No. 21-35826

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE and RANDALL MENGES,

Plaintiffs-Appellees,

v.

LAWRENCE WASDEN, Attorney General for the State of Idaho, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Idaho
No. 1:20-cv-00452-BLW

BRIEF OF AMICI CURIAE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND THE CENTER FOR HIV LAW AND POLICY IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Lambda Legal Defense and Education Fund, Inc. and the Center for HIV Law and Policy certify that they are nonprofit organizations, have no parent corporation, and have no shares or securities that are publicly traded.

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FED. R. APP. P. 29(A) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* have received the parties' written consent to file this amicus brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party or party's counsel authored the brief or contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF INTEREST OF AMICI CURIAE

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), founded in 1973, is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has extensive experience litigating cases affecting the rights of LGBT people, including serving as lead counsel for the petitioners in *Lawrence v. Texas*, 539 U.S. 558 (2003). Lambda Legal also has participated as either party counsel or amicus curiae in many other cases addressing the validity of sodomy prohibitions, including submitting an amicus brief in *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013). Lambda Legal is uniquely qualified to assist the court in the case before it.

The **Center for HIV Law and Policy** ("CHLP") is a national legal resource and support hub that challenges barriers to the sexual health and rights of people on the basis of stigmatized health status or identity. It does this through legal advocacy, high-impact policy initiatives, and creation of cross-issue partnerships, networks and resources that amplify the power of communities to mobilize for change that is rooted in racial, gender, disability, and economic justice. CHLP's interest in this case is consistent with its mission to challenge laws and policies that

disadvantage some Americans under the law and in the criminal and civil legal systems on the basis of their identities as LGBTQ people.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Even two decades after the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), striking down all laws that criminalized merely engaging in oral or anal sex, both Idaho and Montana still seek to impose ongoing sex offender registration for pre-*Lawrence* convictions obtained under such laws. Because both states' efforts to cling to this practice violate liberty and equality for similar reasons, *amici* address them simultaneously through substantially identical briefing in both appeals.

Lawrence controls the outcome of these cases. Its ruling was intentionally broad, striking down all laws whose *only* element was the commission of oral or anal sex (hereinafter "sodomy-only law") and not merely those targeting same-sex conduct. The Supreme Court explained that the breadth of its approach—invalidating all such laws as a violation of substantive due process—was necessary both to address the extent and significance of the fundamental liberty interest at stake, and to eradicate the stigma imposed by such statutes, regardless of whether the laws targeted same-sex or different-sex participants. In doing so, the Supreme Court explicitly foreshadowed the very issue before this Court. It acknowledged that the state-sponsored condemnation arising from the criminal prohibition of sodomy did not stop with criminal prosecution, but could be extended through sex offender registration requirements triggered by those convictions. By holding there was no

constitutional basis for such state action, the Court sought to protect the core aspects of personal liberty guaranteed by the Fourteenth Amendment.

Lawrence thus squarely barred the government from imposing burdens where the only fact necessary for conviction was merely engaging in oral or anal sex, but that is precisely what Idaho and Montana sought to do through their registration requirements. Idaho attempts to avoid *Lawrence*'s clear mandate by reimagining what alternate convictions—supported by additional elements beyond merely engaging in oral or anal sex—it might have been able to obtain to justify its registration requirement. That would require not only rewriting state laws, which exceeds the proper role of the judiciary, but divining how particular criminal cases would have unfolded in this alternate universe, which is unknowable. Meanwhile, Montana attempts to foist all constitutional responsibility on Idaho. But Montana is independently responsible for its own choices, including its decision to impose liberty burdens within its borders. Ultimately, both states' continuing intrusions on liberty for sodomy-only convictions are unjustifiable in light of *Lawrence*.

The registration schemes at issue here also violate equal protection, because they treat individuals who engaged in oral and anal sex more harshly than similarly situated people who engaged in vaginal sex under otherwise identical circumstances. The former are required to register as sex offenders, but the latter are not. That disparate treatment is unsupportable under even rational basis review.

The government has deemed sodomy more deserving of condemnation because it is "against nature"—but *Lawrence* flatly rejected moral disapproval as an illegitimate government interest.

