IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JOHN DOE, Plaintiff, v. ALAN WILSON, in his official capacity as Attorney General of South Carolina; and MARK KEEL, in this official capacity as Chief of the South Carolina State Law Enforcement Division, Defendants.	Case No. 3:21-cv-04108-MGL

Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment or, in the Alternative, for a Preliminary Injunction

INTRODUCTION

South Carolina forces Plaintiff John Doe to register as a sex offender for having consensual gay sex with another man in 2001. This is wrong, violates well-established constitutional law, and must be stopped.

At that time of Doe's conviction, it was constitutionally permissible to prosecute and imprison people for engaging in gay sex. *See Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986). That changed in 2003. In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the United States Supreme Court held that anti-sodomy statutes are facially unconstitutional under the Fourteenth Amendment because they represent an unjustifiable invasion into "the realm of personal liberty which the government may not enter."

Despite this unequivocal ruling, Defendants (the State) continue to operate as though South Carolina's Buggery law, S.C. Code Ann. § 16-15-120, is constitutional and imposes disabilities on people with pre-*Lawrence* sodomy convictions by requiring them to register under the Sex Offender Registry Act, commonly known as SORA, S.C. Code Ann. § 23-3-430(C)(11). This is an unconstitutional infringement on Doe's rights.

This case presents an issue of law, not fact. State records show that Doe is required to register exclusively because of a 2001 Buggery conviction. Because there is no material fact in dispute, summary judgment is appropriate. But even if this Court believes summary judgment is premature, it should preliminarily enjoin this registration scheme until final resolution of this case. Because Doe is likely to prevail on the merits and is being irreparably injured by being unconstitutionally branded a sex offender, preliminary injunctive relief is appropriate.

STATEMENT OF FACTS

This case involves one material fact: Plaintiff John Doe was convicted of Buggery by the state of South Carolina in 2001 for having sex with another man. The State cannot dispute this fact, and all other facts are either immaterial or flow from this fact by operation of law.

I. South Carolina Criminalizes Oral and Anal Sex

On its face, the South Carolina Buggery statute, S.C. Code Ann. § 16-15-120, criminalizes "sexual practices common to a homosexual lifestyle." *Lawrence*, 539 U.S. at 578. In full, the statute states that:

> Whoever shall commit the abominable crime of buggery, whether with mankind or with beast, shall, on conviction, be guilty of [a] felony and shall be imprisoned in the Penitentiary for five years or shall pay a fine of not less than five hundred dollars, or both, at the discretion of the court.

Although the statute fails to define buggery, *see* Argument, Part I(C) (discussing vagueness), secondary sources define the term as "a carnal copulation against nature; a man or a

woman with a brute beast, a man with a man, or a man unnaturally with a woman." 3 S.C. Jur. Adultery and Fornication § 6; *also see* Black's Law Dictionary, "Buggery" (11th ed. 2019). Put more plainly, the statute prohibits (among other things) homosexual sex acts.

South Carolina's prohibition on anal (and possibly oral) sex has existed since the Province of Carolina was split into North and South Carolina in 1712. For a century and a half, conviction carried compulsory death sentence. Death was removed as a mandatory sentence in 1869, at which point the legislature required only a five-year mandatory sentence. The State has since removed the mandatory five-year penalty and instead imposed a maximum five-year sentence. S.C. Code Ann. § 16-15-120.

In 1994, South Carolina enacted its initial sex offender registration act. S.C. Code. Ann. §§ 23-3-400 *et seq*. (1994). It included Buggery as one of the fifteen registrable offenses. S.C. Code. Ann. § 23-3-430(10) (1994). The mandate that people convicted of Buggery register as sex offenders has survived repeated amendment of SORA and continues to this day. S.C. Code Ann. § 23-3-430(C)(11) (2021).

II. Although the U.S. Supreme Court Invalidated Statutes Criminalizing Anal and Oral Sex Eighteen Years Ago, South Carolina Continues to Mandate Registration for Pre-*Lawrence* Buggery Convictions

Of course, South Carolina was not alone in its criminalization of homosexuality and the sex acts traditionally associated with it. "[B]efore 1961[,] all 50 States had outlawed sodomy." *Lawrence*, 539 U.S. at 572. By 1986, only laws in "24 States and the District of Columbia" remained. *Id*. By 2003, that number was down to 13—including South Carolina. *Id* at 573.

In 2003, *Lawrence* invalided those 13 remaining laws that purported to criminalize oral and anal sex with no other elements. It found Texas's sodomy prohibition violated substantive due process because the "statute further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578. In so

holding, the Court explicitly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986)—a prior unsuccessful facial challenge to Georgia's sodomy statute—signaling that its ruling was not limited to Texas or to laws singling out same-sex couples. *Lawrence*, 539 U.S. at 578.

