 assuming my voting rights were also taken away, you know, get
3 special legislation, and nobody in the 1968 legislature, '69
4 legislature, would take it up because the only person was
5 Robert Clark. I mean, so --

6 MR. BARNES: Your Honor, I cannot answer that question
7 because it does require speculation. It is a case that's not
8 before the court. I certainly understand the court's concerns,
9 but it's my understanding, in general, I don't know this is
10 specifically the case with *Loving*, that just because the
11 statute is declared unconstitutional, it doesn't automatically
12 remove a conviction. You still have to go through a process.

13 Now, it may be, with a fundamental right such as the
14 right of marriage at issue in *Loving*, that state courts, even
15 if normally there was a standing requirement or a procedural
16 bar, the courts might well say, *Well, we're not going to let*
17 *that prevent these people from getting relief.* But that's a
18 hypothetical issue for a hypothetical state court. And that
19 kind of goes to part of our issue with this case and our
20 concern over the breadth of the remedy the court appeared to be
21 contemplating in the October 1 order, which the only plaintiff
22 still remaining before the court is Mr. Doe. But if the court
23 were to strike the law down in toto, there would be a whole lot
24 more people that would be -- whose convictions would, in
25 effect, be invalidated.

1 So I know that's an issue for a later time, but your
2 hypothetical sort of brought that to our attention. That
3 situation is not before the court, and there are a lot of
4 situations that aren't before the court that will be affected
5 by this. If we can stick with Mr. Doe's conviction and the
6 facts of Mr. Doe's conviction, and, you know, if the court's
7 ruling was limited to that, we think that's appropriate here.

8 I apologize that I can't answer your question on
9 *Loving* because -- it sounds like that you can't -- with
10 respect, it sounds like you're not positive of the answer
11 either. I may be wrong. I think that state courts would
12 probably find a way to grant relief in that situation. I can't
13 say for sure that they would, but I certainly believe that that
14 would be an equitable result.

15 THE COURT: But the state courts here cannot given Doe
16 this same type of relief because of the jurisdictional bar on
17 the -- he lacks standing.

18 MR. BARNES: Yes, sir, if that is the final ruling of
19 the Mississippi Supreme Court, I think that's correct.

20 THE COURT: Okay. All right.

21 MR. BARNES: Thank you.

22 THE COURT: I'm going to ask the plaintiff -- and
23 again, I don't think the state showed an exhibit, but I would
24 like for you to make your chart a part of this record, the
25 timeline. And we're going to take a brief recess now before we

1 get into the other thing which may -- which may tee up this --
2 the miscegenation issue thing, I think. Maybe. I don't know.
3 We're going to be in recess for about 15 minutes.

4 (Recess)

5 THE COURT: I apologize. That was a long 15 minutes.
6 Second phase of the argument, I presume, unless somebody
7 thought of something that they wanted to remind me of on the
8 first phase, we resolved it.

9 MR. BARNES: Your Honor, during the break Mr. Strugar
10 noted that it might make sense, instead of him going first on
11 the interpretation of *Lawrence*, that since he would just
12 basically say, *Your Honor, you got it right in your order*, that
13 it might make more sense if we address -- brought forward our
14 concerns first.

15 THE COURT: Okay.

16 MR. BARNES: So if that's okay with the court,
17 that's --

18 THE COURT: That's fine. It's always okay for the
19 parties to resolve everything too.

20 MS. SCHWARZ: Your Honor, before Mr. Barnes gets
21 started, I wanted to enter in our chart for the record -- into
22 the record and also ask permission for us to file a short
23 post-argument brief with all these state court cases and
24 issues.

25 THE COURT: You are probably going to be instructed to

1 file something supplemental, but thank you. You can present it
2 to the courtroom deputy and that will be Exhibit 1, or
3 whatever.

4 MR. BARNES: We certainly have no objection to that
5 exhibit, Your Honor

6 (Exhibit 1 marked)

7 THE COURT: Okay. You may proceed, Mr. Barnes.

8 MR. BARNES: Thank you, Your Honor. Obviously, we are
9 in a little bit of a curious position here when the court has
10 indicated in its ruling, its order of October 1st, deferring
11 final ruling on the constitutionality of the statute but has
12 strongly indicated the way the court is leaning and the court's
13 thought process. And so I want it to be clear from the outset
14 that while we might disagree with some of the reasons in the
15 order, we certainly respect that -- it's with respect, but I do
16 want to bring some points to the court's attention we think are
17 relevant and that the court should consider in reaching its
18 final decision.

19 As far as *Lawrence*, facial versus as applied, is
20 *Lawrence* facial versus as applied, certainly the Fourth Circuit
21 made that viewpoint that it's a facial case strongly, but there
22 are other courts that have disagreed. Court of Military
23 Appeals, state courts in Virginia, Washington, I believe North
24 Carolina, have held that *Lawrence* -- interpreted *Lawrence* to be
25 an as-applied case, and we agree with those courts that

1 *Lawrence* should be treated as an as-applied case for several
2 reasons.

3 First of all, the Fourth Circuit's decision that
4 *Lawrence* was a facial case was based on a couple of
5 misconceptions. First of all, it's a misconception that *Bowers*
6 *v. Hardwick* was a facial challenge to the Georgia sodomy
7 statute. That's the way it's characterized by the Fourth
8 Circuit. But as we pointed out in our brief, if you look at
9 the *Bowers* decision, Justice White makes it absolutely clear
10 that that was treated as an as-applied challenge.

11 Second, we disagree that the language, the pertinent
12 language in *Lawrence*, is dicta. We think that those
13 limitations on the court -- or limitations on the court's
14 ruling are really the heart and essence of the holding. And
15 the reason -- the way we reach that conclusion is this: If the
16 only issue was the language of the Texas statute, the court
17 wouldn't have had to tell us anything about the plaintiff,
18 wouldn't have had to -- the facts wouldn't have mattered. The
19 Texas statute, as opposed to the Mississippi statute,
20 specifically applied, by its terms, to same-sex couples and no
21 one else.

22 THE COURT: We're getting it up.

23 MR. BARNES: I was going to say did I do something
24 wrong? While it's warming up -- there it comes. As you can
25 see, Your Honor, the statute in Texas -- as you can see, the

1 Texas statute specifically singles out same-sex couples for
2 discrimination. And the law did not come into being until
3 1974, so it's a modern statute. The Mississippi statute is a
4 much more ancient vintage, as we know. And admittedly, the
5 language of it is not the totality of the interpretation.
6 "Every person should be convicted of the detestable and
7 abominable crime against nature committed with mankind or the
8 beast" --

9 THE COURT: Slow down just a little bit.

10 MR. BARNES: Yes, Your Honor, I apologize. However,
11 as I know the court is aware, limiting constructions and
12 interpretations of the statute have been put in place in some
13 instances by the Mississippi Supreme Court and which are
14 properly treated as a part of the state law. First is that
15 this law is applied to both same-sex and opposite-sex sexual
16 conduct. The reported cases show this has not been used to
17 target homosexuals only, unlike the Texas statute where the
18 very language of it says that's all we're worried about.

19 Second, of course, the language of "the beast,"
20 plaintiffs admit that that language is constitutional and that
21 they are not challenging the constitutionality of a conviction
22 involving sex with animals.

23 THE COURT: Do we know if a woman has ever been
24 convicted under this statute?

25 MR. BARNES: We do, Your Honor. We do. There's a

1 reported decision. I don't know if I have it in hand, but
2 they're cited in our brief if Mr. Wilson can -- if Mr. Minor
3 can pull them up.

4 THE COURT: Okay.

5 MR. BARNES: There are cases where it was applied to
6 both oral and anal sex, and one of those cases in the '50s, the
7 name escapes me at the moment, was oral sex between a man and a
8 woman, and so, yes, there have been --

9 THE COURT: But was a woman charged and was a woman
10 prosecuted?

11 MR. BARNES: I believe so, Your Honor.

12 THE COURT: Okay.

13 MR. BARNES: Let us pull them up. I don't want to
14 make a misrepresentation to the court.

15 THE COURT: Okay.

16 MR. BARNES: But certainly the way it has been applied
17 in the context of sex registration, it has been applied to both
18 men and women evenhandedly because there are numerous women on
19 the registry for sodomy with underaged males.

20 THE COURT: Yeah.

21 MR. BARNES: So the facts in *Lawrence*, Your Honor,
22 were important, and the court told us exactly what we're
23 dealing with. I think the court was emphasizing that we're
24 dealing with exactly the same fact situation as faced the court
25 in *Bowers v. Hardwick*. *Bowers v. Hardwick*, you had the same

1 sex couple in the privacy of their own home or their apartment.
2 The police came in, apparently had a lawful right to be in the
3 home, found two men having sex with each other, arrested them.
4 When they went to the Supreme Court, the Supreme Court at that
5 time said the law's constitutional. There's no fundamental
6 right to homosexual sex. That's how the court interpreted it
7 and the language it used.

8 But so from the time, you know, Mr. Doe was convicted
9 in 1978 and through '86, and until *Lawrence* came down in 2003,
10 there was no reason to doubt or any reason why any court would
11 have challenged the validity of his conviction.

12 In *Lawrence*, again, you had a consensual adult couple
13 that were in private. They are in their bedroom. I believe
14 there was maybe a noise disturbance issue. The police came to
15 check out some sort of problem with the apartment. They were
16 lawfully in the apartment, or maybe that was conceded for
17 purposes of the case. But two men were having sex together,
18 and they were arrested and convicted of violating the Texas
19 statute, which specifically applied to them and no one else.

20 The reason the facts matter more than just the fact of
21 conviction is because that's the way that we normally apply
22 case law to determine is that case applicable to this other
23 fact situation? Is it applicable to this plaintiff? We don't
24 look just at the statute, but we look at the conduct. And the
25 court in *Lawrence* did look at the conduct, you know, and gave

1 us direction.

2 Of course, you know, we are all familiar with this,
3 and I think it is really kind of the dispositive language at
4 issue on this, or it's certainly very important. "The present
5 case does not involve minors. It does not involve persons who
6 might be injured or coerced or who are situated in
7 relationships where consent might not easily be refused. It
8 does not involve public conduct or prostitution. It does not
9 involve whether the government must give formal recognition to
10 any relationship that homosexual persons seek to enter."
11 Obviously, the court had to go -- you know, there was a
12 separate case about that.

13 "The case does involve two adults who, with full and
14 mutual consent from each other, engaged in sexual practices
15 common to a homosexual lifestyle. The petitioners are entitled
16 to respect for their private lives. The state cannot demean
17 their existence or control their destiny by making their
18 private sexual conduct a crime." And the quote goes on.