This Court should uphold the district courts' injunctions enjoining the government from requiring Plaintiffs Doe or Menges to register as sex offenders and thus doubling down on the constitutional harms forbidden by *Lawrence*.

ARGUMENT

I. The Continued Mandate of Sex Offender Registration for Pre-*Lawrence* Sodomy-Only Convictions Violates Substantive Due Process.

A. *Lawrence* Recognized that Sodomy-Only Laws and Their Consequences Strike at Foundational Guarantees of Liberty.

The U.S. Supreme Court's landmark decision in *Lawrence*, 539 U.S. at 558, struck down as unconstitutional a Texas law prohibiting sodomy between same-sex partners. The Court held the statute facially unconstitutional, as it "further[ed] no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual." *Id.* at 578.

But the Court did not limit its ruling to same-sex sodomy prohibitions and rest its decision solely on equal protection grounds. Instead, it struck down all sodomy-only laws, even though they "purport to do no more than prohibit a particular sexual act." *Id.* at 567. The Court invalidated the laws under substantive due process, explaining that "[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. For this reason, it also overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), holding that the Court previously erred in upholding Georgia's sodomy-only law, which criminalized sodomy regardless of the sex of the individuals involved: "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. While striking down sodomy-only laws on due process grounds, the Court simultaneously recognized that equality and liberty "are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575.

The Supreme Court recognized its previous failure, in *Bowers*, to "appreciate the extent of the liberty at stake" when the government enforces sodomy-only laws against its citizens. *Lawrence*, 539 U.S. at 567. It explained that sodomy-only laws implicate more than "simply the right to engage in certain sexual conduct" and instead have far-reaching consequences. *Id*. As Justice Stevens explained in his *Bowers* dissent, the privacy interest at stake stems from the Constitution's critical guarantee of personal liberty. He observed: "the essential 'liberty' that animated the development of the law in cases like *Griswold* [*v. Connecticut*, 381 U.S. 479 (1965)], *Eisenstadt* [*v. Baird*, 405 U.S. 438 (1972)], and *Carey* [*v. Population Services Int'l*, 431 U.S. 678 (1977)] surely embraces the right

to engage in nonreproductive, sexual conduct that others may consider offensive or immoral." *Bowers*, 478 U.S. at 217-18 (Stevens, J., dissenting). The Court held in *Lawrence* that Justice Stevens' previous analysis "should have been controlling in *Bowers* and should control here." 539 U.S. at 578.

The central question presented by sodomy-only laws like those in Texas and Georgia was "whether the majority may use the power of the State to enforce [its condemnation of sodomy as immoral] on the whole society through operation of the criminal law." 539 U.S. at 571. Answering that question in the negative, the Court recognized that these intimate choices are "central to personal dignity and autonomy, . . . central to the liberty protected by the Fourteenth Amendment," and are so central to our core definition of personhood that they simply cannot be compelled by the state. *Id.* (quotes omitted).

The Court was particularly concerned with the "far-reaching consequences" of criminal convictions for sodomy—including sex offender registration requirements. *Lawrence*, 539 U.S. at 567. Explaining the troubling scope of the laws' harms, Justice Kennedy noted that persons convicted of sodomy who came under the jurisdiction of certain states, including Idaho, could be subjected to those states' sex offender registration requirements. *Id.* at 575-76 (citing, inter alia, Idaho Code §§ 18-8301 to 18-8326 (Cum. Supp. 2002)). The Court observed that registration requirements in states like Idaho compounded the injury imposed by

the underlying unconstitutional conviction. In its view, registration requirements "underscore[d] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Lawrence*, 539 U.S. at 576.[1] In holding laws that prohibited merely engaging in oral or anal sex unconstitutional, the Court held that states lack any sufficient interest to impose such consequences.

B. Continuing to Require Registration for a Pre-*Lawrence* Sodomy-Only Conviction Violates *Lawrence*, Regardless of Whether a Different Conviction with Different Elements Was Hypothetically Possible.