In the wake of *Lawrence*, several states repealed or amended their sodomy laws. In 2006, Missouri amended its sodomy statute to only apply to sex acts with minors less than 14 years old. *See* Mo. Rev. Stat. § 566.062. In 2010, Kansas repealed its prohibition outright. *See* Kan. Stat. Ann. § 21-3505. In 2013, Montana formally revised its law to remove the prohibition on gay sex by amending the definition of "deviate sexual intercourse" to apply only to acts of bestiality. *See* 2013 amendment to § 45-2-101, MCA (deleting "sexual contact or sexual intercourse between two persons of the same sex or" from definition of "deviate sexual relations"). In 2014, following a decision by the Fourth Circuit Court of Appeals holding that *Lawrence* rendered its prohibition on "Crime Against Nature" unconstitutional, *Macdonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), *cert denied* 571 U.S. 829 (2013), Virginia amended it to apply only to bestiality and incest. *See* Va. Code Ann. § 18.2-361. And in 2020, Maryland repealed its sodomy prohibition. *See* Md. Criminal Law Code Ann. § 3-321.

Still, South Carolina's Buggery statute not only remains on the books, but the State continues to enforce the three-century old prohibition on sex acts traditionally associated with homosexuality. And it continues to mandate sex offender registration for Buggery convictions.

III. South Carolina Forces Doe to Register as Sex Offender for a Pre-*Lawrence* Buggery Conviction

In 2001, South Carolina charged Plaintiff John Doe with Buggery for having consensual sex with another adult man. Plaintiff's Request for Judicial Notice, Ex. A (Indictment). It also indicted the other man. *Id*., Ex. B (Arrest Warrant, listing other man as a co-defendant).

Doe pleaded guilty. *Id*., Ex. C (Sentence). For the crime of having gay sex, Doe was handed a suspended sentence of two years imprisonment, put on one year of supervised probation, fined $100, ordered to undergo counseling, and placed on the sex offender registry for life. *Id*.

In 2006, the South Carolina Board of Probation, Parole, and Pardon Services granted Doe a pardon. *Id*., Ex. D (Certificate of Pardon).

But because South Carolina continues to mandate sex offender registration for life and requires sex offender registration even for offenses for which the convicted is pardoned—and because South Carolina in the year 2021 continues to mandate people convicted of having gay sex register as sex offenders—Doe remains forced to register as a sex offender. S.C. Code Ann. §§ 23-3-430(F) (requiring registration despite pardons); 23-3-460(A) (requiring lifetime registration). In addition to the burdens of registration, the State also publishes Doe's name, picture, and identifying information on their online public registry. Ex. E (Registry Entry).

IV. Registration Imposes Severe Burdens on Doe's Life

Registration imposes incredible burdens on Doe's life. He must report to law enforcement, in person, twice a year to register. S.C. Code Ann. § 23-3-460(A).

As part of the registration process, the State collects an enormous amount of information about him. State officials photograph him. S.C. Code Ann. § 23-3-530(2)(a). They take his fingerprints and palm prints. *Id*. They collect his name; social security number; age; race; sex; date of birth; addresses of permanent and temporary residence; place of employment; date of employment; and his vehicle's make, model, color, and license tag number. S.C. Code Ann. §§ 23-3-530(2)(a, c). He must inform them about every online account he creates. S.C. Code. Ann. § 23-3-555(B).

Failure to follow any of registration's strict dictates is, on the first offense, a misdemeanor subject to a $1,000 fine and up to 366 days of imprisonment. S.C. Code Ann. § 23-3-470(B)(1). A second offense carries a mandatory 366 days of imprisonment, no part of which may be suspended and for which no probation can be granted. S.C. Code Ann. § 23-3-470(B)(2). A third offense carries a mandatory five-year imprisonment, three years of which cannot be suspended or given probation. S.C. Code Ann. § 23-3-470(B)(3).

V. Other Federal Courts Enjoined Similar Registration Schemes

Federal courts have been unkind to similar registration schemes in other states.

One plaintiff challenged his registration obligation in Montana for a 1993 conviction under Idaho's "Crime Against Nature" statute, which also criminalized consensual gay sex. *Menges v. Knudsen*, No. CV 20-178-M-DLC, --- F. Supp. 3d ---, 2021 WL 1894154, at *1 (D. Mont. May 11, 2021), *appeal docketed* No. 21-35370 (May 12, 2021). Montana required that he register there because of its reciprocal registration requirement.[1] *Id*. After the defendants moved to dismiss and the plaintiff moved for a preliminary injunction, the district court—recognizing that the case presented a question of law, not fact—advanced the trial on the merits and enjoined the state from requiring the plaintiff to register. *Id*. at *2, *28. The case lasted six months and two days from filing the complaint to final judgment. *Id*. at *2.