19 In conclusion, "the Texas statute furthers no
20 legitimate state interest which can justify its intrusion into
21 the personal and private life of the individual."

22 And, you know, the whole semantical argument turns on,
23 well, we say when the court says it doesn't involve this, but
24 it does involve two adults, that's traditionally the way a
25 court announces an as-applied ruling, because as the court said

1 in *Ayotte*, it is axiomatic if the statute may be constitutional
2 to one set of facts and unconstitutional to another.
3 Plaintiffs, of course, seize on the fact that they say the
4 Texas statute furthers no legitimate interest, so, therefore,
5 the statute must be struck down in its entirety.

6 And because they seek facial relief, the effect of
7 that, of what they are saying, is that any person convicted of
8 unnatural intercourse under Mississippi law, regardless of the
9 facts of the condition -- of the conviction, has to be taken
10 off the sex registry, because if you facially invalidate a law,
11 if you invalidate it, enjoin it in toto, that means every
12 conviction, everyone. If it's unenforceable, it is
13 unenforceable as to everyone. And that's a problem because we
14 can't just look at Mr. Doe's case. We have to look at also the
15 cases of other individuals that would be affected.

16 And that is especially important to us, to me, in my
17 official duties as an Assistant Attorney General, a Special
18 Assistant Attorney General, that we have a duty to protect the
19 public. And the sex registry statute, as the legislative
20 findings in the statute itself make clear, it's a civil
21 regulatory scheme. It's not criminal. It is done for the
22 protection of the public, to allow the public to know when
23 sexual predators are in their midst, and to be warned.

24 THE COURT: Let me ask you this. You were talking
25 about the specific language that you read from from *Lawrence*.

1 MR. BARNES: Yes, sir.

2 THE COURT: It's not this, it's not that. But one of
3 those lines before it -- before -- I guess it's the next to the
4 last sentence, it talks about liberty and due process, which
5 suggests to the court that it's sort of like the freedom to --
6 it's the liberty concept, the due process concept. Justice
7 Kennedy wrote *Lawrence*, I think, and he ended up *writing*
8 *Obergefell* and talked about that whole concept of the right to
9 be human, the right to exist, due process, liberty, despite the
10 fact early on in that section of *Lawrence* that you quote, it's
11 not this, it's not that, it sounds like he ended up on a far
12 more expansive view when he ends it with due process and
13 liberty.

14 MR. BARNES: I apologize for smiling, Your Honor. I
15 mean, it's just that certainly no one could accuse Justice
16 Kennedy of sticking to standard dry language in his opinions.
17 He certainly was prone to use, at times, expansive language,
18 but he also used that very restrictive language in the first
19 part. So I think you've got to balance those out. I don't
20 think you can accept one or the other.

21 But here's the question, or here's the problem: The
22 effect of saying that *Lawrence* facially invalidated all sodomy
23 statutes means that's the end of it.

24 THE COURT: I mean, but if, for example, it says
25 it's -- these are two consenting adults. I think the flip side

1 of that is -- well, he said these are two consenting adults.
2 So if we assume that the opposite of that is that somebody was
3 not consenting, then another statute comes into place. That
4 would be rape or sexual assault or something like that. Or if
5 he says, these are adults, nobody here is a minor. If it
6 were -- and I guess the opposite of that, if one were a minor,
7 it could be statutory rape, or it could be contributing to the
8 delinquency of a minor or something like that.

9 So should we sort of say that it ought to be as
10 applied when he gives those type of -- when he gives that sort
11 of language, and if you flip the language around, it means that
12 people can be prosecuted and stuff for other offenses and not
13 just for the act of engaging in sodomy? I mean, I guess if
14 that opinion were -- well, one thing he couldn't say back then
15 in *Lawrence* is that these -- not only are they consenting
16 adults. He could not say that they were married. And today,
17 under the statute, even the way the statute is written, even
18 married couples can commit sodomy, but we don't want to be in
19 the process of prosecuting married couples for engaging in
20 sodomy, same sex or otherwise. Right?

21 MR. BARNES: Well, that's exactly what Justice
22 O'Connor said was, you know, you want to -- you want to cause a
23 problem with the law -- or said bring this against an opposite
24 sex couple or a heterosexual couple.

25 But the point, Your Honor, is that that is exactly

1 what he did. The way the courts, as I understand it, when you
2 determine whether a statute applies to somebody in the first
3 place, whether or not they can be convicted is, yes, you look
4 at the elements, and you say, does the conduct that this person
5 engaged in satisfy those elements? But that's not the end of
6 the inquiry. That's one. That's not the end of the inquiry
7 when the sex registry is trying to determine, especially where
8 out-of-state participants or offenders are concerned, whether
9 or not -- what crime their conviction should be deemed to be,
10 because now, as we know, Mississippi didn't have this crime
11 until 1980, didn't have sexual battery.

12 Now, at this point, the conduct that could be
13 prohibited under the unnatural intercourse statute
14 constitutionally could also be prosecuted as sexual battery.
15 That provides a path in the future for the state to prosecute
16 people who are guilty of sex with minors, et cetera, but it
17 doesn't resolve the question or issue of people like this.

18 Now, I've redacted these, and if it's hard to read, I
19 apologize, but as we produced over 10,000 pages of documents,
20 we produced law enforcement records, and we're trying to, you
21 know, to stick with the court's ruling, the protective order,
22 and to not disclose more than necessary.

23 This gentleman -- I apologize. I've got to get my
24 cheat sheet. This is offender number 31, as he is described in
25 the briefs. Offender number 31, as you can see, "willfully,

1 unlawfully and feloniously forced one -- the name -- a female
2 of the age three years, to take into her mouth the penis of the
3 said defendant, a male human being, and forcing her, the said
4 victim, to suck thereon." And I apologize, but this -- that's
5 what this case involves. And the next page shows that there's
6 a Count 2, so two instances where this adult man forced a
7 three-year-old child to perform oral sex on him.

8 Now, if this person had been the plaintiff in
9 *Lawrence*, one, I don't think the court would have ever accepted
10 the case. But, two, can we reasonably believe that the court
11 in *Lawrence* would have said that this man's conviction was
12 unconstitutional and had to be voided? Because if the
13 Mississippi unnatural intercourse statute is voided in its
14 entirety, that would be the effect. And I'm not sure -- I
15 don't know of any way around that.

16 Similarly, another offender, this is offender number
17 10, forced to make a nine-year-old female perform oral sex on
18 him. Offender number 19, committed the detestable, abominable
19 crime against nature by placing his penis inside the anus of
20 the victim, a male child of the age of ten years, and engaging
21 in sexual penetration.

22 Your Honor, I've also got offender number 4, anal
23 sodomy with a 14-year-old child. Offender number 11, anal
24 sodomy with either a 15 or 12-year-old child. There are
25 multiple references, but it was one or the other. Offender

1 number 24, engaged in unnatural intercourse with a male between
2 the age of 14 and 18. I candidly admit, that one, you know, we
3 can't absolutely say it was a minor, but the range says that it
4 could have been. Offender number 2, attempted to engage in
5 oral sodomy with a minor child. Offender number 3, also
6 involved an inmate, inmate-on-inmate sexual activity. There
7 the indictment specifically says that he forced the person onto
8 their stomach and performed anal intercourse. Offender number
9 8, a 7-year-old female. The victim was 36 years old. The
10 nature of the crime was described as sexual assault when the
11 offender registered.

12 Offender number 17 is kind of a special case because
13 offender number 17 gave some conflict -- the records are a
14 little bit in conflict, or they suggest that he probably is
15 guilty of more than one offense. You know, this registration
16 form shows sexual battery. The description, "Had sex with a
17 15-year-old child, a minor." The next page, this is page
18 MSOR10801, also shows that there was an indictment for this
19 individual engaging in sex with an animal. The reason I say
20 it's unclear is, we don't have a court order in the file
21 showing that he was actually convicted of that one, but
22 certainly it may have been -- he may also have been convicted
23 of that. And the unnatural intercourse convictions, I guess we
24 have no reason to think that the person would have said that he
25 had sex with a 15-year-old child unless he had.

1 But the point of all that, Your Honor -- and that's
2 why I say I wish we could just talk about Mr. Doe, but if
3 *Lawrence* facially invalidated all sodomy statutes, that's the
4 statute that these people were prosecuted under. So if the
5 court facially invalidates that, all these individuals would
6 have to be removed from the registry.

7 Now, that's not all, and we didn't put in the record
8 everyone, every offender that would be problematic because,
9 again, primarily the issue is Mr. Doe, but we did -- these few
10 examples alone are enough to show if even one of those persons
11 was permitted to be taken off the registry, it would harm the
12 public. I mean, that's the whole point. These are sexual
13 predators. These are sexual predators. If any of these
14 predators had been the plaintiff in *Lawrence*, I personally
15 cannot conceive that the Supreme Court would have said that
16 conviction is unconstitutional, if that would be the effect of
17 the relief that the plaintiffs seek, and that's why it's of
18 great concern to us.

19 And the court looked at *Ayotte* and said, *Well, I don't*
20 *think I can do what the state is asking me to do under Ayotte*
21 *because I would have to write into the statute additional*
22 *elements, such as perhaps it was force that the court used in*
23 *the order.* But you could also -- an age of a victim, you could
24 say sodomy with a child under the age of 14. Certainly those
25 laws would be constitutional. We don't disagree with

1 plaintiffs about that. However, the point is, you don't have
2 to add elements when the language of the statute itself is
3 broad enough to encompass those acts.

4 And it is true that the Mississippi unnatural
5 intercourse statute only requires the commission of the act of
6 sodomy on its face to be -- for a conviction. But it applies
7 to Mr. Doe's conduct in prison. It applies to these child
8 molesters. It applies to others.

9 Now, since the statute can be unconstitutional in one
10 set of circumstances, constitutional in another, the question
11 is, well, how could the court grant Mr. Doe relief if it found
12 he was entitled to it without letting off all these other
13 offenders? And the answer is just to say, I'm granting Mr.
14 Doe -- this law is unconstitutional as applied to him. If any
15 of these child molesters want to come and convince me that they
16 also -- their convictions -- that that conduct is
17 constitutionally protected and that there's a reason to take
18 them off, then they can do so. But the plaintiffs say, no, no
19 use the blunt instrument, strike the law down in its entirety.