Both Idaho and Montana required sex offender registration here for one reason and one reason alone: the existence of a conviction under a statutory provision that penalized the act of merely engaging in sodomy, without regard to age or consent. Nothing a state does on a prospective basis to modify its sodomy-only law can alter the historical reality of a prior conviction. While no plaintiff has sought to overturn his conviction here, *Lawrence* constrains the government from continuing to inflict

[1] In her concurrence, Justice O'Connor also found the collateral consequence of registering as a sex offender magnified the constitutional infirmity of Texas's law under the Equal Protection Clause, which she would have relied upon to invalidate the statute. *Lawrence*, 539 U.S. at 581 ("[W]hile the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not . . . Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement. *See*, *e.g.,* Idaho Code § 18-8304." (further citations omitted)).

fresh injuries based on sodomy-only convictions.

The government cannot impose a registration requirement by pretending it was based upon a conviction under a different version of the law, which it contends might survive scrutiny under *Lawrence*, rather than the one that actually formed the basis of a conviction. Regardless of what additional elements may be required for convictions going forward, *e.g., State v. Gomez-Alas*, 167 Idaho 857, 864 (2020) (requiring a showing of lack of consent), nothing can alter the reality that, at the time of both Doe and Menges's convictions, the necessary and sufficient element for conviction was the mere commission of sodomy, without regard to age or consent. Nor is it relevant whether the state might have prosecuted alleged conduct differently if the sodomy-only statute had been invalidated sooner, because registration requirements are predicated on actual convictions—not hypothetical ones. Therefore, the registration requirements applied in these cases fall squarely within *Lawrence*'s scope.

It is true—and immaterial here—that *Lawrence* "[did] not involve minors" and "[did] not involve persons who might be injured or coerced or . . . in a relationship where consent might not easily be refused." 539 U.S. at 578. That language simply left latitude for states to craft future prohibitions, on a prospective basis, within constitutional limits. *See MacDonald v. Moose*, 710 F.3d 154, 165 (4th Cir. 2013). But it was not expecting nor authorizing courts to speculate upon what

precise elements (and potential defenses) might have been added onto a crime, and then to reimagine if the prosecution would have prevailed within the context of historical convictions secured decades ago. Judges are neither mind-readers nor fortune-tellers of alternate universes.

Problems abound in the suggestion that the judiciary should rewrite state statutes, particularly as to the specific ways that age or consent might have been legislatively addressed at a particular moment in history. Idaho asks this court to presume that, if the Idaho legislature could not prohibit mere sodomy, it still would have at least criminalized sodomy within particular contexts up to its maximum constitutional limits (whatever those may be)—but other aspects of its criminal law cast serious doubt on that presumption. For instance, in both past and present forms, other provisions of Idaho law have not uniformly prohibited all instances of sex involving someone under the age of 18. *See, e.g.*, Idaho Code § 18-6108 (1994) (repealed 2016) (prohibiting male rape but without any age element at the time); Idaho Code § 18-1601 (requiring 3-year age difference in certain contexts). And, in criminal cases concluded long ago, it is unknowable how criminal proceedings with different elements and potential defenses might have alternately played out.

In any event, even if this guesswork could be predicted with perfect confidence, it far exceeds the proper role of the judiciary. *Va. v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). The only workable approach is the one

identified by the district courts below: to halt further injury based on historical convictions that required nothing more than sodomy, without regard to age or consent.

C. Montana's Reciprocal Registration Mandate Imposes the Same Burdens on Liberty as Idaho.

For its part, Montana attempts to disclaim constitutional responsibility on the grounds that any violation of rights protected under *Lawrence* originated with Idaho. But a state that chooses to incorporate another jurisdiction's registration requirement into its own laws is no less responsible for its own actions. That is true for both equal protection, as discussed below, *supra* II.B, and due process. With respect to due process, the relevant inquiry is whether the government has unjustifiably burdened an individual's liberty. Here, there is no doubt that Montana has done so—and in the exact same way as Idaho—because that is how its reciprocity scheme works. In both states, Menges is subject to the significant burdens associated with sex offender registration based on his sodomy-only conviction.

To be clear, a cognizable burden on liberty does not only exist where the government's action rises to the level of criminalizing the conduct at issue, as Montana also seems to suggest. In *Witt*, for example, this Court recognized that the threatened loss of one's military career for engaging in a same-sex relationship plainly constituted a burden on fundamental liberty interests protected by *Lawrence*. *Witt v. Dep't of Air Force*, 527 F.3d 806, 810 (9th Cir. 2008). Being required to

register as a sex offender—whether in Idaho or Montana—is no less consequential than the loss of employment prospects.