The same plaintiff from the Montana case also filed suit in Idaho, along with another plaintiff proceeding pseudonymously, challenging Idaho's registration requirement for people with Idaho Crime Against Nature convictions. *Doe v. Wasden*, No. 1:20-CV-00452-BLW, --- F. Supp. 3d ---, 2021 WL 4129144, at *1 (D. Idaho Sept. 8, 2021) *appeal docketed* No. 21-35826 (Oct. 10, 2021). Assessing a motion to dismiss by the defendants and a motion for a preliminary

[1] South Carolina also has such a requirement. S.C. Code Ann. § 23-3-430(A).

injunction by the plaintiffs, the District of Idaho found the plaintiffs were likely to succeed on their due process (under both substantive and procedural due process theories) and equal protection claims and preliminarily enjoined the plaintiffs' registration obligations. *Id*. at *11–17.

LEGAL STANDARDS

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant has the initial burden of showing there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The non-movant(s) must then present specific facts by affidavit or other admissible form sufficient to raise a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247–48 (1986). There must be a genuine dispute as to any material fact—a fact "that might affect the outcome of the suit." *Id*. at 248.

Summary judgment is the preferred vehicle for adjudicating facial challenges to the constitutionality of statutes. 10A Charles Alan Wright, FED. PRAC. & PROC. CIV. § 2725 (3d ed. 2011) ("[I]f the only issues that are presented involve the legal construction of statutes or legislative history or the legal sufficiency of certain documents, summary judgment would be proper.").

A plaintiff seeking a preliminary injunction must show: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *WV Ass'n of*

Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

ARGUMENT

This case presents a dispute of law, not fact. Doe was convicted of having gay sex at a time when it was considered constitutionally permissible to convict people for being gay. And the State continues to require that he register for that conviction today, despite Supreme Court holdings that Doe could not be convicted under such a statute today. The legal disputes presented by this statutory scheme are ripe for final adjudication now.

Another federal district court, facing another registration scheme involving a man made to register for a historical sodomy conviction, similarly cut to the chase and resolved the legal dispute without unnecessary extended timelines, discovery, or other motion practice. *Menges*, 2021 WL 1894154, at *2. This Court should do the same here.

But even if the Court does not believe summary judgment is appropriate now, it should preliminarily enjoin Doe's registration obligations until the parties can obtain final judgment.

I. The Court Should Enter Summary Judgment on Each Claim

Doe should win on each of his claims. He should win on his substantive due process claim that the Buggery statute facially violates due process as the Supreme Court explained in *Lawrence*. Even if it isn't facially invalid, it still violates substantive due process to force Doe to register as a sex offender for the pre-*Lawrence* Buggery conviction. He should win on equal protection because criminalizing homosexuality and requiring sex offender registration for homosexuality can't possibly be tailored to any important or even legitimate governmental purpose. And he should win on his vagueness claim because the text of the statute provides no notice of what it prohibits and what it permits.

A. By Enforcing the Facially Invalid Buggery Law, South Carolina Is Violating Doe's Substantive Due Process Rights

The State violates Doe's substantive due process rights in two ways: first, by collaterally enforcing a facially unconstitutional statute; and second, even if the Buggery statute were not facially unconstitutional, by requiring Doe to register as sex offender for a pre-*Lawrence* Buggery conviction.

1. The Buggery Statute is Facially Invalid

The Supreme Court rendered South Carolina's Buggery statute facially invalid and thus incapable of any valid application. The facial invalidity is clear from the text of *Lawrence* itself and the Supreme Court's own characterization of the opinion in the years since. Binding Fourth Circuit precedent confirms that reading. *Macdonald v. Moose*, 710 F.3d 154 (4th Cir. 2013). Because the statute is facially invalid, so is the State's mandate that people convicted under the unconstitutional statute must register as sex offenders.

i. Lawrence *Invalidated Sodomy Laws Like the Buggery Statute*

The Supreme Court was clear in *Lawrence*: any statute that criminalizes the commission of oral or anal sex without additional elements—*i.e.* a sodomy-only statute—is unconstitutional. By its plain terms, this rule applies retroactively. *Id.* ("*Bowers* was not correct when it was decided, and it is not correct today."); *also see*, *e.g.*, *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) ("*Lawrence* held that a state cannot enact laws that criminalize homosexual sodomy. *Lawrence* is a new substantive rule and is thus retroactive.").

That *Lawrence* facially invalidated sodomy statutes is apparent from (1) the language of the *Lawrence* opinion, which proves that the Court was invalidating a statute, and not considering an as-applied challenge, and that it intended to reach all sodomy-only laws; (2) *Lawrence*'s express determination to strike down Texas's same-sex sodomy law on due process

rather than equal protection grounds to reach other sodomy-only laws prohibiting acts of sodomy engaged in by different-sex couples as well; and (3) the Supreme Court's later characterizations of *Lawrence* and the Fourth Circuit's binding ruling on *Lawrence*'s scope.