20 And *Ayotte* has been interpreted at times as saying
21 that it's never appropriate for a court to put a limiting
22 construction on a state statute, and that's not what *Ayotte*
23 exactly says. *Ayotte* -- and first of all, let's look at what
24 the Supreme Court did. In *Ayotte*, the Supreme Court reversed a
25 lower court ruling facially invalidating the statute at issue,

1 and the Supreme Court said, *No, wait, we -- almost*
2 *apologetic -- we know that we have done that ourselves, we've*
3 *facially invalidated statutes for not having this emergency*
4 *health exception, and so it's understandable why the lower*
5 *court was confused, but we think in this case it's*
6 *inappropriate, and here's why.*

7 And the difference between this case and *Ayotte*: In
8 *Ayotte*, you had a statute which could be constitutionally
9 applied. The parental notification abortion statute in New
10 Hampshire could be constitutionally applied in many, many
11 cases. The problem was, there wasn't a timely exception -- an
12 exception for a timely way for a doctor to get -- in a true
13 emergency involving a minor, to get around the parental
14 notification requirements. I think the statute gave the --
15 perhaps seven days for the court to rule, and that would not
16 work in an emergency situation.

17 So the doctors -- one, you have relaxed standing
18 requirements, you know, because in abortion cases, the normal
19 rules against parties asserting -- the rights of third parties
20 are somewhat relaxed. The court allows doctors to assert
21 claims on behalf of their patients. And in that, you had
22 doctors who would have -- who say -- who told the court, *We*
23 *have situations where there are emergency cases involving*
24 *minors where we have to perform an abortion, and we don't have*
25 *time to do that under this parental notification law.*

1 So to be constitutional, as to us, you would have to
2 write into that law an exception saying this doesn't apply in
3 certain circumstances. It would have to be a pretty complex
4 exception because you are dealing with a very complex parental
5 notification requirement with strict deadlines. It was a
6 complex regulatory scheme.

7 Here you've got a law which by its terms can
8 constitutionally be applied to the person who's before the
9 court. And there's no one properly before the court to whom
10 this law would require an exception. We have said from the
11 get-go in this case, we have conceded that after *Lawrence*, a
12 state may not criminalize consensual sex between adults.

13 THE COURT: But what stops a prosecutor from taking
14 that particular case to the grand jury or for -- what stops a
15 police officer from arresting someone for engaging in sodomy?

16 MR. BARNES: What stops them is the court, with the
17 trial judge saying, that violates *Lawrence v. Texas*, I'm
18 dismissing that indictment, or if they inveigle the trial judge
19 to get past them, the Mississippi Supreme Court saying, *Wait a*
20 *minute, Lawrence v. Texas said you can't constitutionally*
21 *prosecute someone for that crime, so no.* No, it could be no
22 valid conviction based on consensual sex at this point after
23 *Lawrence*.

24 And so the problem is -- and again, because we've got
25 sexual battery, the problem is, what do you do, what does the

1 court do, what do we do about these offenders that if, say,
2 Mississippi wrote a new statute, or if the Mississippi Supreme
3 Court, you know, did a limiting construction, what effect would
4 it have? Well, even if the legislature rewrote the statute
5 extensively, ex post facto says these people can't be convicted
6 of that crime. So we're still stuck with the fact that they
7 were convicted under the unnatural intercourse law. If they
8 had been convicted of sexual battery because of the name of the
9 offense for the exact same conduct, we wouldn't have this
10 problem.

11 And so in *Ayotte*, where you had a statute where you
12 had to write into it this detailed exception to keep it from
13 affecting the plaintiffs in the case, that's one situation.
14 Here, all the court would have to do is if there was a
15 plaintiff who could come to this court and say, *I am Bowers*,
16 *I'm the guy in --* I don't remember which was the plaintiff,
17 whether it was Bowers or Hardwick -- *I'm the guy from Bowers v.*
18 *Hardwick. I am Lawrence. I, you know, was convicted of*
19 *private consensual sex in my own home with my partner, and this*
20 *law, this language is too broad. It's unconstitutional as*
21 *applied to me.* And all the court would have to say, *You're*
22 *right, this law, that language, too broad. It's*
23 *unconstitutional as applied to that conduct.* End of story.
24 But if you say the whole statute is unconstitutional, that's
25 where all these other people come into play.

1 Now, Mr. Doe, was convicted of sex in prison. As the
2 court said, we don't know whether it was consensual or not, but
3 then the question becomes, well, is there a right to have sex
4 in prison? Does the constitution protect that right to the
5 extent that states can't bar sex in prison? And the answer is
6 no.

7 And as the court noted, prisons are primarily or are
8 exclusively same-sex institutions, and so by its nature, that
9 means that -- but again, the state can constitutionally
10 prohibit same-sex conduct. A big part of that, I think, is the
11 regulatory environment and the fact that it's inherently
12 coercive. How do you know which inmates tell -- if an inmate
13 says it was forcible, another inmate said it was consensual,
14 how do you know? And we think that's one of the instances
15 where the court, as in *Lawrence*, when it said where consent
16 might not easily be refused. Mr. Doe was awaiting trial on
17 murder charges at the time the sodomy of the other inmate
18 occurred. I'd just suggest that might be one of those
19 circumstances where consent might not easily be refused.

20 By the same token, though, states are not required to
21 permit sex/opposite sex. States are not absolutely or
22 constitutionally required to permit conjugal visits. And so
23 there's no right to sex in prison. And we think that's
24 critical to Mr. Doe's case, his specific facts set, because
25 that's what his conviction is based on.

1 They say it doesn't matter. One element, one element
2 only. All you look at is the fact of conviction. But
3 convictions are based on facts. And the Supreme Court has told
4 us that, you know, constitutional cases, we don't determine
5 these cases based on broad principles. We determine them based
6 on facts. So we think the idea that the facts of the
7 convictions not being relevant, we respectfully disagree. The
8 idea that the facts of who would be granted relief by a facial
9 ruling, we disagree that those facts are not relevant. We
10 think they are highly relevant because if this -- the guy
11 forcing the three-year-old child to perform oral sex on him, if
12 he comes off the registry, he can move anywhere he wants, he
13 can get any job he wants, he can move in across the street from
14 a school, anything like that, and the registry would lose track
15 of him, move to another state. And then even if the case were
16 reversed on appeal, we would -- that offender would be gone,
17 and that would -- could very easily endanger the public.

18 So that is obviously one of our primary concerns. So
19 we don't think that this law -- I think -- this is the way we
20 would suggest that the court approach the analysis. First of
21 all, say, *Well, does this individual, the only plaintiff before*
22 *the court, have standing to assert this claim on his own*
23 *behalf?* Well, yeah, he certainly -- he's got standing to say
24 this law's unconstitutional as applied to me.

25 So then the question becomes, well, is it

1 unconstitutional? And we would say, *Well, is his conviction --*
2 *was his conduct the same as that that was before the court in*
3 *Lawrence v. Texas and Bowers v. Hardwick?* And the answer is
4 no, it wasn't. So we would say this law is not
5 unconstitutional as applied to Mr. Doe.

6 THE COURT: And the reason he was not like *Lawrence* is
7 because he was in prison. That's the only difference. Right?
8 I mean --

9 MR. BARNES: That's the primary distinction right on
10 its face is that it was in prison, yes.

11 THE COURT: Okay.

12 MR. BARNES: And, Your Honor, this is assuming that
13 the court finds -- thinks it gets by the *Heck* bar, which we
14 don't think it's possible. But, again, for the sake of
15 argument going on, then the question would become, well, what
16 do I do to remedy this injury to this particular plaintiff?
17 And the answer is, declare that the law would be
18 unconstitutional as applied to Mr. Doe and then stop, because
19 if you go past that, you're getting into third-party standing.

20 And again, whether or not Mr. Doe, whether the law is
21 constitutional or unconstitutional as applied to Mr. Doe is
22 critical there, because if the law can constitutionally be
23 applied to Mr. Doe, the Supreme Court said in *^Broadrick v.*
24 *Oklahoma*, we will not hear a plaintiff to whom a law can
25 constitutionally be applied attempt to assert the rights of

1 third parties who aren't before the court.

2 And so then the question becomes does the court have
3 to grant facial relief to everyone convicted, including the
4 predators, under this statute, when an order limited to Mr. Doe
5 would alleviate his problem, and again, not interfere in any
6 way with the rights of any other plaintiff to come to court or
7 to come to state court. If there ever was a conviction, again,
8 of unnatural intercourse where they had standing, I'm not aware
9 of one. I don't think the law's being enforced -- what we can
10 tell, there just hasn't been any recent cases except one that
11 involved an animal.

12 And so it's not necessary, it's not necessary to grant
13 that relief to get Mr. Doe off the registry if the court
14 decides that he's entitled to that. So we would say stop at
15 that point. Is this case barred by *Heck*? Yes. Then stop. Is
16 this law unconstitutional as applied to Mr. Doe? No, it's not,
17 it's constitutional, and stop.

18 Is this -- if the court says, *No, this law is*
19 *unconstitutional as applied to Mr. Doe, so, therefore, I'm*
20 *going to enjoin its use against Mr. Doe,* and then stop, and
21 never get to the *I'm going to strike this law down in its*
22 *entirety, letting all these people off the hook,* which is kind
23 of -- the court, in the order, it's kind of upside down in the
24 sense that the court seems to start from the premise that this
25 law is facially unconstitutional. Well, then it's easy to get

1 down to everybody has to come off the registry. But that's not
2 the way the Supreme Court normally applies cases when they are
3 saying, Do we do this, is this person entitled to relief?

4 And it goes against what the court said in *Ayotte*.
5 The court said in *Ayotte*, said, the normal rule, the normal
6 rule is that we strike down no more than the unconstitutional
7 applications, leaving the other applications in force. They
8 said, or sometimes we strike constitutional language -- I mean,
9 statutory language. It's we do this or this. And then, of
10 course, the court goes on to give us instruction and guidance
11 as to when that's appropriate or inappropriate.

12 So we think it would be fine here because you don't
13 have to write anything into this statute. The language is
14 broad enough to apply to Mr. Doe. Nothing has to be added.
15 The court could stop.

16 If an appropriate plaintiff ever came before the court
17 and had standing, could get before the court to assert that
18 they were a *Lawrence* situation plaintiff, then they could raise
19 that issue. And if they did, the court could say, *The law is*
20 *unconstitutional as applied to that person. It doesn't excuse*
21 *these child molesters, these sexual predators. It doesn't*
22 *vacate, void their convictions.* Again, because in *Ayotte*, they
23 would have had to write a detailed exception. Here you don't
24 have to write anything more because the statutory language is
25 broad enough.

1 So we see no reason for the court to deviate from the
2 normal rule in *Ayotte*, which is enjoin only the
3 unconstitutional applications of the law.