Ultimately, each state must enforce its laws in a manner that does not violate the Constitution. As the Supreme Court has made clear, a state cannot be "excused from performance" of its own constitutional obligations "by what another State may do or fail to do." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938). Thus, for instance, Missouri could not justify excluding Black students from its law school on the grounds that other states' law schools did so as well, because each state's constitutional duties exist "independently of the action of other States." *Id.* Two constitutional wrongs do not make a right.

Furthermore, a state does not infringe upon the sovereignty of another state by declining to follow in any unconstitutional footsteps. Contrary to Montana's bizarre suggestion, the Full Faith and Credit Clause does not require a state to adopt the policy of another state in deciding which out-of-state convictions justify registration. The Supreme Court has explained that its "precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998). As to the former, "a state need not substitute the statutes of other states for its own statutes." *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 179 (2016) (quotes omitted).

Here, plaintiffs challenge civil registration requirements that, although

triggered by a sodomy-only conviction, were not part of the underlying criminal sentence. Each state requiring a person to register based upon that conviction must justify its own policy choice—including where that choice is to incorporate another state's registration requirements. There is no exception for imposing unjustified burdens on liberty merely because another state has provided the blueprint. Nor, as explained below, do efficiency concerns outweigh the constitutional injury. *See Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (speed and efficiency do not justify significant constitutional injury). There is no support for the notion that registration schemes would grind to a halt simply because the government could not reflexively mandate registration for pre-*Lawrence* sodomy-only convictions like those at issue here.

D. The Government Cannot Justify Its Liberty Burdens in Continuing to Mandate Registration for Sodomy-Only Convictions.

The government's continued mandate of sex offender registration for sodomy-only convictions is unsupported by any constitutionally adequate interest that can justify its liberty burdens. *Cf. supra*, II.C (further analyzing insufficiency of justifications under equal protection). First and foremost, *Lawrence* already settled the issue, and neither Idaho nor Montana can resuscitate a government interest that the Supreme Court has rejected. It bears repeating that *Lawrence* unequivocally held sodomy-only laws "further[] no legitimate state interest which can justify [their] intrusion into the personal and private life of the individual." 539 U.S. at 578. That

holding obviates any further scrutiny of already-rejected justifications.

To be sure, the injunctive relief awarded here runs directly to Idaho and Montana's mandate of registration for convictions under sodomy-only laws, rather than any sodomy-only law itself. But any suggestion that the government's action is cleansed of its constitutional infirmity somewhere between prosecuting a person for sodomy and imposing lifetime burdens based on that conviction ignores that the same illegitimate interest animates the entire sequence of actions. *Lawrence* anticipated this issue when it labeled such consequences as a mere extension of the "state-sponsored condemnation attendant to the criminal prohibition." 539 U.S. at 576. The Court explicitly determined that the Constitution compelled it to invalidate sodomy-only laws and ameliorate the stigma caused by their attendant consequences. *Id.* at 575-76.

To the extent any further argument is necessary, Idaho's registration scheme is also not remotely tailored to satisfy the strictures of *Lawrence*, which is especially notable given that it does not uniformly require registration for every sex offense. For example, although the state has prohibited statutory rape, it does not require registration for individuals convicted of that offense who were 18 years old at the time. Idaho Code § 18-8304(1)(a) (chapter applies to those "convicted of . . . 18-6101 (rape, but excluding 18-6101(1) where the defendant is eighteen years of age)"). In contrast, the state categorically mandates registration for crimes against

nature, despite the glaring constitutional infirmity presented by convictions based on merely having engaged in oral or anal sex.