First, the plain language of *Lawrence* shows facial invalidation. At the very outset of the majority opinion, Justice Kennedy stated: "The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." *Lawrence*, 539 U.S. at 562. Likewise, the Court concluded its decision in terms that unmistakably held the statute unconstitutional on its face and not just as applied to the conduct of the plaintiff in the case: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id*. at 578; *see also id*. at 579 (Justice O'Connor, concurring) ("I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional.").

The Supreme Court also made clear that its holding applied to all sodomy-only statutes, framing the issues presented as the validity of the statutes, not how they were applied. The Court granted certiorari on two questions related to the constitutionality of the Texas statute and a third question asking whether the Court should overrule *Bowers*. *Lawrence*, 539 U.S. at 564 (framing the questions presented). *Lawrence* found that "*Bowers* was not correct when it was decided, and it is not correct today." *Id*. at 578. The decision rendered invalid "the laws involved in *Bowers*"[2] and the "power of the State to enforce these *views* [targeting oral and anal sex] on the whole society through operation of the criminal law." *Id.* at 567, 571 (emphases added). Indeed, throughout its analysis the Court addressed the constitutional deficiencies of laws (plural)

[2] The Buggery statute was one of the laws involved in *Bowers*. Justice Powell specifically identified it as one of the still-existing sodomy-only prohibitions at the time *Bowers* was decided. *Bowers*, 478 U.S. at 198 n.1 (Powell, J., concurring).

targeted at intimate sexual behavior. The opinion noted that "[t]he 25 States with *laws* prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13 [including South Carolina's], of which 4 enforce their laws only against homosexual conduct." *Id.* at 573 (emphasis added). The Court's opinion in *Lawrence* cannot be read to permit continued enforcement of sodomy-only statutes given the Court's aim, set forth in unusually candid and explicit language, to remove these laws from the books.

The Court thus made clear that all state sodomy-only statutes analogous to the Texas law, whether between same-sex or different-sex partners, are invalid under the Due Process Clause. *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF L. REV. 915, 938 and n.143, 948 and n.211 (2011); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1379-80 (2005) (explaining that the Court invalidated all sodomy-only laws to eradicate the stigma those laws engendered); Scott A. Keller and Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes In Toto*, 98 U. VA. L. REV. 301, 354 n.198 (2012) (citing *Lawrence* as example of when the Supreme Court "does invalidate statutes in toto").

Second, the Court grounded its holding in substantive due process deliberately to effect this sweeping change. Justice O'Connor's concurrence advocated for a narrower remedy under the Equal Protection Clause that would have avoided overruling *Bowers*, *see* 539 U.S. at 579 (O'Connor, J., concurring in judgment, but dissenting from the Court's overruling of *Bowers*), but the Court's majority explicitly rejected this approach in favor of a sweeping ruling under substantive due process that reached not just same-sex sodomy prohibitions but all sodomy-only prohibitions: "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id*. at 575.

The Court's choice to decide the case on due process rather than equal protection grounds thus voided all sodomy-only statutes and precluded the harms of leaving any such laws in force. The Court's opinion in *Lawrence* cannot be read to permit continued enforcement of sodomy-only statutes given the Court's evident aim—set forth in unusually candid and explicit language—to remove these laws from the books.

Third, the Supreme Court's later writings on the scope of *Lawrence* confirms this reading. In *Obergefell v. Hodges*, 576 U.S. 644 (2015), for example, the case that invalidated same-sex marriage prohibitions, both the majority and the dissent spoke of *Lawrence* in broad terms and of striking down more than just the Texas statute. *See, e.g.*, 576 U.S. at 667 ("*Lawrence* invalidated *laws* that made same-sex intimacy a criminal act." (emphasis added)); *id*. at 661–62 ("Then, in 2003, the Court overruled *Bowers*, holding that *laws* making same-sex intimacy a crime 'demea[n] the lives of homosexual persons.'" (quoting *Lawrence*, 539 U.S. at 575) (emphasis added)); *id.* at 675 ("Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from *laws* making intimacy in the lives of gays and lesbians a crime against the State") (emphasis added); *id*. at 701 ("*Lawrence* relied on the position that criminal sodomy *laws*, like bans on contraceptives, invaded privacy by inviting 'unwarranted government intrusions' that 'touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home,'" (Roberts, C.J., dissenting) (quoting *Lawrence*, 539 U.S. at 562, 567) (emphasis added)).

ii. The Fourth Circuit Confirmed that Lawrence *Facially Invalidated Sodomy-Only Laws like the Buggery Statute*

Binding precedent from the Fourth Circuit confirms that *Lawrence* invalidated all then-remaining sodomy-only statutes, including South Carolina's Buggery statute. In *MacDonald v.*

Moose, the Fourth Circuit declared Virginia's then-existing sodomy-only prohibition invalid on its face in the context of a challenge to a conviction for solicitation to commit sodomy with a 17-year-old. *Macdonald v. Moose*, 710 F.3d 154 (4th Cir. 2013).