4 And when the court was talking about -- says, *We can't*
5 *rewrite statutes*, again, it was in the context of a very
6 detailed statute, and it was in the context -- the court said
7 that the real question is, Would the legislature prefer the
8 statute as we rewrote it rather than no statute at all? And I
9 think that if when striking down the statute would involve
10 these people, I don't think there's any doubt that the
11 Mississippi legislature would prefer the statute to remain in
12 effect and keep these predators on the registry. And candidly,
13 Your Honor, I don't know any way the court could strike the law
14 down in toto and not take those people off the registry.

15 THE COURT: Because they had been convicted under that
16 statute.

17 MR. BARNES: That's correct. I think there is --
18 there is an out for people convicted -- out-of-state
19 convictions, because there that travels under the "deemed to be
20 an offense" in Mississippi law. And so if you have an offense
21 where out of state somebody's convicted of unnatural
22 intercourse, but the facts there show that it was with a
23 three-year-old child, we suggest that could be characterized as
24 sexual battery under Mississippi law, and that person could
25 remain on the -- on the registry. So the primary problem is

1 people convicted in Mississippi of violating the statute.

2 Can I have one moment, Your Honor?

3 THE COURT: Yes, sir.

4 (Short Pause)

5 MR. BARNES: Last, Your Honor, I don't want to jump
6 the gun, but I think let's streamline the process, because,
7 again, we're not blind to the implications of the court's
8 interim order of October 1st. If the court were to rule
9 against us, as the court noted, it most likely would be
10 appealed. We think that's certainly the case. I think
11 plaintiff would do it. We would. We would have to, especially
12 if it affects these predators.

13 So, Your Honor, we would move now, if the court does
14 rule against us and grant any relief, we more ore tenus that
15 the court grant us a stay staying the effect of any such order
16 until the resolution of appeal. That would be warranted
17 because, one, you've got the potential harm to the public if
18 predators are out there. They could move, they could get lost.
19 The other thing is, if they were removed from the registry,
20 they could buy a new house, Fifth Circuit reversed, and then
21 they would have to sell it. So there would be irreparable harm
22 both to the general public, harm -- the risk of recidivism, and
23 actual harm to the plaintiffs themselves.

24 So we think that a stay would be appropriate, if
25 necessary. And so if the court rules against us, if you'd go

1 ahead and grant us a stay, we would greatly appreciate it, and
2 we respectfully request that. I don't think we should need it,
3 but if we do, we certainly would ask the court now to include a
4 stay in any ruling.

5 THE COURT: Was it the Fourth Circuit case or the
6 State of Virginia case where the Virginia Supreme Court was
7 given the opportunity to -- didn't the Virginia Supreme Court
8 fix their statute?

9 MR. BARNES: They did, Your Honor, but I think it was
10 two different plaintiffs.

11 THE COURT: Oh, okay.

12 MR. BARNES: I think the first case was a federal
13 habeas case. *Moose v. MacDonald* was a habeas case in federal
14 court. The other case was *Toghill* in Virginia state court. I
15 think it was a different plaintiff. I could be wrong. I'm
16 sure that -- I'm sure that they will explain if I am.

17 THE COURT: Okay.

18 MR. BARNES: Right. So it was two separate actions,
19 but it wasn't like a stay and go to state court. It was just a
20 separate action.

21 THE COURT: Okay. Thank you, Mr. Barnes.

22 MR. BARNES: Thank you, Your Honor.

23 MR. STRUGAR: Good morning. Matthew Strugar for the
24 plaintiff. If you don't mind, may I turn off the Elmo?

25 THE COURT: Yeah. Turn it off.

1 MR. STRUGAR: Thank you very much. If I speak too
2 quickly, please let me know.

3 THE COURT: You can speak a little louder probably.

4 MR. STRUGAR: Can I raise this up a little bit?

5 THE COURT: Yes.

6 MR. STRUGAR: It's as high as it goes. So I'd like to
7 take each of the state's points kind of in turn in the order
8 that they took them, but I'd like to start with the state
9 saying that they've conceded from the start of this litigation
10 that the statute cannot apply to consensual sex. And they said
11 the facts of the convictions matter under the Mississippi
12 unnatural intercourse statute, or the underlying conduct
13 matters. That's not true. It's the conviction that matters.

14 What we have here is a broad statute that criminalizes
15 all acts of oral or anal sex, that according to the CDC,
16 89 percent of straight American adults have participated in,
17 constituting over a million Mississippians, and all of that is
18 criminal under the statute. And I think that the fact that the
19 facts underlying the conviction don't matter is made clear in a
20 number of examples that we have in the record.

21 In 1982, Michael Hardwick, who's the plaintiff in the
22 *Bowers v. Hardwick* case, was arrested in Georgia for engaging
23 in sex with another man. The state declined to pursue those
24 charges after they were filed. But he filed a 1983 case for
25 facial relief, or for facial invalidation, like this case,

1 subsequently. It went up to the Supreme Court, and the Supreme
2 Court said that law is constitutional and that Georgia would
3 have had the right to go through with his prosecution if it
4 decided to continue to pursue those charges.

5 Twenty-one years later, the Supreme Court said that
6 case was wrong when it was decided, and it was wrong on the day
7 that *Lawrence* was decided. But if Mr. Hardwick, still alive
8 today, if he was convicted under that statute and he moved to
9 Mississippi today, even given the *Lawrence* ruling, he would
10 have to register as a sex offender for 25 years. The state has
11 admitted as much in a request for admission in this case.
12 Request for admission 7 is Exhibit 1, the plaintiff's MSJ.

13 The same is true for someone who was convicted under
14 the exact same circumstances as Mr. Lawrence and Mr. Gardner in
15 the *Lawrence v. Texas* case. Of course, that case was a direct
16 criminal appeal up to the Supreme Court, but if somebody in the
17 exact same situation as those two men, who were convicted prior
18 to the date of the statute, was facially invalidated in Texas,
19 if they moved to Mississippi, they would have to register
20 because they have a conviction. Despite any facts underlying
21 the conviction, they have a conviction that is registerable in
22 Mississippi under the unnatural intercourse statute. Again,
23 the state's admitted this as well, request for admission number
24 6.

25 And so, too, with Mr. MacDonald, who still has his

1 conviction.

2 THE COURT: So if Mr. Lawrence moved to Mississippi
3 today, he would have to register as a sex offender, you
4 believe?

5 MR. STRUGAR: Not Mr. Lawrence, only because Mr.
6 Lawrence had a direct criminal appeal to the Supreme Court, and
7 the Supreme Court then threw out his conviction. So Mr.
8 Lawrence doesn't have a conviction. Mr. Lawrence today -- both
9 Mr. Lawrence and Mr. Gardner are deceased. But if somebody in
10 the exact same sexual circumstances who did not appeal their
11 case to the Supreme Court, who predated the *Lawrence* decision,
12 moved to Mississippi today, he would have to register.

13 As with Mr. MacDonald in Virginia, who filed for
14 federal habeas relief but still has a conviction, the Fourth
15 Circuit, Federal Circuit Court of Appeals, struck down that
16 statute and said that the statute was unconstitutional on its
17 face, but his conviction remains. And if Mr. MacDonald moved
18 to Mississippi today, despite the fact of the facial invalidity
19 of the statute under which he is registered, if he moved to
20 Mississippi today, Mississippi would require him to register
21 for 25 years as a sex offender. And this is true of people who
22 are on the registry today.

23 The state went through a number of examples of -- and
24 all the threats to the public. But offender number 36, who is
25 on the registry, a man who was arrested and convicted outside

1 of San Francisco in 1966, under California's then sodomy law,
2 which, like Mississippi's, criminalized all acts of oral and
3 anal sex, he was 26 at the time. His alleged victim, as the
4 state puts it in their registration requirements, was two years
5 older than he was. There is no allegation anywhere in the
6 files that the state has that there was any force used, that
7 there was anything other than a consensual sex act in
8 California in 1966. California repealed that statute in 1970
9 something. The Supreme Court ruled in 2003 that it would have
10 been unconstitutional at any time, but -- I'm sorry, I'm trying
11 not to use the name because of the protective order. I'm on
12 the record. But registrant number 36 still registered in
13 Mississippi today. He died, I think three months ago. But he
14 received relief only on account of his death, only on account
15 of the passage of time.

16 So when the state stands up and says we -- we concede
17 that the facts of these cases don't matter and that people who
18 have had consensual sex, like Mr. Lawrence, like Mr. Hardwick,
19 do not have to register, it's just not borne out by the facts
20 in this case.

21 THE COURT: So Mr. San Francisco, a 1966 conviction --

22 MR. STRUGAR: Yes.

23 THE COURT: -- was required to still maintain his
24 registration even after *Lawrence*?

25 MR. STRUGAR: Even after *Lawrence*, until four

1 months --

2 THE COURT: Even after -- you know, even after
3 *Lawrence*?

4 MR. STRUGAR: Even after -- when we filed this case,
5 he was registered, and he was a prospective class member.

6 THE COURT: And he had an ongoing duty to comply with
7 the registration requirements is my question, because they
8 are -- I think -- I didn't call them byzantine, but I think I
9 called them all-inclusive or something. I mean sweeping.

10 MR. STRUGAR: He had to comply as much as anyone who
11 was convicted of rape or any other horrific sex act. He -- I
12 mean, to be frank with the court, he absconded. He moved to
13 another state, probably to avoid the continued humiliation of
14 the registration requirement in Mississippi. And we understand
15 that he died a few months ago, but after -- after summary
16 judgment briefing was closed in this case.

17 THE COURT: But he would have been required to report
18 to the Department of Public Safety every 30 days, I think it
19 is, and get an updated picture or whatever you have to do?

20 MR. STRUGAR: Pay the \$11, receive permission to visit
21 his children at school, to visit a public beach, to visit a
22 public campground where there might be children, every
23 requirement attendant to -- every humiliation attendant to
24 registration, number 36, Mr. San Francisco, had to comply with.

25 THE COURT: Okay. Thank you.

1 MR. STRUGAR: So the crux of the disagreement between
2 the parties here, Your Honor, is how to read *Lawrence*. You
3 know, we contend that *Lawrence* invalidated the Mississippi
4 unnatural intercourse statute on its face. The state contends,
5 obviously, that it was an as-applied ruling only to the two
6 defendants in that case.

7 We believe our reading is supported by the text of
8 *Lawrence* but also by subsequent precedent. Mr. Barnes spoke a
9 little bit about how the Texas law was different from the
10 Mississippi law because it applied only to same-sex couples,
11 but that's not true with the Georgia statute in *Bowers*, which
12 was also overturned. The Georgia statute also applied
13 regardless of the gender of the participants, and the Supreme
14 Court in *Lawrence* grounded its ruling in substantive due
15 process instead of equal protection. And they did so
16 because -- and I'm going to quote from a case here -- they
17 characterized it -- they said -- let me back up.