Concerns about efficiency do not change the calculus. Montana, for example, has suggested that, to avoid violating *Lawrence*, it would need to examine the factual basis of every conviction. To the contrary, the scope of individuals who must register for pre-*Lawrence* sodomy-only convictions is necessarily circumscribed, and the infirmity in those contexts is readily apparent. And especially given that the government already has tools at its disposal to decide if registration is required in a particular circumstance (such as in determining if one crime is substantially equivalent to another), it cannot conceivably argue that it has no choice but to mandate registration for such convictions. *Cf. Witt*, 527 F.3d at 819 (recognizing alternate means to achieve a government interest). The state cannot ignore obviously unconstitutional registration categories based solely on the fact that it is simpler to ignore them. *See Frontiero*, 411 U.S. at 690 (the "Constitution recognizes higher values than speed and efficiency").

II. The Government's Disparate Treatment Violates Equal Protection.

Idaho and Montana's actions also independently violate equal protection. The government has no constitutional basis for imposing harsher consequences on individuals like Menges, who engaged in oral or anal sex, as compared to similarly situated individuals, who engaged in vaginal sex under otherwise identical

circumstances. Even setting to one side the glaring implications for sexual orientation discrimination inherent in such a scheme, which contravenes settled law that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association,"[2] *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015), it is also unconstitutional taken on its own terms. Treating individuals worse because they engaged in oral or anal sex rather than vaginal sex violates the most foundational equal protection guarantee that all differential treatment must be supported by a rational basis at a minimum. That does not exist here. To the contrary, the disparate treatment here is inescapably rooted in greater moral disapproval of what the government deems "unnatural" sex—which *Lawrence* already rejected as an impermissible interest.

A. The Government Treats Individuals Like Menges Worse Than Other Individuals Who Are Similarly Situated.

As a threshold matter, there is no question that Menges is similarly situated to individuals who engaged in vaginal sex under otherwise identical circumstances.

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[2] It is impossible to ignore the reality that sodomy has been traditionally associated with homosexuality—to the point that it was often described as the conduct that defines the class. *See Lawrence*, 539 U.S. at 583 ("the conduct targeted by this law is conduct that is closely correlated with being homosexual") (O'Connor, J., concurring); *Romer v. Evans*, 517 U.S. 620, 641 (1996) ("there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal") (Scalia, J., dissenting); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013) (recognizing that discrimination can occur based on criteria "closely associated with the disfavored group").

The proper comparator in an equal protection analysis is an 18 year old who was convicted for engaging in vaginal sex with a 16 year old in 1994 in Idaho.[3] That individual, unlike Menges, is not required to register as a sex offender today. Idaho Code § 18-8304(1)(a). In other words, even where the ages of the individuals involved are held constant, the government's differential treatment still persists.

Idaho denies that this comparator is similarly situated to Menges by raising a *non sequitur*: that it supposedly has good reason for treating the two groups differently. But that argument, which boils down to an assertion that "sodomy is worse," goes to the distinct issue of whether Idaho has adequate *justification* for its disparate treatment—not whether the groups are similarly situated. The existence of discrimination "does not depend on why the [defendant] discriminates but rather on the explicit terms of the discrimination." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1049 (9th Cir. 2007) (quotes omitted).

To show that the groups are not similarly situated, Idaho would need to point to some other difference, apart from the distinction between oral and anal sex versus vaginal sex, which it cannot do. For instance, the mere fact that the groups'

[3] Notably, while the government's argument based on *Heck v. Humphrey*, 512 U.S. 477 (1994), is meritless across-the-board, it is particularly inapposite to the equal protection claim. Holding that an unequal *registration requirement* violates equal protection in no way invalidates the underlying convictions. Indeed, it may even be presumed, for purposes of analysis, that both groups have been equally convicted and that the convictions themselves accordingly raise no equal protection concerns.

underlying offenses involve statutes that are differently numbered and labeled (e.g., Idaho Code § 18-6605's prohibition on a "crime against nature" versus Idaho Code § 18-6101's prohibition on "rape") does not, as Idaho insists, render the comparator group not similarly situated. "The groups need not be similar in all respects" but, rather, only in "relevant" respects. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014). Here, the only legally relevant considerations are that, in both groups, (a) 18 year olds had sex in 1994, (b) with individuals who were 16 years old, and (c) were convicted as a result. Everything else is immaterial to whether the groups are similarly situated.

