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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN DOE,

Plaintiff,

v.

LAWRENCE WASDEN, et al,

Defendants.

Case No.:

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Introduction

In 2003, in the landmark decision *Lawrence v. Texas*, the Supreme Court held that anti-sodomy statutes are facially unconstitutional under the Fourteenth Amendment. Despite this unequivocal ruling, Idaho continues to enforce its pre-Lawrence sodomy prohibition—the "Crime Against Nature" statute—by requiring individuals with sodomy convictions to register with the Idaho Central Sexual Offender Registry.

The defendants ("State") cannot command registration under an unconstitutional statute. The State seeks to compel Plaintiff John Doe to register pursuant to an unconstitutional statute and registration scheme—and for an out-of-state conviction that predated *Lawrence* by three years. This is an unconstitutional infringement on Doe's Due Process rights.

Registration as a sex offender burdens almost every aspect of daily life. Doe suffers significant restrictions on his public and personal life through Idaho's unconstitutional conduct. Doe moves for a preliminary injunction to stop Idaho from enforcing its unconstitutional sodomy prohibition and to remove the Crime Against Nature statute or any purportedly analogous out-of-state law as offenses for which the State can force a person to register.

Doe is entitled to a preliminary injunction. First, he will succeed on the merits because the Supreme Court has long held that sodomy prohibitions violate the Due Process clause. Second, the constitutional injuries that Doe suffers every day through the violation of his Fourteenth Amendment rights constitute

irreparable harm. Third, a balance of the equities favors granting a preliminary injunction because it will not cause any harm to Defendants to comply with the Supreme Court's ruling in *Lawrence v. Texas* and the public interest is served by enforcing the Supreme Court's clear holding.

Statement of Facts

I. Idaho Criminalizes Oral and Anal Sex and Requires Those Convicted to Register as Sex Offenders

Idaho's Crime Against Nature statute criminalizes "the infamous crime against nature, committed with mankind" and subjects those convicted to imprisonment for up to five years. I.C. § 18-6605. Idaho courts have interpreted the Crime Against Nature statute to bar oral ("per os") or anal ("per anum") sex. *See, e.g.*, *State v. Altwatter*, 29 Idaho 107, 157 P. 256 (1916). The statute criminalizes all oral and anal sex without requiring any element of force, public conduct, commercial activity, or conduct with a minor.

The prohibition on oral and anal sex targets conduct that consenting adults widely practice. Federal government survey data from 2011 to 2013 shows that 86% of women and 87% of men nationwide aged 18 to 44 had engaged in oral sex with a different-sex partner and 36% of women and 42% of men had engaged anal sex with a different-sex partner.[1] The Crime Against Nature statute makes criminals of hundreds of thousands of Idahoans.

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[1] *See* Centers for Disease Control & Prevention, *Sexual Behavior, Sexual Attraction, and Sexual Orientation Among Adults Aged 18–44 in the United States: Data From the 2011–2013 National Survey of Family Growth*, 88 NAT'L VITAL HEALTH STAT. REP. 1 (2016), *available at*

Since 1998, when Idaho established a Central Registry by enacting the Sexual Offender Registration Notification and Community Right-to-Know Act, Idaho Code §§ 18-8301–8331, Idaho has required people to register for a range of convictions, including convictions under the Crime Against Nature statute. I.C. § 18-8304(1)(a). Idaho also requires people to register if they have been convicted in another jurisdiction for an offense that Idaho considers the equivalent of a Crime Against Nature conviction. I.C. § 18-8304(1)(b).

II. Although the U.S. Supreme Court Banned Statutes Criminalizing Oral and Anal Sex Fifteen Years ago, Idaho Continues to Enforce Its Statute.