18 Justice O'Connor, in concurrence, said she would have
19 gone with the equal protection route, preserving the *Bowers*
20 precedent, preserving the statute in *Bowers*, but overturning
21 the Texas law on account of it applying based on the gender of
22 the participants. And the majority rejected that, and they
23 said they did -- they did so on substantive due process grounds
24 instead of equal protection grounds because "some might
25 question whether a prohibition would be valid if drawn

1 differently, say, to prohibit the conduct between same-sex and
2 different sex participants." The Supreme Court wanted to avoid
3 that, the consequence of thinking that only statutes that
4 applied to same-sex couples are unconstitutional. Instead they
5 went broad. They said substantive due process, we reject the
6 equal protection rationale, and we believe that laws that apply
7 to different sexed couples or different sexed participants are
8 unconstitutional as well.

9 There are also multiple references throughout the
10 opinion as to the validity of the statute. A strong indication
11 of facial ruling are eight references to validity just in the
12 majority opinion alone; the fact that they overruled *Bowers*.
13 Now, the state says *Bowers* was also an as-applied challenge,
14 but the majority in *Lawrence* characterizes *Bowers* as, quote, an
15 action in federal court to declare a state statute invalid.
16 Again, *Lawrence* saw *Bowers* as a facial challenge. *Bowers*
17 himself saw -- I'm sorry, *Hardwick* himself saw *Bowers* as a
18 facial challenge.

19 And, you know, Justice O'Connor's concurrence, she
20 says twice, she opens her opinion and she closes her opinion
21 saying she joins the majority in declaring the Texas statute
22 unconstitutional, again, not evidence of an as-applied ruling
23 to those plaintiffs but evidence of a broad facial relief.

24 But this was the conclusion that the Fourth Circuit
25 majority reached in *MacDonald*, which we believe should control

1 here. Of course, the state says, We believe that the court
2 should go with the dissent in the Fourth Circuit, and the
3 dissent in the Fourth Circuit said, based on the dictum about
4 what this case is not about that the state relies on here, it
5 was unclear whether they -- whether the Supreme Court was doing
6 facial invalidation or as-applied invalidation. He said, *You*
7 *know, I'm not as sure as the majority is that there is a facial*
8 *invalidation here.*

9 But even if such ambiguity existed when *MacDonald* was
10 decided in 2013, since then we've had the Supreme Court
11 describe and clarify what it did in *Lawrence*. In *Obergefell*,
12 the 2015 same-sex marriage case, the court described its own
13 ruling in *Lawrence* repeatedly. The Supreme Court said,
14 "*Lawrence* invalidated laws that made same-sex intimacy a
15 criminal act." That's 135 Supreme Court at 2600. In this 11
16 words, the Supreme Court uses the word "invalidated" to
17 demonstrate facial relief, and the use of the word "laws"
18 plural to indicate the breadth of the decision.

19 I'll back up to *Lawrence* again for just one moment.
20 The *Lawrence* majority seems to recognize what they are doing.
21 They mention that the number of states that still have
22 sodomy-only laws, they say, you know, it's been declining, but
23 there are still -- I forget if it was 11 or 13, but it was one
24 of those two, at the time. They say that that number has been
25 decreasing. And they also mention that in some states,

1 including Mississippi, that there is an attendant sex offender
2 registration requirement under such law.

3 So the Supreme Court was aware that when it was ruling
4 on *Lawrence* and overturning *Bowers*, that it would have effect
5 in other states and that that effect would include people who
6 are on a sex offender registry no longer being registered, at
7 least forward-looking but also likely, whether they were aware
8 of it or not, it seems like in the past.

9 Again, from *Obergefell*, the court says, "In 2003, the
10 court overruled *Bowers*, holding that laws making same-sex
11 intimacy a crime, demean homosexual persons." Again, the use
12 of the word "laws" plural.

13 Even the Chief Justice's dissent in *Lawrence* conceded
14 as much. It said, "*Lawrence* relied on the position that
15 criminal sodomy laws" -- plural -- "like bans on contraception,
16 invaded privacy by inviting unwarranted government intrusion."
17 So we contend that the *Obergefell* decision should be game, set,
18 match in the dispute between the parties as to what *Lawrence*
19 did and whether the majority opinion in *MacDonald* should be
20 followed or whether the dissent in *MacDonald* should be
21 followed.

22 The *Obergefell* language confirms the broad ruling or
23 the broad nature of the *Lawrence* decision and sort of puts to
24 rest the dissent's concerns in *MacDonald* that perhaps *Lawrence*
25 was much more narrow than the majority in *MacDonald* believed.

1 If I can, I'd like to go to the -- some more of the
2 threats to the public. I already touched on that a little bit
3 by mentioning registrant number 36, who, you know, seems to
4 present no threat to the public, yet was made to register for
5 that amount of time. But our -- I want to make a number of
6 points about the threats to the public because it's really the
7 core of the state's -- one of the cores of the state's
8 argument.

9 Our position is, absolutely, that if the statute is
10 unconstitutional on its face, it can't be enforced against
11 anyone. We're not going to run away from that consequence or
12 act like that's not the case. But for whatever reason, the
13 state made a decision to accept a plea or to charge unnatural
14 intercourse for each of the cases that they present as a major
15 threat to the public. They had other options.

16 Mississippi's always had an aggravated assault
17 statute. As far back as I can tell from my research, the
18 maximum penalty for aggravated assault was twice as much as
19 unnatural intercourse. They could have charged aggravated
20 assault instead of unnatural intercourse. They made the
21 decision to go with unnatural intercourse.

22 Since 1980, they could have charged sexual battery,
23 which carries 30 years, instead of unnatural intercourse is
24 ten. And since 1985, they could have charged rape. That
25 carries a life sentence. But for whatever reason, they decided

1 they were going to file simply the unnatural intercourse or
2 accept a plea to unnatural intercourse. And that's not
3 uncommon in pleas in criminal courts in Mississippi every day.
4 People charged with horrific things bargain to get out of sex
5 offender registration. And the facts underlying their crimes
6 don't matter. It's the conviction that is the sole trigger.

7 So these threats to the public that the state
8 presents, supposedly threats to the public, exist in criminal
9 courts in Mississippi every day, but the state takes those
10 pleas for whatever reason.

11 So it would be the consequence if the people charged
12 with only unnatural intercourse would come off the registry.
13 It would be the case that if people have -- that there are a
14 number of people who have other registerable offenses in
15 Mississippi, which include a number of people with unnatural
16 intercourse convictions, would remain on the registry on
17 account of those other unnatural intercourse convictions.
18 People with out-of-state sodomy convictions where the other --
19 where the out-of-state law requires an element of force or a
20 crime against a minor or any of those aspects, they would also
21 remain on the registry, because Mississippi just asks is there
22 an equivalent registrable offense in Mississippi. It basically
23 would require checking another box.

24 If, like Alabama's aggravated sodomy law, it requires
25 the use of force in the commission of the sex act, Mississippi

1 could just uncheck the unnatural intercourse box and check the
2 sexual battery box. It would still be a registrable offense in
3 Mississippi. It would only be the case where the out-of-state
4 conviction requires the commission of the sex act alone.
5 That's the only time that someone with an out-of-state
6 conviction would be registrable under the Mississippi unnatural
7 intercourse statute and no other statute.

8 So we believe we're talking about 15 people. Your
9 Honor's ruling from last week mentions on page 5 that there are
10 35 people with unnatural intercourse or out-of-state equivalent
11 convictions, 22 of whom are on the sex offender registry. We
12 aren't entirely clear where those numbers originate, but we
13 think the actual number is significantly fewer. And so we
14 presented a list, and it's of the numbers that the state has
15 been using and that I've been using for the registrant numbers.
16 We presented a list in discovery of 48 people, based on the
17 discovery we received, who we believed would be -- at that
18 time, we believed they would be class members, but now that
19 we've abandoned class certification, you know, maybe I'll talk
20 about potential class members or people who might obtain relief
21 in this situation.

22 We settled out 29 of those 48. Two have died, and the
23 state's presented additional discovery to show us that two
24 others are not covered by the lawsuit. One actually has a
25 sexual battery conviction but is misregistered on the sex

1 offender registry, and the other has a conviction for
2 bestiality. So that leaves 15 people. That includes Mr. Doe.
3 Eleven of those 15 have Mississippi unnatural intercourse
4 convictions. Two have military convictions. One has a
5 conviction from Virginia involving a 19-year-old having sex
6 with a 17-year-old, which I'll note if that happened in
7 Mississippi and the sex was vaginal would not be registrable,
8 would not even be a crime. And the fourth is a conviction from
9 Michigan. All 15 of them have convictions that predate
10 *Lawrence*. All but one have convictions that are a minimum of
11 20 years old. And many were very young, like 17 to 20, and
12 they've had no intervening sex offenses in the time that's
13 passed.

14 Of the out-of-state convictions, one of them was 44
15 years old, with no intervening offense. He's now 70 years old.

16 Of the 12 who have in-state unnatural intercourse
17 convictions, all but two, like Mr. Doe, took pleas years before
18 the passage of the sex offender registry, where they had no
19 opportunity or no -- they had no opportunity to seek a plea to
20 an offense that wasn't registrable because nothing was
21 registrable at the time.

22 All of these men have had no additional offenses
23 between the initial registration requirement and now or between
24 the initial conviction and the passage of the sex offender
25 registry. And the registration requirement seems to have no

1 effect on recidivism for these individuals. One registrant is
2 80 years old today. One -- another is 79 of the 15.

3 So, you know, our position is that the convictions are
4 unconstitutional and can't be enforced in any case, but to look
5 practically, there's no indication that these threats to the
6 public that the state posits are a practical reality. These
7 men are elderly. They are dying.

8 I note that offender number 10 that the state focused
9 on, involving -- that was the case involving the nine-year-old
10 child, I believe they handed the exhibit up to the courtroom
11 deputy, offender number 10, like Mr. San Francisco, has died in
12 the meantime, so any threat that he would pose is ameliorated
13 by his death.

14 And I think of the -- I think of the registrants that
15 the state focused on, he's the only one who has -- who wouldn't
16 obtain relief here, for whom the threat is nonexistent, or the
17 alleged threat, because he is dead.

18 I'm sorry. The state also talked about offender
19 number 17, who was the bestiality conviction. We concede.
20 We're not challenging bestiality convictions. So to the extent
21 the state's concerned about registrant number 17, we concede.
22 We received that in additional discovery later in the case.