The Fourth Circuit held that "prohibiting sodomy between two persons without any qualification[] is facially unconstitutional[,]" even though MacDonald himself was charged for engaging in oral sex with a minor. *Id*. at 166. "Because the invalid Georgia statute in *Bowers* is materially indistinguishable from the anti-sodomy provision being challenged here, the latter provision likewise does not survive the *Lawrence* decision." *Id*. at 163.

The Fourth Circuit recognized *Lawrence*'s dictum clarifying that states are not prohibited from enacting laws that seek to protect minors from sexual exploitation or sexual conduct lacking consent. 539 U.S. at 578 ("The present case does not involve minors. . . . [or] persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. . . . [or] public conduct or prostitution"). But as it explained, this dictum was the Supreme Court "reserving judgment on more carefully crafted enactments yet to be challenged." *Macdonald*, 710 F.3d at 165.

The Supreme Court denied Virginia's petition for certiorari. *Moose v. MacDonald*, 571 U.S. 829 (2013).

Taking a cue from the Circuit, Virginia enacted a more carefully crafted law. In 2014, it amended its sodomy-only statute to apply only to bestiality and incest. Va. Code Ann. § 18.2-361.

The Fourth Circuit's firm declaration that "prohibiting sodomy between two persons without any qualification[] is facially unconstitutional," *MacDonald*, 710 F.3d at 166, is binding

here. And it requires the Court enter summary judgment for Doe on his substantive due process claim.

iii. The Buggery Statute Is Unconstitutional and the State Cannot Enforce It Through the Sex Offender Registration Act or in Any Other Way

While other states repealed or limited their sodomy-only statutes in the wake of *Lawrence*, South Carolina's Buggery statute remains on the books, as does the onerous requirement to continually register as a sex offender.

Like the Georgia and Texas statutes struck down in *Lawrence* and the Virginia law declared facially invalid in *MacDonald*, the Buggery statute's criminalization of anal (and arguably oral) sex between human beings is facially invalid.

The federal Due Process Clause cannot mean one thing in Texas and something different in South Carolina. If enforcement of one State's statute is struck down as unconstitutional, then enforcement of another state's substantively identical statute must also be unconstitutional. When "enforcement of [a] statute" has properly been invalidated as unconstitutional, "then so is enforcement of all identical statutes in other states, whether occurring before or after [the Supreme Court's] decision." *Danforth v. Minnesota*, 552 U.S. 264, 286 (2008); *see also Martin v. Hunter's Lessee*, 14 U.S. 304, 347-49 (1816) (holding Constitution requires "uniformity of decisions throughout the whole United States, upon all subjects within [its] purview"); *Am. Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 201 (1990) ("Either enforcement of the statute at issue in [a prior case] . . . was unconstitutional, or it was not; if it was, *then so is enforcement of all identical statutes* in other States . . . .") (Scalia, J., concurring) (emphasis added).

Because the Buggery statute is facially unconstitutional, any enforcement of it is invalid under *Lawrence*. The State's requirement that people convicted of Buggery register under SORA cannot stand. An unconstitutional criminal statute can be given no effect.

Lawrence even addressed sex offender registries in general—and South Carolina's in particular—as an unacceptable collateral consequence of unconstitutional sodomy convictions: "The stigma . . . [the] statute imposes, moreover, is not trivial. . . . [T]he convicted person would come within the [sex offender] registration laws of at least four States were he or she to be subject to their jurisdiction." 539 U.S. at 575 (citing the sex offender registration laws of four states, including South Carolina). The registration requirements that attend sodomy convictions "underscore[] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Id*. at 576. As *Lawrence* made clear, any enforcement of a sodomy-only law, whether by prosecution or by forced registration, violates the Fourteenth Amendment.

Because the Buggery statute is facially unconstitutional, any enforcement of it is invalid under *Lawrence*. The State's requirement that people convicted of Buggery register under SORA cannot stand.

The conviction South Carolina has relied on in compelling Doe to register for at least two decades is for a violation of a statute that is "*substantive*[*ly*] . . . defective (by conflicting with a provision of the Constitution)." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (emphasis in original). Eighteen years have passed since the Supreme Court issued *Lawrence* and specifically highlighted South Carolina's sodomy-only statute and its accompanying sex offender registration requirement. Yet the State continues to operate as if *Bowers v. Hardwick* were valid law and the Buggery statute enforceable. This position cannot be sustained. The Buggery statute is facially unconstitutional and must be enjoined from further enforcement.

Declaring the Buggery statute facially unconstitutional is the most straightforward way to rule on this motion. It is the plain result of binding Supreme Court and Fourth Circuit precedent.