In 2003, the United States Supreme Court struck down Texas's sodomy prohibition as a whole on substantive due process grounds because the "statute further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In striking down the Texas law and asserting that it lacked any legitimate state interest, the Court necessarily held that any criminal statute whose only element is the commission of oral or anal sex is unconstitutional. *Id.* at 578–79. By explicitly overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), a prior unsuccessful facial challenge to Georgia's sodomy statute, the Court held that its ruling was not limited to Texas or to laws singling out same-sex couples. The Court emphasized that the requirement to register as a sex offender in four states, including Idaho, as

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https://www.cdc.gov/nchs/data/nhsr/nhsr088.pdf. *See also Mohammed v. State*, 561 So.2d 384, 386 n.1 (Fla. Ct. App. 1990) (citing surveys showing between 85% and 87% of adults engage in oral sex).

a result of a sodomy conviction demonstrated the "consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition" of sodomy. *Lawrence*, 539 U.S. at 576 (citing I.C. §§ 18-8301 to 18-8326). These consequences compelled the Court to hold all anti-sodomy statutes unlawful. *Id*. at 575–76.

In the wake of the Supreme Court's unequivocal ruling, several states have repealed or amended their prohibitions on oral and anal sex. In 2006, Missouri amended its Sodomy statute to only apply to sex acts with minors less than 14 years old. Mo. Rev. Stat. § 566.062. In 2010, Kansas repealed its prohibition outright. Kan. Stat. Ann. § 21-3505. And in 2014, following a decision by the Fourth Circuit Court of Appeals holding that *Lawrence v. Texas* had rendered its prohibition on oral and anal sex unconstitutional, *Macdonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), *cert denied* 134 S. Ct. 200 (2013), Virginia amended its Crimes Against Nature statute to apply only to bestiality and incest. Va. Code Ann. § 18.2-361. But Idaho's Crime Against Nature statute remains on the books, as does the requirement to register.

III. By Enforcing the Facially Invalid Crime Against Nature Law, Idaho Harms Doe's Substantive Due Process Rights.

Forcing Doe to register pursuant to an unconstitutional statute and registration scheme causes substantial harm. Registration creates severe restrictions on liberty unknown outside incarceration, probation, or parole. Every registrant must provide the state with fingerprints, addresses, license plate numbers, telephone numbers, employers, volunteer positions, passport number,

license plate numbers, and every email address and electronic identity. I.C. § 18-8305(1)(a–p). The state shares this information with the federal government, volunteer organizations, and anyone else who asks for information. I.C. § 18-8324(1).

The state prohibits registrants from living within five hundred feet of a school, I.C. § 18-8329(1)(d), or even picking up or dropping off one's own children without prior written approval, I.C. § 18-8329(2).

Registration is for life. I.C. § 18- 8307(7).

Failure to follow this surveillance scheme is a felony punishable by up to 10 years and $5,000. I.C. § 18-8311(1).

And the state demands each registrant pay $80 a year (every year, for life) for these overwhelming and onerous constraints on daily life. I.C. § 18- 8307(2).

The Preliminary Injunction Standard

A preliminary injunction is warranted when a party (1) is likely to succeed on the merits of her claim, (2) is likely to suffer irreparable harm in the absence of preliminary relief, (3) can show that the balance of hardships tips in her favor, and (4) can show that the injunction is in the public interest. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015). "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Preliminary injunctive relief can also be warranted where "serious questions going to the merits [are] raised and the balance of hardships tips

sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (citation omitted).

Argument

I. Doe Shows a Substantial Likelihood of Success on the Merits Because the Supreme Court Invalidated Idaho's Crime Against Nature Law More than Seventeen Years Ago.

A. Idaho's Crime Against Nature Statute Violates Doe's Substantive Due Process and Is Facially Invalid.

The United States Supreme Court unmistakably held in *Lawrence* that a criminal statute whose only element is the commission of oral or anal sex—a sodomy-only statute—is unconstitutional. The Court in *Lawrence* invalidated Texas's ban on sodomy between same-sex partners based on the "right to liberty under the Due Process Clause," 539 U.S. at 578, making clear that *all* state statutes remaining in effect in the nation whose only element is the commission of oral or anal sex are invalid. The Court made clear that its ruling applied to *all* statutes barring oral and anal sex alone, overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a Georgia law criminalizing consensual oral and anal sex between same-sex and different-sex partners alike. *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today.").