23 THE COURT: But if the court struck the statute?

24 MR. STRUGAR: We ask the court only to strike the
25 words "with mankind" out of the statute. We dropped a footnote

1 in the complaint saying we do not challenge the bestiality
2 provision. In fact, most of my work that I do is in the animal
3 rights context, and my clients would be very upset if I struck
4 down a bestiality conviction in Mississippi state court -- or
5 in Mississippi state.

6 So we only seek -- the relief we seek in striking down
7 the statute is striking down the words "with mankind" out of
8 the unnatural intercourse statute. We have no objection to
9 unnatural intercourse remaining as to people who commit acts of
10 bestiality.

11 I'd like to go to -- I'd like to pivot to the *Ayotte*
12 argument about rewriting the statute. As I think the court
13 correctly recognizes, it's not within the court's authority to
14 rewrite the Mississippi anti-sodomy law by adding the words
15 with force, with minors, in a prison, et cetera. And that's
16 the *Ayotte* case, that's the *Virginia v. American Booksellers*
17 case, that's the *Reno* case, and it's also the *Serafine v.*
18 *Branaman* case in the Fifth Circuit. It's essentially a
19 separation of powers issue. It prevents courts from drafting
20 laws because that is the job of the legislative branch.

21 It's one thing to strike out words. Courts do that
22 all the time, strike out words to provide limited relief. In
23 fact, we're asking for the court to only strike out words.
24 We're not asking for every word of the statute to come out.
25 We're asking just for the "with mankind" words to come out.

1 But it's another thing to insert words that aren't there.

2 The Fifth Circuit laws is in accord here. In the
3 *Serafine* case, the plaintiffs challenged a Texas law regulating
4 the use of the word "psychologist," and the state, in its
5 defense, asked the court to read into the law a limitation that
6 applied only to the professional practice of psychology. But
7 the circuit said no, said because the plain text of the statute
8 on its face reached, quote, life coaches, weight loss
9 counselors and AA sponsors, and, quote -- they, quote, declined
10 to give the unconstitutional law an additional extra-textual
11 limiting construction in a frantic attempt to rescue it.

12 The state's request that we insert words into this
13 statute is the same frantic attempt that the Fifth Circuit
14 rejected in the *Serafine* case.

15 THE COURT: Could you give me the cite for *Serafine*?

16 MR. STRUGAR: Absolutely. I think I have it in my --
17 I don't. Your Honor, I apologize for not having it.

18 THE COURT: Oh, no.

19 MR. STRUGAR: I believe it's in our briefing.

20 THE COURT: Okay.

21 MR. STRUGAR: Actually, let me -- thankfully, we have
22 a table of contents. Let me see if I -- yes, I have it here,
23 Your Honor. It's 810 F.3d 354, and that's out of the Fifth
24 Circuit in 2016.

25 THE COURT: Thank you.

1 MR. STRUGAR: And, in fact, while the principles
2 prevent rewriting the statute here, as this court recognized in
3 its order, in *Contreras* the Mississippi Supreme Court
4 specifically rejected efforts to rewrite the unnatural
5 intercourse statute. In *Contreras*, the defendant was charged
6 with unnatural intercourse. He argued that the law
7 criminalized common sexual activity and should be limited to
8 crimes that constitute sexual battery. Essentially, the
9 defendant in that case was making the state's case today. And
10 the Mississippi Supreme Court denied that request, saying, "The
11 courts interpret statutes and decide the law. The enactment,
12 modification or amendment or repeal of statutes is for the
13 legislature."

14 So the state can't have it both ways, seeking in
15 *Contreras* to reject such a limitation, but seeking in this
16 case, where it suits their interest, to have such a limitation
17 be inserted into the statute.

18 *Contreras* recognized that the language and the intent
19 of the statute was to punish all acts of oral or anal sex,
20 without limitation, and so it upheld it in its entirety,
21 wrongly, as *Lawrence* would later in time say, but that's the
22 route that the Mississippi Supreme Court chose to take.

23 So any suggestion that the legislature right now
24 intends something, intends it to be limited to uses of force or
25 crimes against minors, is just disingenuous. Judicial

1 rewriting of the statute should not occur when the statute's
2 plain intent was to invade protected liberty interests. And
3 again, the Fourth Circuit's decision in *MacDonald* followed
4 exactly these principles.

5 You know, the state argues that it has -- that Mr. Doe
6 should not have the -- that the state -- that the statute can
7 be constitutional because in some situations, it can still be
8 applied constitutionally. And I think -- I think any -- easy
9 examples show that that just can't be the standard. Think of a
10 law that criminalized all sex. Obviously, that's an absurd
11 hypothetical, but a law that criminalized all sex could be
12 constitutionally applied in situations involving force or
13 children. But, of course, such a law would be
14 unconstitutional.

15 Imagine, if you will, a law that banned homosexual
16 marriage. We don't have to imagine it so much, but the state
17 could certainly ban marriage in certain situations. The
18 participants are already married. The participants are
19 underage. The participants are being married under force. The
20 participants are biologically related. The state can prohibit
21 marriage in those situations, but it couldn't use a gay
22 marriage statute to say -- they couldn't justify the facial
23 constitutionality of a gay marriage statute by saying --
24 because it's not unconstitutional in every aspect, because
25 there are some hypothetical ways to apply it within its broad

1 sweep so it's therefore constitutional. The same would
2 apply -- the court mentioned *Loving* earlier. The same issue
3 would apply as to interracial marriages that would gay
4 marriage.

5 Just briefly, Your Honor -- I'm finishing up -- as to
6 standing, there's clearly an injury that is caused by the state
7 and redressable by this court. Mr. Doe has an injury. He must
8 suffer the humiliations of registration every day. He must
9 stay away from certain recreational facilities. He has
10 limitations on where he can live. He must report every number
11 of days and pay the fine, whatever the cost is, however one
12 wants to articulate that. And he's on a public registry for
13 everyone to see. His license plate -- or his driver's license
14 says "sex offender" in large letters.

15 He has an injury here. It restricts his movement. It
16 restricts his liberty. It costs him money. It's caused by the
17 state. It's redressable by this court. It seems to me that
18 the state's making some prudential arguments here, like of the
19 kind that were rejected in *MacDonald*, if I can understand their
20 standing argument.

21 COURT REPORTER: You need to slow down.

22 MR. STRUGAR: Sure. It is the same -- it seems that
23 the state is making the same kind of argument that was rejected
24 in *MacDonald* as to standing. That argument was a prudential
25 rule. It wasn't a -- it wasn't constitutional standing. It

1 wasn't injury, redressability, causation. Seems to be
2 something of a zone of interest test. But courts frequently
3 hold that the zone of interest test can be relaxed in cases
4 where the dispute before the court is particularized. The zone
5 of interest test, as it existed in the early '80s, it hasn't
6 really had much purchase since then. But as it existed, it was
7 put forward to sort of prevent abstract disputes from coming to
8 court, from having people assert rights that didn't really
9 apply to them that might apply in future situations. And here,
10 we have someone who is clearly injured, who is clearly
11 presenting the issue to the court. And we don't believe
12 there's any sort of prudential limitation. There's certainly
13 no constitutional limitation as to Mr. Doe's standing.

14 If the court has concerns about standing, it's not
15 something that we briefed. It's not something that the state
16 really briefed. If standing is an issue, we'd be happy to
17 submit some argument on it, but it seems clear to me that
18 there's an injury, causation and redressability.

19 THE COURT: So with respect to Mr. Doe himself,
20 couldn't the court construe this as a facial challenge and just
21 give him the relief that he wishes to have and ask -- and he
22 can move on with his life?

23 MR. STRUGAR: Absolutely.

24 THE COURT: And just be done that way? That would be
25 a narrow as-applied sort of thing that said he is -- Mr. Doe is

1 entitled to relief. We'll let the others come forward to see
2 if they are ever entitled to any relief.

3 MR. STRUGAR: Certainly. I'm sorry. Maybe I
4 misunderstood. I thought you started that by saying facial,
5 but I think the court --

6 THE COURT: I'm sorry. As applied.

7 MR. STRUGAR: Okay. The court -- we're not going to
8 take a -- we're not going to reject a win, Your Honor. If the
9 court wishes to go the as-applied route, we're not going to
10 tell the court it can't do that or it shouldn't do that.
11 Obviously, we would prefer the facial invalidation, especially
12 for registrants like number 36, the San Francisco man, who only
13 by nature of his death avoided the consequences of the statute
14 and the registration requirement, and the gentleman from
15 Virginia who -- you know, who was 19 and had sex with a
16 17-year-old, for whom if he had vaginal sex in Mississippi, it
17 wouldn't even be a crime. So --

18 THE COURT: Does he still -- does that particular
19 person still live in Mississippi, and is that person still
20 under the registration requirements?

21 MR. STRUGAR: Yes, Your Honor.

22 THE COURT: All right.

23 MR. STRUGAR: So, yes, we would -- we would celebrate
24 an as-applied ruling, but we believe facial invalidation is
25 proper here. We wouldn't reject it.

1 My final point, I want to sort of go to the state's
2 argument about how this is -- this is conduct that was in a
3 coercive environment and, therefore, outside of the *Lawrence*
4 ruling.

5 Defendants, at different times in this case, have
6 appeared to rely on the idea that Mr. Doe used force or that it
7 was not consensual sex. They seem to concede at this point
8 that the record doesn't establish that, and they seem to have
9 pivoted to the, *Well, it was in prison, so it's outside of*
10 *Lawrence*. And the argument seems to be that prison is a,
11 quote, inherently coercive environment. That's the term they
12 use in their brief, and that's the term Mr. Barnes used today.
13 That phrase isn't found anywhere in *Lawrence*. It seems to have
14 been extrapolated from the dictum in *Lawrence*, noting that the
15 case, that case, *Lawrence*, did not arise from, quote, a person
16 who might be injured or coerced or a situation in which consent
17 might not easily be refused.

18 We noted in our briefing that text relies twice on the
19 word "might" and seems to be far too amorphous to constitute a
20 criminal prohibition. We're unsure what the parameters of that
21 broad exception to *Lawrence* might be. What is a situation --
22 what is an inherently coercive environment? Would it encompass
23 a workplace where a staff person with seniority engages in oral
24 sex with a person more junior, a professor and a graduate
25 student, a relationship where one party is financially more

1 secure than the other?