Idaho's contention that the equal protection claim should be analyzed and rejected as a "class-of-one" claim constructs a straw-man argument. A class-of-one claim exists where the plaintiff alleges that she alone was subject to worse treatment for irrational reasons. *See, e.g.*, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding that property owners could pursue class-of-one claim based on allegations that village targeted them for more burdensome easement as compared to other owners). But the equal protection claim here does not rest on any allegation that Menges was, say, singled out as an individual for worse treatment by prosecutors. Rather, the disparate treatment here occurs by operation of law. By Idaho's logic, even the petitioners in *Lawrence* were raising a class-of-one claim in

disguise. But, as here, the equal protection challenge was to the disparate treatment imposed by state law itself.

B. The Incorporation of Idaho's Crime Against Nature Statute Into Other Laws Defeats Any Pretense of Facial Neutrality.

While Idaho does not contend that its registration statute is facially neutral, Montana attempts to argue that its registration statute is facially neutral in an effort to disclaim Idaho law. It contends that it merely distinguishes based on whether an individual must register elsewhere. But just as Idaho's registration statute necessarily incorporated the Idaho crime against nature statute, which prohibited oral and anal sex, so too does Montana's registration statute.

The government engages in facial discrimination wherever it incorporates other laws that are facially discriminatory. Statutory schemes, in particular, must read as a whole: they rely on multiple laws working in tandem, and each is equally part of the "face" of the law. That is also why, for example, courts historically recognized that government employers had engaged in facial discrimination against same-sex couples when it limited health insurance coverage to the "spouses" of employees—but *other* state laws, upon which the employers had necessarily relied, excluded same-sex couples from marriage at the time. *See, e.g.*, *Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013); *accord In re Fonberg*, 736 F.3d 901, 903 (9th Cir. Jud. Council 2013). Similarly, courts recognized that federal laws requiring marriage as part of eligibility for social security benefits had also

necessarily relied upon facially discriminatory state marriage laws, which excluded same-sex couples from marriage at the time. *Thornton v. Comm'r of Soc. Sec'y*, No. 18-1409, 2020 WL 5494891, at *4 (W.D. Wash. Sept. 11, 2020). Whether any given law is facially neutral "cannot be read in a vacuum" divorced from "the interconnected nature of the statutory scheme at issue." *Id.* Rather, the law must be "read in conjunction" with any other law relied upon. *Id.*

Montana all but concedes these established legal principles—but it dances on the head of pin by insisting that, here, it has only "implicitly" but not "explicitly" incorporated Idaho law into its registration scheme. That is pure sophistry. Montana's registration scheme is inextricably intertwined with the other state laws upon which it relies; that is how it works. Its plain text requires registration where there was a violation of "a law of another state" for which registration was required. Mont. Code Ann. § 46-23-502(9)(b). It is difficult to imagine a more "explicit" incorporation than that. *Cf. Thornton*, 2020 WL 5494891, at *4 (holding that federal law stating that it "look[ed] to the laws of the State" had explicitly incorporated state law, including any facially discriminatory provisions). Nor does it make any logical difference that Montana explicitly incorporates the laws of multiple states, as if incorporating the laws of, say, Arkansas somehow disappears if a state also incorporates the laws of Texas too.

Ultimately, Montana's position requires the court to disregard what the referenced law actually says, which is akin to ignoring how terms are defined by a statute when determining if the statute is neutral. Because Idaho law differentiates between oral and anal sex versus vaginal sex, Montana's decision to incorporate that "law of another state" into its own scheme necessarily does so as well.

C. The Government's Unequal Treatment, Which is Rooted in Moral Disapproval of Sodomy, Fails Even Rational Basis Review.

The government's disparate treatment here fails even rational basis review. Rational basis review is not toothless. Courts have applied more searching rational basis review depending on context, including when the government has disadvantaged an unpopular group or burdened intimate relationships. *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) ("'rational basis analysis can vary by context'"); *see also Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012) ("When applying rational basis review to a classification that adversely affects an unpopular group, courts apply a 'more searching' rational basis review."). Here, the societal disapproval that led to criminalizing individuals engaged in sodomy is beyond question; indeed, as *Lawrence* recognized, "condemnation of nonprocreative sex" has deep historical roots. 539 U.S. at 570. In all events, the court must conduct an inquiry into "the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632; *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). Thus,

for instance, the wholesale exclusion of households with unrelated members from a food assistance program was not a rational means of combatting fraud, particularly where other provisions of law could accomplish that objective more directly. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973).