Idaho's Crime Against Nature statute, I.C. § 18-6605, criminalizes, in relevant part, "the infamous crimes against nature, committed with mankind," which Idaho courts have interpreted to mean oral or anal sex. *State v. Altwatter*, 29 Idaho 107, 157 P. 256 (1916). The Supreme Court has established that a facial attack is proper where a statute "lacks any plainly legitimate sweep." *United States*

v. Stevens, 559 U.S. 460, 473 (2010) (citations and quotations omitted); *accord United States v. Tomsha-Miguel*, 766 F.3d 1041, 1049 (9th Cir. 2014). The Crime Against Nature statute which criminalizes oral and anal sex with no other elements, "lacks any plainly legitimate sweep" and is thus facially invalid.

Lawrence invalidated the statute before it in that case, along with all remaining sodomy-only laws in this country. The plain language of *Lawrence*'s holding makes clear that the Texas statute at issue was struck down on its face. 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. 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 (emphasis added); *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 v. Hardwick*. *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*" 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 (emphasis added). Indeed, throughout its analysis, the Court addressed the constitutional deficiencies of laws (plural) targeted at intimate sexual behavior. *See, e.g.*, *id*. at 567 ("The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. *Their penalties and purposes, though, have more far-reaching consequences*. . . .") (emphases added). 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 Idaho], of which 4 enforce their laws only against homosexual conduct." *Id*. at 573. 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.

This reading is confirmed by the Supreme Court's own descriptions of the scope of *Lawrence*. In *Obergefell v. Hodges*, for example, 135 S. Ct. 2584, 2600 (2015), 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. *E.g.*, 135 S. Ct. at 2600 ("*Lawrence* invalidated *laws* that made same-sex intimacy a criminal act." (emphasis added)). And the only federal appellate court to evaluate the continuing validity of a sodomy-only law in the wake of *Lawrence* confirmed that *Lawrence* invalidated all such laws. In *MacDonald v.*

Moose, the Fourth Circuit declared Virginia's sodomy prohibition invalid on its face in the context of a challenge to a conviction for solicitation to commit sodomy. 710 F.3d 154 (4th Cir. 2013), *cert. denied* 134 S. Ct. 200 (2013). The Court held that "prohibiting sodomy between two persons without any qualification[] is facially unconstitutional" no matter the underlying conduct, *id*. at 166; indeed, the petitioner had engaged in conduct with a minor. "[B]ecause 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*. Idaho's Crime Against Nature statute does not survive it either.

B. Doe's Registration Is Not Saved by the Idaho Courts' Attempts to Salvage Crime Against Nature Prosecutions

Although a court must "try not to nullify more of a legislature's work than is necessary," when an application or portion of a statute is found unconstitutional, it cannot "use its remedial powers to circumvent the intent of the legislature." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–30 (2006) (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring); other citations omitted). Importantly, courts cannot "rewrite a state law to conform it to constitutional requirements" in their attempts to salvage it. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988); *see also Ayotte*, 546 U.S. at 329; *accord State v. Doe*, 147 Idaho 326, 329, 208 P.3d 730, 733 (2009) ("We are not free to rewrite a statute under the guise of statutory construction."); *State v. Lindquist*, 99 Idaho 766, 770, 589 P.2d 101, 105 (1979) (holding that Idaho courts lack power to rewrite a statute to make it constitutional).

But Idaho courts have attempted to do just that when addressing post-*Lawrence* Crime Against Nature prosecutions. Five years after *Lawrence*, the Idaho Court of Appeals upheld a Crime Against Nature prosecution in an as-applied challenge where the defendant stipulated to a lack of consent. *State v. Cook*, 146 Idaho 261, 192 P.3d 1085 (Ct. App. 2008). And just this year the Idaho Supreme Court upheld a Crime Against Nature conviction and rejected a defendant's contention that *Lawrence* requires force, violence, duress, or threat—and not simply a lack of consent—to constitute a violation of the Crime Against Nature statute. *State v. Gomez-Alas*, No. 46724, 2020 Ida. LEXIS 182, at *14–*19 (Sep. 2, 2020).