2 Every relationship has some power differential in some
3 aspect, be it financial, be it reputational, be it seniority.
4 I note that in *Lawrence v. Texas*, Mr. Lawrence was 24 years
5 senior to Mr. Gardner and his part-time employer. So to the
6 extent that the state wants to have it that this amorphous
7 category of coercive environment should apply, it seems that
8 argument could have been leveled against Mr. Lawrence and Mr.
9 Gardner themselves, but the Supreme Court still went on to
10 strike down the statute in that case.

11 So it's our position that the undefined and
12 unsupported exception would threaten to swallow the holding of
13 *Lawrence* almost in its entirety.

14 Unless the court has any other questions, I will
15 submit.

16 THE COURT: I have none, I don't think.

17 MR. STRUGAR: Thank you, Your Honor.

18 THE COURT: Mr. Barnes, you may proceed when you're
19 ready.

20 MR. BARNES: Yes, Your Honor.

21 Thank you, Your Honor.

22 THE COURT: All right.

23 MR. BARNES: And I apologize because I don't know any
24 way to do this other than go through my list and hit them and
25 respond to any comments the court has.

1 One question I have for counsel opposite, I just want
2 to clarify. Are you saying that out-of-state -- people with
3 out-of-state convictions that are -- I didn't understand
4 exactly what out-of-state convictions you're saying don't fall
5 within the group that would be affected.

6 THE COURT: Make sure you speak into the microphone
7 for the purpose of the court reporter.

8 MR. STRUGAR: Yes, Your Honor. So there are different
9 statutes that are titled "sodomy" in different states. Some
10 states, like Mississippi, are sodomy-only statutes, where the
11 only element of the offense is commission of oral or anal sex.
12 Those statutes have no other registrable equivalent in
13 Mississippi. There's no -- there can't be considered any other
14 equivalent other than unnatural intercourse.

15 Other statutes, California, for instance, where I
16 live, there is a statute titled "sodomy." Since 1970 -- I
17 think it was '4, a conviction for sodomy in California requires
18 oral or anal sex by use of force on someone under the age of, I
19 think it is 16. If someone with a post-1974 sodomy conviction
20 in California were to move to Mississippi, it would still be
21 registrable, even if we obtained the relief that we seek in
22 this case, because there is an additional element, and that
23 element makes somebody registrable under another statute,
24 likely sexual battery, perhaps statutory rape, things like
25 that.

1 So if the answer -- if relief -- if the unnatural
2 intercourse statute being struck down and no longer a
3 registrable offense were to happen, the state would essentially
4 just have to check a different box than it checks right now on
5 the sex offender registry for those out-of-state individuals.
6 It would be, you know, take off the unnatural intercourse
7 equivalent and put in an equivalent for sexual battery or
8 statutory rape or something to that effect.

9 THE COURT: Right, because as I understand
10 Mississippi's SOR, you have a duty to register if it fits in
11 any box that is Mississippi eligible.

12 MR. STRUGAR: That is correct.

13 THE COURT: No matter if what you were convicted of is
14 no longer illegal in the particular state where -- from where
15 you came.

16 MR. STRUGAR: That is correct. And we articulated the
17 distinction and who we think fits within that distinction in
18 our discovery responses early in this case.

19 THE COURT: Okay.

20 MR. BARNES: That's why I wanted to clarify, Your
21 Honor. I think understand. Because my question really was, if
22 one committed something that would constitute sexual battery in
23 another state, that they were convicted under that state's
24 equivalent of the Mississippi unnatural intercourse statute
25 instead of sexual battery, say, in Georgia, are you saying that

1 under the "deemed to be," that that person could be deemed to
2 be the equivalent of sexual battery, or does it have to have
3 another statutory element?

4 MR. STRUGAR: The facts of the -- the facts supposedly
5 underlying the conviction have no relevance. It's the elements
6 of the crime. If the elements of the crime have an additional
7 element for which there is an equivalent crime in Mississippi,
8 that that matters, but the facts underlying the conviction
9 don't matter.

10 If somebody from out of state -- if somebody has a
11 conviction from out of state for an unnatural intercourse
12 conviction in -- I forget what the other states have, just pure
13 sodomy-only laws, but no matter the facts underlying that
14 person's conviction, they would come off the registry in
15 Mississippi. And again, that's the distinction that we've
16 articulated. It's based on -- in the discovery responses, it's
17 based on the elements of the crime under which the person was
18 convicted out of state, not the facts.

19 MR. BARNES: We disagree, Your Honor. I thought
20 that -- I just wanted to be sure I was understanding, but yes,
21 that's one of the fundamental disagreements we have.

22 Counsel went into defendants' responses or requests
23 for admission and talked with the court about the fact that
24 said that if Lawrence was here today, if Bowers was here today,
25 he would have to register in Mississippi, because look at the

1 responses, requests for admissions.

2 And, Your Honor, as we explained in our brief, I guess
3 we thought the question presupposed a valid conviction. And
4 obviously, Lawrence's conviction was declared invalid. So now,
5 if someone was to come -- if our answer to the request for
6 admission is incorrect, which it is within the context placed
7 by plaintiffs, I just want to correct that. I mean, I
8 understand the rules regarding requests for admissions, but it
9 presupposed a valid conviction in our minds, saying if someone
10 did have a valid conviction, then under that statute, yes, they
11 would still have to register. But if Lawrence came here, he
12 wouldn't have a valid conviction.

13 THE COURT: But what about someone who was convicted
14 on the same day as Mr. Lawrence in a separate courthouse
15 right -- two municipal courts going forward -- well, no, I
16 guess a felony conviction, in two criminal courts there in
17 Texas. On the day that Lawrence was convicted, Mr. X was
18 convicted in the courtroom -- in the courtroom next door.
19 Lawrence is the only one who appealed his, and it went all the
20 way up to the U.S. Supreme Court, and the court overturned his
21 conviction and said that that statute is unconstitutional.
22 What happens to Mr. X, who was in the courtroom next door, who
23 did not appeal his conviction under that same statute in Texas?

24 MR. BARNES: He would do exactly what Mr. McDuff did
25 for his client from Pennsylvania a couple of years ago, which

1 was went back to Pennsylvania and got an order from the court
2 of conviction in Pennsylvania saying that gentleman's
3 conviction is no longer valid. And I think that's the answer.
4 I think that's -- for out-of-state convictions, that's the
5 answer for all these things is they should be seeking relief in
6 the court of conviction.

7 And when that happened and Mr. McDuff brought the
8 order from the Pennsylvania court saying this gentleman's
9 consensual sodomy conviction is no longer valid, Mississippi
10 took him off the registry.

11 Your Honor, a little bit out of order, but they say
12 all we're asking you to do is strike the language "with
13 mankind." But with respect, what they have said in their court
14 filing goes a good bit beyond that. When they talk about any
15 situations involving human beings, I think that's broader than
16 what they're saying.

17 First of all, it's my understanding the registration
18 requirement -- and I'm just trying to hit a couple of points --
19 it's every 90 days is my understanding, not every 30 days. The
20 onerousness of the requirements, those are, you know, not
21 before the court today other than just in context. There's
22 certainly cases that you can go into about those. This is not
23 one of them.

24 It's my understanding that the Georgia statute in
25 *Bowers*, that the court said it was only applied to same-sex

1 conduct, even though it was read -- it was written to apply to
2 both, but it was only applied to same-sex conduct.

3 I thought of the answer to the court's question about
4 *Loving*, and the answer is, after *Loving*, there were no
5 constitutional applications of a miscegenation statute. Every
6 application that could apply to I think would fail at least
7 with that as a reason.

8 The aggravated assault, that one puzzles me because
9 aggravated assault is not a sex offense, or maybe it is now,
10 but I don't think that the conduct that Mr. Doe committed would
11 constitute aggravated assault under -- grievous bodily injury
12 or use of a deadly weapon? I don't understand that. And as we
13 set out in our reply brief in support of our own motion, we
14 attached the statutes that we thought were applicable at the
15 time, and again, the only statute that we were aware of at the
16 time of Mr. Doe's conviction in 1978 that would cover a sex
17 offense for same-sex forcible conduct was unnatural
18 intercourse. Just -- because, again, at that time there wasn't
19 a sexual battery statute. Also, there were some really strange
20 issues under Mississippi law, such as the law that said that if
21 a male teacher had sex with a female student, that was a
22 problem. It was a misdemeanor. But there was absolutely no
23 law that prohibited, like, same sex, a male teacher and a male
24 student or a female teacher and a female student. So,
25 obviously, there were some old and archaic laws. But I don't

1 think aggravated assault -- I don't know that there's anything
2 in the record to indicate that there was grievous bodily injury
3 or use of a deadly weapon.

4 *Contreras*, Mississippi Supreme Court declined to
5 narrow its construction of the statute in *Contreras*. That is
6 true. That was 1984. That was four years before *Bowers v.*
7 *Hardwick* even -- you know, when the Supreme Court confirmed at
8 that time that the convictions were valid. So the Mississippi
9 Supreme Court had no reason at that time to narrow the
10 construction. However, we are unaware of the court ever being
11 asked post *Lawrence*, you know, to opine as to the
12 enforceability of that statute, consensual sex, or interpreting
13 it post *Lawrence*. That might well be a different result than
14 what *Contreras* case showed in 1984.

15 Effectively, Your Honor, the plaintiffs haven't really
16 proven that there's anybody on the registry for consensual sex.
17 All they've really shown, we think, is that there might be two
18 or three where the evidence is equivocal, but equivocal doesn't
19 meet the burden of proof, and that we can't show that these
20 people were child molesters. But then they say it doesn't
21 matter, because it doesn't matter if it was a child molester
22 because if he was prosecuted under -- for sexual -- for sodomy,
23 in Tennessee, it doesn't matter if he did it with a
24 three-year-old child. Again, we just respectfully disagree
25 with that premise.

1 *Obergefell* -- *Obergefell* was dealing with consenting
2 adults. First thing is, in *Lawrence*, there was no evidence
3 that there was -- it was not consensual. I think the parties
4 agree it was consensual. No one implied that there might be
5 coercion. To the extent that implied coercion exists, I think
6 Mr. Strugar's argument could be to say that nobody can ever
7 have sex with anybody truly consensually because there's always
8 some sort of coercion.

9 What we referred to, and I thought it was actually a
10 pretty good summary, you know, inherently coercive
11 environments, is the court did specifically say, though,
12 environments where consent -- people who are in a position
13 where consent might not easily be refused. It is our
14 understanding that's what the court was talking about.

15 For example, the military, where you've got the
16 superior and subordinate relationship where that's inherently
17 coercive regardless of whether the subordinate says, *Oh, it's*
18 *consensual because in the military, you have to obey your*
19 *ranking officers, et cetera*. So that's another situation.