The government cannot articulate any rational basis here for mandating sex offender registration simply because an individual engaged in oral or anal rather than vaginal sex under otherwise identical circumstances. There is no secret why the government has treated one worse than the other: as the law explains, it is to condemn individuals who have engaged in sex that is deemed "against nature," Idaho Code § 18-6605, a prohibition that traces back to at least the late nineteenth century when Idaho was a territory. *See Ex Parte Miller*, 129 P. 1075 (Idaho 1913).

But the Supreme Court has made clear that mere moral disapproval is not a legitimate government interest. *Lawrence* confirmed that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." 539 U.S. at 577 (adopting Justice Stevens' analysis in *Bowers*; quotes omitted); *see also State v. Limon*, 122 P.3d 22, 35 (Kan. 2005) (recognizing, on remand from U.S. Supreme Court in light of *Lawrence*, that moral disapproval was not a legitimate interest that could justify unequal sex offender registration requirements). This Court has similarly confirmed that "private disapproval is a categorically inadequate

justification." *Latta v. Otter*, 771 F.3d 456, 471 (9th Cir. 2014) (striking down exclusion of same-sex couples from marriage). Notably, it did so in rejecting the notion that the government could treat individuals presumed to engage in procreative sex more favorably than individuals presumed to engage in non-procreative sex. *Id.* at 468.

Other federal courts have recognized that there is no rational basis for the government to treat individuals who engaged in oral and anal sex more harshly than those who engaged in vaginal sex under identical circumstances. In Louisiana, the state barred the solicitation of sex for money, but the consequences varied depending on the sex at issue: one group convicted for offenses involving oral or anal sex were required to register as sex offenders, while another group convicted of offenses involving vaginal sex were not. *Doe v. Jindal*, 851 F. Supp. 2d 995, 998 (E.D. La. 2012). This disparate treatment violated equal protection, because there was not "even one unique legitimating governmental interest that [could] rationally explain the registration requirement," and any rational relationship to such an interest was "so shallow as to render the distinction wholly arbitrary." *Id.* at 1009; *see also Doe v. Caldwell*, 913 F. Supp. 2d 262, 277 (E.D. La. 2012).

Both Idaho and Montana gesture vaguely at a government interest in the protection of minors—but that wholly fails to explain the disparate treatment here, because the ages of the individuals involved in sexual activity are already held

constant in the equal protection analysis. The government can articulate no rational explanation for why it treats two classes of individuals differently, based on having engaged in oral or anal sex versus vaginal sex, where the ages of their sexual partners are exactly the same. It cannot, for instance, appeal to pernicious stereotypes that individuals engaging in anal sex are more deviant and thus more likely to re-offend than individuals engaging in vaginal sex. *Cf. Limon*, 122 P.3d at 36 (rejecting similar justification as having no conceivable support).[4]

Furthermore, the government's irrationality becomes even starker when considering the broader statutory scheme at issue, which undermines any rational connection to a legitimate interest. To the extent the government's interest in ongoing registration is to reduce similar instances of oral or anal sex on a prospective basis, it is eviscerated by the fact that Idaho's statutory rape law no longer even prohibits such conduct between an 18 year old and a 16 or 17 year old. *See* Idaho Code § 18-6101(2) (requiring an age difference of at least 3 years where an individual engaged in sex with a 16 or 17 year old). The government cannot rationally advance a goal that it has already abandoned. Nor can it claim a generalized interest in notifying the public of prior sex offenses, when it does not

[4] *See, e.g.*, Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians are Harmful to Children*, 21 Duke J. Gender L. & Pol'y 125, 155–57 (2013) (recounting how anti-gay opponents disseminated damaging stereotypes that gay people were more likely prey upon minors).

similarly require such notice for individuals who also violated then-existing criminal laws barring vaginal sex between an 18 year old and 16 year old.

Ultimately, the government has sought to impose a lifetime burden on Menges, not for any rational reason, but simply because it has deemed sodomy to be "against nature" and thus deserving of greater condemnation. The constitutional guarantee of equal protection for all forbids the government from doing so.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: January 20, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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