Neither *Cook* nor *Gomez-Alas* saves the facial unconstitutionality of the Crime Against Nature law or the statute requiring registration for Crime Against Nature convictions or out-of-state equivalents. In both cases, the Idaho courts read limitations into the statute that do not exist in the text so that the State could prosecute people who had oral or anal sex when consent (or even affirmative consent) was potentially lacking. *Cook*, 146 Idaho at 262, 192 P.3d at 1086; *Gomez-Alas*, 2020 Ida. LEXIS 182, at *16. The Idaho courts based this reinterpretation of the statute on nothing more than the Supreme Court's dictum in *Lawrence* that the case "[did] not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution," *Lawrence*, 539 U.S. at 562.

Gomez-Alas involved a defendant who was convicted of performing oral sex on female victim against her will. *Gomez-Alas*, 2020 Ida. LEXIS 182 at *3. The trial

court instructed the jury that it had to find that the defendant performed oral sex "'against the will' of the victim." *Id.* at *16. The defendant argued that the statute required the jury find "force, violence, threat or coercion," but the Supreme Court found that "an act that is performed without consent, or without affirmative consent," was sufficient to support a Crime Against Nature conviction. *Id.* at *17.

Cook involved a defendant who performed oral sex on a "male adult with Down's Syndrome, in the sauna at a local gym." *Cook*, 146 Idaho at 262, 192 P.3d at 1086. The defendant entered a conditional guilty plea and sought appellate review denying his as-applied challenge to the constitutionality of the statute. *Id.*, 146 Idaho at 262, 192 P.3d at 1086; *see also id.*, 146 Idaho at 264, 192 P.3d at 1088. The Idaho Court of Appeals affirmed. It found that, in the wake of *Lawrence*, it was Cook's "burden of demonstrating that the government could not regulate the conduct he engaged in" and that he failed that burden. *Id.*, 146 Idaho at 262, 192 P.3d at 1086. The court credited various allegations by the prosecution related to diminished capacity, force, public conduct, and an admission in Cook's own briefing that "[t]his case has arisen from an encounter in a sauna." *Id.*, 46 Idaho at 264, 192 P.3d at 1088. Based on that record, the court found that "Cook ha[d] not shown that he was prosecuted for contact that occurred in private and with an adult who could and did consent." *Id.*, 46 Idaho at 264, 192 P.3d at 1088.

Neither *Cook* nor *Gomez-Alas* cure the unconstitutionality of the Crime Against Nature statute or its application to Doe. Neither says anything about the facial validity of the Crime Against Nature statute. Any reading of either case as

upholding the facially constitutionality of the Crime Against Nature statute in the wake of *Lawrence* would require judicial policymaking, inserting words ("without affirmative consent" and "in public") into a criminal statute that has no such language.[2] If, to make a statute constitutional, a court "would be required not merely to strike out words, but to insert words that are not now in the statute," the court then is "'mak[ing] a new law, not . . . enforc[ing] an old one. This is no part of [the judiciary's] duty.'" *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)); *see also Nelson v. Evans*, 166 Idaho 815, ___, 464 P.3d 301, 307 (2020) (holding that Court cannot read a limitation into a statute that is not in the statute's text); *Doe*, 147 Idaho at 329, 208 P.3d at 733; *Lindquist*, 99 Idaho at 770, 589 P.2d at 105. Attempts to re-write the Crime Against Nature statute wrongly "substitute[s] the judicial for the legislative department of the government" and creates a "dangerous" precedent to encourage legislatures to "'set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied." *Ayotte*, 546 U.S. at 330 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

There is no evidence that the Idaho legislature would have wanted the Crime Against Nature statute revised in this manner. In fact, as the Idaho Supreme Court