It is the relief from which all other relief would naturally flow. And it would avoid having to reach the other issues briefed in this motion.

But if the Court wishes to reach the other issues, Doe wins on each.

2. Even if Lawrence *Narrowed—Rather than Invalidated—the Buggery Statute, Forcing Sex Offender Registration on Pre-*Lawrence *Buggery Convictions Violates Substantive Due Process*

The Fourth Circuit's decision in *MacDonald* defeats any argument that *Lawrence* narrowed, as opposed to invalidated, South Carolina's Buggery statute. 710 F.3d at 165. But even if the Fourth Circuit never decided *MacDonald*, and this Court were inclined to rule differently than the panel there, it would still violate Doe's substantive due process rights to force him onto the sex offender registry for a pre-*Lawrence* conviction.

In *Lawrence*, the Court ruled that Texas's sodomy law, which criminalized sexual acts between consenting adults, "furthers no legitimate state interest." 539 U.S. at 578. In dictum, the Court explained that it was not foreclosing the enforcement of laws targeting nonconsensual acts of sodomy, sodomy involving children, sodomy in public view, or sodomy for compensation. *Id*. at 578. But even if sodomy-only laws like South Carolina's Buggery statute were narrowed in their application after *Lawrence*, all convictions secured prior to *Lawrence* are necessarily invalid.

In a hypothetically valid post-*Lawrence* Buggery prosecution, the State must prove, beyond a reasonable doubt, at least one additional material fact—e.g. that the conduct occurred without consent (rape), that the conduct occurred with a minor (criminal sexual conduct with minors), that the conduct took place in view of the public (public indecency), or that the conduct involved compensation (prostitution). In whichever case, the conviction must be supported by a knowing, intelligent, and voluntary admission of guilt to each material element, *Boykin v.*

Alabama, 395 U.S. 238, 243 (1969), or by a jury's finding of guilt beyond a reasonable doubt on each material element, *Alleyne v. United States*, 570 U.S. 99, 104 (2013).

Under these well-established standards, a pre-*Lawrence* Buggery cannot stand. Before *Lawrence*, a Buggery conviction need only be supported by proof of, or an admission to, one element: anal sex. Because Doe's conviction for Buggery pre-dates *Lawrence*, when it was permissible to prosecute people for only having gay sex, no post-*Lawrence* attempts to save the statute could be retroactively applied to Doe. His conviction was obtained under an irredeemably unconstitutional statute and mandating registration based on that conviction is a continuing constitutional harm. *Menges*, 2021 WL 1894154, at *27–*28; *Wasden*, 2021 WL 4129144, at *17–*18.

B. Requiring Registration for Private Consensual Sexual Acts Violates Substantive Due Process.

SORA, like most other registry schemes, has been repeatedly challenged in the courts. In general, it has been upheld by the South Carolina Supreme Court as a valid effort by the Legislature to "protect[] the public from those with a high risk of reoffending." *Powell v. Keel*, 860 S.E.2d 344, 348–49 (S.C. 2021); *also see State v. Dykes*, 744 S.E.2d 505, 510 (S.C. 2013) ("[A] likelihood of re-offending lies at the core of South Carolina's civil statutory scheme."). But because SORA's registration obligations and humiliating public notification scheme "implicate[] a protected liberty interest[,]" its requirements must "bear[] a reasonable relationship to any legitimate interest of government." *Powell*, 860 S.E.2d at 348 (striking down SORA's imposition of lifetime registration without judicial review because it is "arbitrary" and "fails to promote the State's legitimate interest [in reducing sex crime].").

Here, even assuming the State is not barred from requiring registration for a constitutionally infirm conviction, there is no rational basis for South Carolina to require se

offender registration for acts of private and consensual anal or oral sex. Even if viewed by some as immoral, such conduct is noncriminal, nonthreatening, and implicates no state interest whatsoever. *Lawrence*, 539 U.S. at 560 (noting that Texas's sodomy law "furthers no legitimate state interest"); *id.* at 586 (Scalia, J., dissenting) (clarifying that the majority's holding is that sodomy laws fail under rational basis). Without support from a legitimate state interest, the state's imposition of SORA's extensive burdens on liberty and privacy violate the Due Process Clause of the Fourteenth Amendment.

C. Criminalizing Homosexuality or Requiring Sex Offender Registration for It Violates Equal Protection

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike," *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). South Carolina distinguishes between homosexuals and heterosexuals and treats them differently with no legitimate purpose.

The first step in equal protection analysis is identifying the classification into which the plaintiff is slotted by operation or law counterposed against a control group in a different classification. *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 820 (4th Cir. 1995).

Doe is a man who had gay sex. The control group is heterosexual men—*i.e.* men who had heterosexual, vaginal-penile sex with a woman.