20 I don't think that substantive due process requires
21 every time a court declares a law is unconstitutional as
22 applied to a person, I don't think it requires facial
23 invalidation just because the court relies on substantive due
24 process. There could be substantive due process violations
25 which can be remedied by as-applied relief, again, which is why

1 the Supreme Court tells us that as-applied challenges are the
2 building blocks of constitutional jurisprudence, and we don't
3 disturb more applications than necessary.

4 But what is absolutely clear is that nowhere has the
5 United States Supreme Court ever said *Lawrence* requires a
6 conviction of someone convicted of sodomy of a six, seven,
7 eight, nine-year-old child, or forcible sodomy. That
8 conviction is invalid. That is all interpretation. There's
9 certainly no case. If there was a case, obviously, we wouldn't
10 be here, and the court wouldn't be confronted with these
11 issues.

12 But we -- also, nowhere does the court say the state
13 can't prohibit sex in prison. So there are no explicit
14 holdings. I wish -- you know, Justice Kennedy could have saved
15 us a lot of trouble if he had just said facially or as applied,
16 as opposed to involve, it does involve this, as opposed -- if
17 he had said as applied to this, but unfortunately, he didn't.
18 So it gives us an interesting question of interpretation. But
19 we think that our argument is the superior one.

20 However, in sum, we -- this lawsuit is barred by *Heck*.
21 We don't think there's any way around that. And we would ask
22 the court to rule in our favor on the merits. We think our
23 argument has -- we have the better of the argument on the
24 facial and as applied. And last, if the court disagrees and
25 grants any relief, we ask the court to make it as narrow as

1 possible. And, finally, I guess really last, if the court
2 rules against us, again, we would like to reiterate our request
3 for a stay pending any appeal.

4 THE COURT: That issue is certainly preserved. The
5 court could take the easier route and just say *Heck* bars it
6 right now.

7 MR. BARNES: Well, that would be --

8 THE COURT: *Heck* bars it, three words. No, no.

9 MR. BARNES: You can say, can he bring this action?
10 *Heck* no. But again, our point is, but that may well be what
11 the Fifth Circuit does with it. Again, though, Your Honor,
12 thank you. We appreciate the opportunity to speak.

13 THE COURT: You have a -- yeah, you may come forward.

14 MR. STRUGAR: Thank you. A few brief points, and I'm
15 serious about a few. I have five here. Mr. Barnes opened by
16 talking about how the out-of-state issue works, and if somebody
17 who had an unconstitutional conviction in another state moved
18 to Mississippi, they could go back to that state and seek
19 relief there.

20 Who knows if they could seek relief there? We've seen
21 here today there's all sorts of procedural jurisdictions,
22 statute of limitations, successive writs bars that could
23 prevent such a person from seeking relief in his or her own
24 state.

25 THE COURT: They may have something like people here

1 have.

2 MR. STRUGAR: Exactly.

3 THE COURT: Okay.

4 MR. STRUGAR: And, second, and maybe more
5 fundamentally, Mississippi can't excuse its own constitutional
6 failure and the constitutional -- additional constitutional
7 failure of another state. If another state has convicted
8 somebody for something that is not a crime, Mississippi can't
9 register them and then say, *Sorry, you have to go back to that*
10 *state. It's not our business.* Mississippi has made it their
11 business.

12 As to *Loving*, Mr. Barnes' suggestion that there were
13 no constitutional applications of *Loving*, of miscegenation
14 statutes after *Loving* is just as untrue in *Loving* as it is
15 here. And here we have a statute that criminalizes a sex act
16 that 90 percent of people participate in, 90 percent of
17 straight adults participate in. The vast, vast, vast majority
18 of those sex acts are constitutionally protected and
19 criminalized by the unnatural intercourse statute. There's a
20 subset of them where the state could enact laws, narrowly
21 tailored laws that prohibit those sex acts. That's the same
22 case with marriage.

23 In *Loving*, again, if the interracial couple were
24 sufficiently related by blood, if one of the partners was
25 already married, if they weren't of the right age, those could

1 be prohibited. So in *Loving*, you know -- and again, it's
2 almost an absurd example because the idea that a state would
3 try to enforce a miscegenation statute against somebody
4 practicing polygamy, for instance, and then come in and say,
5 *Well, it's constitutional because we can prohibit polygamy, so*
6 *we can use the miscegenation statute because it's not*
7 *unconstitutional in all of its applications.* We'd be laughed
8 out of every courtroom in the country. Frankly, the reason
9 it's different here is because we're talking about
10 homosexuality and not race.

11 As to the point that aggravated assault wouldn't hold
12 here, the requirement for aggravated assault is serious bodily
13 injury. The requirement for simple assault is bodily injury.
14 The Mississippi Supreme Court has held that physical pain
15 constitutes the injury. Whether that constitutes serious
16 bodily injury or not, I don't practice enough in Mississippi to
17 know, Your Honor. But they could have charged him with simple
18 assault, certainly, if there was a forcible sex act here.

19 But the state made their decision to charge him with
20 unnatural intercourse and charge all of these people with
21 unnatural intercourse. And they can't hide from that
22 consequence now.

23 I want to go directly to the dictum that the state
24 relies on and sort of --

25 THE COURT: Well, the state could have prosecuted

1 someone under aggravated assault or simple assault. I guess
2 that's the same as if it were today and a person had had sex
3 with a child, he may plead guilty to a related offense,
4 aggravated assault, which would not require registering on a
5 sex offender registry.

6 MR. STRUGAR: Absolutely, Your Honor. And that
7 happens every day. You know, it happens frequently enough.
8 Whether it's every day or not, I don't know. But the state
9 makes much of the fact that because Mr. Doe's conviction was in
10 1978, at that point the rape statute didn't apply, and at that
11 point there was no sexual battery statute. And that's true,
12 which is why we say they could have charged him with aggravated
13 or simple assault. But if that happened today, people could
14 plead down to sexual battery, or the state could charge
15 somebody with rape instead of unnatural intercourse. Of
16 course, they don't get out of the registration requirement in
17 that case, but people who -- often people who are charged with
18 sexual battery will plead down to something like aggravated
19 assault to avoid a registration requirement. It's quite
20 common. Thinking that goes to -- that's what our expert report
21 is about, which in some ways is obvious but seemed to be
22 contested, so we decided to put in an expert.

23 I want to put forward a sort of positive
24 interpretation of what the -- of what Justice Kennedy was doing
25 in the dictum in *Lawrence* that the state relays on. He does

1 obviously say, you know, this case does not involve minors,
2 involve a coercive transaction, involve force.

3 And what Kennedy was doing was responding to Justice
4 Scalia in dissent and to some of the briefs in the case
5 positing that the sky would fall if they struck down the sodomy
6 law. People said, *If you strike this down -- well, one of the*
7 *things they said that the sky would fall was gay marriage. But*
8 *they also said, you know, We will no longer be able to prohibit*
9 *incest, we'll no longer be able to prohibit polygamy or*
10 *prostitution or oral sex against children.*

11 And so Kennedy was saying this case doesn't involve
12 any of those things, and in taking that dictum, many courts
13 have since amended or rescinded and then passed new laws of
14 their sodomy statutes, limiting it to the situations that
15 Justice Kennedy envisioned. So there are states, like my
16 state, California, that limits the criminalization of oral or
17 anal sex to issues involving force or children.

18 People have -- there have been, usually pro se,
19 challenges to those under *Lawrence*, and they are always
20 rejected because the courts -- the courts recognize that's what
21 Kennedy was doing there in saying states can go and pass laws
22 in these narrowly tailored circumstances, but they can't cast a
23 net that ensnares 90 percent of adults and just say, *Trust us*
24 *to use it responsibly.*

25 And related to that, the state here says, *Well, we*

1 *could prohibit sex in prison.* Again, that's not really in the
2 *Lawrence* decision, but some states have done that. That's the
3 *Groux* case, G-R-O-U-X, that the state relies on. Again, that's
4 a California -- unpublished California Court of Appeal case
5 where California does have a law prohibiting sex in prison.
6 Someone challenged it under *Lawrence*, and the Supreme Court --
7 the court of appeals in California said *Lawrence* wasn't about
8 this. It was about these broad statutes. And California, in
9 response, passed narrow statutes to narrow circumstances, which
10 is entirely consistent with *Lawrence*. That's also our
11 position.

12 But I note Mississippi doesn't have a law that
13 prohibits sex in prison. Mississippi is saying -- standing up
14 and saying, *We could prohibit sex in prison, you know, if we*
15 *wanted to, and Lawrence doesn't prohibit that,* but if it wanted
16 to do that, it could have a statute that prohibits, like
17 California has done, a narrowly tailored law, but it doesn't.

18 I mean, obviously, there are not mixed gendered
19 prisons in Mississippi, but if there were, there would be no
20 prohibition on inmates having sex. Mississippi could pass that
21 law if it wishes to, just as it could pass a law prohibiting
22 minor -- prohibiting forced oral or anal sex, or oral or anal
23 sex with minors, or oral or anal sex in a coercive transaction.
24 It has the right to do all of those things. It has chosen not
25 to. The broad prohibition is unconstitutional.

1 Thank you, Your Honor.

2 THE COURT: Thank you. I know the part -- well, at
3 least the plaintiffs have asked for possibility of supplemental
4 briefing with respect to -- in light of the questions that I've
5 asked here and things, and you will be given that opportunity.

6 Any supplemental briefs may be filed 21 days after the
7 transcript of this hearing is provided to the parties. And if
8 we need additional time, just request it and it will be
9 granted. Because I realize now we're running into the seasons
10 of the year where things are -- a lot is happening and going
11 on, so I respect that. Obviously, it will delay the court's
12 decision, but the court's decision is going to be delayed.
13 I've got some other matters that I have -- that I'll have to be
14 dealing with over the next several weeks, including --

15 MR. BARNES: Sorry, Your Honor. Why are you looking
16 at me?

17 THE COURT: I'm looking at you and Mr. McDuff. I
18 think Mr. McDuff has got two cases at least he's asking for
19 relief before December 31st possibly, one of which involves
20 you. So I'm looking at you for that one now.

21 So you have 21 days after this transcript is available
22 to you. And, of course, if you need additional time, and I
23 understand what -- I suspect I know what some of your schedules
24 are, so if you need additional time after that, it will be
25 extended or approved. No problem.

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We can go off the record now.

(Off Record)

(Hearing Concluded)

CERTIFICATE OF REPORTER

I, CHERIE GALLASPY BOND, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 11th day of November, 2018.

s/ *Cherie G. Bond*
Cherie G. Bond
Court Reporter