[2] Even if the Idaho courts' decision could be read to rewrite the Crime Against Nature law to include additional words, it would still be the government's burden to prove each element of an offense beyond a reasonable doubt (and not the defendant's burden, as *Cook* appears to suggest, *Cook*, 46 Idaho at 264, 192 P.3d at 1088). *See, e.g.*, *Carella v. California*, 491 U.S. 263 (1989) (per curiam); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

recognized, the Crime Against Nature statute is "unambiguous" in its intent to criminalize "*all unnatural carnal copulations*," including *all* oral and anal sex. *Gomez-Alas*, 2020 Ida. LEXIS 182, at *8 (quoting *State v. Altwatter*, 29 Idaho 107, 108, 157 P. 256, 257 (1916)) (emphasis in *Gomez-Alas*). The statutory text plainly demonstrates Idaho's constitutionally impermissible intent to ban *all* sodomy. Under *Lawrence*, that intent cannot support the Idaho courts' attempts at revising the statute. *See Lawrence*, 539 U.S. at 578; *Bowers*, 478 U.S. at 219 (Stevens, J., dissenting).

This was the conclusion of the only Court of Appeal to address this issue. In *MacDonald*, the Fourth Circuit faced a situation where the Virginia courts had read *Lawrence*'s dictum to allow for post-*Lawrence* convictions under the general sodomy prohibition for sexual activity involving minors. 710 F.3d at 165. The Fourth Circuit found the state courts' attempts to save the statute unconvincing. *Id*. The *Lawrence* dictum simply "reserve[ed] judgment on more carefully crafted enactments yet to be challenged." *Id*. "The [*Lawrence*] Court's ruminations concerning the circumstances under which a state might permissibly outlaw sodomy, however, no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary." *Id*. The Fourth Circuit found that the *Lawrence* dictum meant the state "might be entitled to enact a statute specifically outlawing sodomy [only in constitutional applications], it has not seen fit to do so." *Id*.[3]

[3] Unsurprisingly, quick on the heels of the Fourth Circuit's holding that Virginia's wholesale prohibition on oral and anal sex was unconstitutional, the state

Even if *Cook* or *Gomez-Alas* did address the Crime Against Nature statute's facial validity and rewriting the statute was constitutionally legitimate, the Idaho courts' interpretation of *Lawrence* as requiring a lack of affirmative consent or public conduct to obtain a Crime Against Nature conviction cannot be retroactively applied to pre-*Lawrence* convictions like Doe's, where the singular element needed to convict was having oral or anal sex. The legal foundation of the *Cook* and *Gomez-Alas* decisions is that, after *Lawrence*, a defendant must be given a chance to show that his conduct fit within *Lawrence* for a Crime Against Nature conviction to be constitutional. Because Doe was convicted for Crime Against Nature before *Lawrence* (and before *Cook* and *Gomez-Alas*, and in a state on the other side of the country), he lacked any opportunity to make such a showing. Indeed, the State did not seek to apply *Cook*'s[4] nuanced legal analysis (or even consider in the decision) in forcing Doe to register. Neither *Cook* nor *Gomez-Alas* can retroactively validate Doe's conviction for constitutionally protected activity.

Cook and *Gomez-Alas* are also inapplicable to Doe because they dealt with conviction, not sex offender registration. While the fact finding inherent in the criminal process lends itself to the kind of factual distinctions that *Cook* and *Gomez-Alas* rely on, registration is binary. Registration does not allow any post-hoc investigation or provide procedural due process requirements to guide any such

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amended its Crimes Against Nature statute to apply only to bestiality and incest. Va. Code Ann. § 18.2-361.

[4] The Idaho Supreme Court's recent decision in *Gomez-Alas* post-dated the State's determination that Doe was required to register.

post-hoc investigation. The *only* consideration is the elements of the offense. *Doe v. State*, 158 Idaho 778, 783, 352 P.3d 500, 505 (2015). That is especially clear here, where the State failed to consider *Cook*—which circumscribes the scope of I.C. § 18-6605—at all when making its registry determination. Declaration of John Doe at ¶ 7.