Of course, South Carolina does not prosecute heterosexuals for having sex or require that they submit to a harsh registration scheme for having had sex. This is differential treatment between the two classification groups.

The Court then must decide the appropriate level of scrutiny and assess the government interest and tailoring required that level of scrutiny. *Id*. Here, the State will be unable to meet any level of scrutiny the Court applies.

That said, heightened scrutiny is appropriate here. The Supreme Court has found that the Due Process and Equal Protection Clauses share a "synergy" by which analysis under one informs analysis under the other. *Obergefell*, 576 U.S. at 672–73; *see also Lawrence*, 539 U.S. at 575 ("[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests"). *Lawrence*, *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell*—the trio Supreme Court cases involving discrimination against gays and lesbians—are best understood as imposing a form of heightened scrutiny. *See*, *e.g.*, Jeremiah A. Ho, *Once We're Done Honeymooning:* Obergefell v. Hodges*, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination*, 104 KY. L.J. 207, 227 (describing "toothful" or "searching" rational basis review).

The Supreme Court has also recently made clear that it is impossible to discriminate against someone for being homosexual or transgender without discriminating against them based on sex. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020). And sex classifications "are subject to intermediate scrutiny, meaning that they 'fail[] unless [they are] substantially related to a sufficiently important governmental interest.'" *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (quoting *City of Cleburne*, 473 U.S. at 441) (alternations in *Grimm*). "To survive intermediate scrutiny, the state must provide an 'exceedingly persuasive justification' for its classification." *Id*. (quoting *United States v. Virginia*, 518 U.S. 515, 534 (1996)).

The State will be unable to put forth any important government interest, much less an exceedingly persuasive justification, in criminalizing homosexuality or requiring homosexuals register as sex offenders.

But even if heightened scrutiny weren't appropriate, there is not even a rational basis for the State to criminalize homosexuality or require sex offender registration for homosexuals. *See Menges*, 2021 WL 1894154, at *20–*23 (finding registration requirement for Crime Against Nature conviction failed even rational basis review); *Wasden*, 2021 WL 4129144, *16–*17 (same).

The State cannot have a constitutionally valid interest in requiring those who engage in homosexual sex (or sex traditionally associated with homosexuality) to be treated differently from those who engage in heterosexual sex. This classification treats groups of similarly situated individuals differently, fails any form of constitutional scrutiny, and deprives Doe of equal protection.

D. The Buggery Statute is Unconstitutionally Vague Because It Gives No Notice as to What Conduct it Prohibits

"It is axiomatic that a law fails to meet the dictates of the Due Process Clause 'if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.'" *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)). Vagueness can be triggered for "either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). A statute fails to provide a reasonable opportunity to understand it if it "fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). But "perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other

principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

The Buggery statute, states, in full, that "[w]hoever shall commit the abominable crime of buggery, whether with mankind or with beast, shall, on conviction, be guilty of [a] felony and shall be imprisoned in the Penitentiary for five years or shall pay a fine of not less than five hundred dollars, or both, at the discretion of the court." S.C. Ann. § 16-15-120.

The Buggery statute does not provide any explicit standards. In fact, it provides no opportunity to understand what conduct it permits. It circularly defines the crime of Buggery as "the abominable crime of buggery," without explaining what constitutes "buggery."

Does the statute prohibit oral sex? Legal scholars and the judiciary seem unable to tell, let alone people of average intelligence. One edition of Black's Law Dictionary defines "buggery" as "a carnal copulation against nature; a man or a woman with a brute beast, a man with a man, or man unnaturally with a woman." Black's Law Dictionary, Buggery (6th ed. 1990). But the current edition defines it as synonymous with "sodomy," which it in turn defines as "[o]ral or anal copulation between humans, esp. those of the same sex." Black's Law Dictionary, Buggery; Sodomy (11th ed. 2019). In one of the very few reported cases interpreting the prohibition, the South Carolina Supreme Court ruled that a trial court had properly set aside a "sodomy" conviction of a man for performing oral sex on a seven-year-old girl. *State v. Nicholson*, 228 S.C. 300, 304 (1955). The Court upheld the conviction for committing a lewd or lascivious act on a child under the age of fourteen but found the "sodomy" conviction was still "unsupported by the evidence." *Id.* While not a model of judicial clarity, the decision suggests the Court believed that oral sex was not included in the South Carolina's prohibition on "sodomy." This confusion has led at least one commentator to conclude that the Buggery statute likely does not

cover acts of oral sex. Rodney Patton, *Queerly Unconstitutional?: South Carolina Bans Same-Sex Marriage*, 48 S.C. L. REV. 685, 698 (1997) ("lesbians . . . do not appear biologically capable of committing the 'abominable crime of buggery'"). But at the same time, Doe's indictment here alleges he violated the statute by "having both oral and anal sexual intercourse." Plaintiff's Request for Judicial Notice, Ex. A (Indictment). It's easy to forgive anyone for being unsure what the statute prohibits because the statute itself offers *no* clues.