Cook and *Gomez-Alas* do not uphold the facial validity of the Crime Against Nature statute, and such a reading would raise multiple, independent constitutional infirmities.

C. Enforcement of Idaho's Crime Against Nature Statute Through the Sex Offender Registry Is Invalid Under *Lawrence*.

Any enforcement of the Crime Against Nature statute to criminalize sodomy is invalid under *Lawrence*. The State must be enjoined from enforcing the collateral registration consequences of Crime Against Nature or equivalent convictions. When "enforcement of a statute" has been invalidated as unconstitutional, "then so is enforcement of all identical statues in other States, whether occurring before or after our decision." *Danforth v. Minnesota*, 552 U.S. 264, 286 (2008). The Crime Against Nature statute cannot be enforced not only for any future charge, but also for past convictions for which the state has continued to impose collateral consequences.

Lawrence addressed sex offender registries in general—and Idaho in particular—as an unacceptable result 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 Idaho). The registration requirements that attend Crime Against Nature convictions "underscore[] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Id*. As *Lawrence* made clear, any enforcement of a sodomy ban, whether by prosecution or by forced registration, violates the Fourteenth Amendment.

Seventeen years have passed since the Supreme Court issued *Lawrence* and specifically highlighted Idaho's Crime Against Nature ban and its accompanying sex offender registration requirement. Yet the State continues to operate as if *Bowers v. Hardwick* were valid law and the Crime Against Nature statute enforceable. This position cannot be sustained. Because Doe continues to be registered as a sex offender pursuant to a statute the Supreme Court has already declared unconstitutional, his substantive due process rights are being violated.

Doe is therefore likely to succeed on the merits of his claim that Idaho Code §§ 18-6605 and 18-8304(1)(a) violates his due process rights in the clearest way possible, is unconstitutional, and must be enjoined from further enforcement.

II. An Injunction Is Necessary to Avoid Continuing Irreparable Harm

Doe faces continuing irreparable harm because of violations of his Substantive Due Process rights. "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (internal citations omitted); *see also* 11A

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.").

III. The Balance of Equities Strongly Favors an Injunction

In evaluating the balance of equities, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (citation omitted). Doe's harms are significant and weigh heavily in favor of injunctive relief, as explained above.

Moreover, "it is *always* in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (emphasis added) (citation omitted). Indeed, "by establishing a likelihood that [the government's] policy violates the U.S. Constitution," as Doe has here, he has "also established that both the public interest and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("[T]he public interest and the balance of the equities favor 'prevent[ing] the violation of a party's constitutional rights.'").

IV. The Bond Should Be Waived

Given the rights at stake, the F.R.C.P. 65(c) bond should be waived. "[T]o require a bond would have a negative impact on plaintiff's constitutional rights, as well as the constitutional rights of other members of the public affected . . . ." *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 738 (C.D. Cal. 1996). Nor is there any chance of harm to the State. *See Johnson v. Couturier*, 572 F.3d 1067,

1086 (9th Cir. 2009). "[R]equiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because . . . protection of those rights should not be contingent upon an ability to pay." *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1302 n.6 (C.D. Cal. 2008) (internal quotation marks omitted). A bond is neither appropriate nor necessary in this case.

Conclusion

Seventeen years after *Lawrence*, the Crime Against Nature statute not only remains on the books but is actively enforced through Idaho's sex offender registry. This enforcement causes myriad, daily injuries to Doe and others.

Because continued enforcement of the Crime Against Nature statute through the sex offender registry violated Doe's substantive due process rights, Doe respectfully requests that this Court grant his Motion for a Preliminary Injunction, preliminary enjoining defendants from requiring Doe to register, enforcing Idaho Code § 18-6605 in any situation involving activity between human beings, and enforcing Idaho Code § 18-8304(1)(a) in any situation in which a conviction in another jurisdiction is considered a substantial equivalent to Idaho's Crime Against Nature statute, Idaho Code § 18-6605, in any situation involving activity between human beings.

Date: 9/23/2020 Respectfully submitted,

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