Perhaps the South Carolina legislature sought to avoid the explicitness of stating "oral and anal sex" in the South Carolina code. But this kind of sheepishness leaves readers unaware of exactly what can conduct can land them in jail for five years and put them out five hundred dollars. And it's not a sheepishness the legislature displayed in enacting other laws. *See, e.g.*, S.C. Code Ann. § 16-3-651 (defining "Sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body").

In any event, the demure definition of Buggery fails Due Process's command to provide "explicit standards." *Broadrick*, 413 U.S. at 607. It fails to "establish minimal guidelines to govern law enforcement." *Smith*, 415 U.S. at 574. And through that ambiguity, it "authorizes or even encourages arbitrary and discriminatory enforcement," *Hill*, 530 U.S. at 732—which is why The State has wielded it as a weapon against gay life in South Carolina.

II. In the Alternative, the Court Should Preliminarily Enjoin the State from Forcing Sex Offender Registration on People with Pre-*Lawrence* Buggery Convictions

If the Court believes that this is not a purely legal dispute, and that some material facts are in dispute or unavailable to the State, the Court should enter a preliminary injunction to stop this unconstitutional registration scheme until the Court can enter a permanent injunction. Doe meets every criteria for a preliminary injunction. He is likely to succeed on the merits. He suffers

irreparable harm every day that an injunction does not issue. The balance of equities tips in his favor. And an injunction is in the public interest.

A. Doe is Likely to Prevail on Each of His Claims

For the same reasons Doe details above about how he ultimately prevails on the merits, he is also likely to succeed on the merits for those same reasons.

B. An Injunction is Necessary to Avoid Continuing Irreparable Harm

Requiring sex offender registration for pre-*Lawrence* sodomy convictions is an irreparable injury. *Menges*, 2021 WL 1894154, at *26; *Wasden*, 2021 WL 4129144, at *17. Indeed, Doe faces continuing irreparable harm because of violations of his substantive due process rights. "It is well settled that any deprivation of constitutional rights 'for even minimal periods of time' constitutes irreparable injury." *Condon v. Haley*, 21 F. Supp. 3d 572, 588 (D.S.C. 2014) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* 11A Charles Alan Wright, FED. PRAC. & PROC. CIV. § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved . . . no further showing of irreparable injury is necessary."). Beyond that, the injurious consequences of sex offender registration are plain and well understood. *See* Statement of Facts (IV). Doe, for example, is exposed to criminal penalties and prolonged incarceration if he trips over any of the many burdensome and technical statutory requirements for reporting his personal information to law enforcement. The collateral consequences are also severe—registration under SORA automatically disqualifies Doe from federally assisted housing, 42 U.S.C. § 13663(a) (2012), and exposes him to "profound humiliation and community-wide ostracism," *Smith v. Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting).

C. The Balance of the Equites Strongly Favors an Injunction

Being forced to register as a sex offender for consensual gay sex between adults is an unquestionably greater harm than the State would face if the Court entered an injunction. The State is "in no way harmed by issuance of a preliminary injunction which prevents it from enforcing" a law that "is likely to be found unconstitutional." *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). "If anything, the system is improved by such an injunction." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (citation omitted).

The public interest is also served by entry of an injunction necessary to "uphold[] constitutional rights." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) (quoting *Newsom*, 354 F.3d at 261); *accord Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 190 (4th Cir. 2013) (en banc).

The two other federal courts to assess injunctions for sex offender registration for pre-*Lawrence* sodomy convictions agreed that the balance of equities favored an injunction. *Menges*, 2021 WL 1894154, at *26–*27; *Wasden*, 2021 WL 4129144, at *17.

D. The Injunction Should Issue Without Bond

This Court has wide discretion to set the preliminary injunction bond "in an amount that the court considers proper," Fed. R. Civ. P. 65(c), including by waiving it altogether, *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013). The Court should use that discretion to waive the bond requirement here, where relief will cause no monetary loss to the State. *See, e.g.*, *Accident, Injury & Rehab., PC v. Azar*, 336 F. Supp. 3d 599, 606 (D.S.C. 2018) (citing *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999)).

CONCLUSION

John Doe had gay sex in 2001, at a time when this country still prosecuted people for being gay. For the crime of having gay sex, South Carolina continues to require that Doe register as a sex offender today—eighteen years after *Lawrence*. Enough.

Because continued enforcement of the registration requirement violates Doe's due process and equal protection rights, Doe respectfully requests that this Czourt grant summary judgment in his favor. In the alternative, this Court should issue a preliminary injunction prohibiting the State from enforcing SORA against individuals with pre-*Lawrence* Buggery convictions.

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Respectfully submitted,

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