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JURISDICTIONAL STATEMENT

This is an appeal from an entry of an order of the trial court sustaining summary judgment in favor of Respondents and against Appellant, ruling that Section 589.400 *et seq.* RSMo. is constitutional, and ordering Appellant to register as a sex offender. The underlying action for declaratory and injunctive relief involves the question of whether or not House Bill 1055, enacted as Section 589.400 *et seq.* RSMo., violates the United States and Missouri Constitutions by being applied retrospectively, by violating the clear title requirement of Section 23, Article III of the Missouri Constitution, by violating the single subject requirement of Section 23, Article III of the Missouri Constitution, by violating the original purpose requirement of Section 21, Article III of the Missouri Constitution, and by violating the due process guarantees of the First and Fourteenth Amendments to the United States Constitution. Hence, appellate jurisdiction lies with this Supreme Court of Missouri because the action challenges the validity or construction of a statute of Missouri.

STATEMENT OF FACTS

Summary

Appellant is aggrieved by the trial court's rulings that he must register as a sex offender under Section 589.400, *et seq.*, as amended by HB 1055, because the statute violated various provisions of the United States and Missouri Constitutions.

Procedural History

Appellant filed his *Amended Petition* seeking declaratory and injunctive relief and Respondents timely filed Answers and each party filed trial briefs. (L.F. 14-21). The parties stipulated to undisputed material facts. (L.F. 101-106). Both parties filed motions for summary judgment, each claiming that they were entitled to a judgment as a matter of law based on the undisputed material facts. (L.F. 107 and 215). The trial court, after receiving the motions for summary judgment, memoranda of law, etc., entered its *Judgment* denying Appellant's declaratory and injunctive relief, ruling that Appellant was "subject to registration provisions of Section 589.400, *et seq.*" and granted Respondents' motion for summary judgment. (L.F. 231). Appellant filed this appeal.

Stipulated Facts

The parties stipulated to the following facts (L.F. 101-106):

1. On May 21, 2004, Appellant pleaded guilty to and thereby was convicted of the crime of *Public Display of Explicit Sexual Material*, Section 573.060, RSMo. (2000), which is a misdemeanor, in Division 1 of the Circuit Court of St. Louis County, Missouri.

2. The basis for Appellant's guilty plea referenced in paragraph 1 *supra* was the display of a video tape recorded with the consent of the then-girlfriend of Appellant and her having consensual sex.

3. After Appellant's conviction, his Probation Officer, Crystal Cottrell, referred him to the Behavioral Science Institute to undergo psychosexual assessment to ascertain whether sex offender treatment was necessary. The report issued by the Behavioral Science Institute, entitled "Psychosexual Assessment" concluded, "The results of this assessment are not consistent with those of a sexual offender." (See "Exhibit 1", L.F. 151-156).

4. Neither at the time of the display of the videotape nor when Appellant pleaded guilty to the charge of *Public Display of Explicit Sexual Material* was Appellant legally obligated to register as a sex offender pursuant to the provisions of Sections 589.400 *et seq.*, RSMo. (2000).

5. Subsequent to Appellant's conviction, the 92nd General Assembly of the State of Missouri passed House Bill 1055, which then

Governor Robert Holden, former Defendant below, and now current Governor Matt Blunt, by substitution, signed into law on June 14, 2004. The effective date of House Bill 1055 is August 28, 2004.

6. House Bill 1055 requires all persons convicted of *Public Display of Explicit Sexual Material* after July 1, 1979, to register as sex offenders pursuant to Sections 589.400 *et seq.*, RSMo. (2000).

7. Section 589.400.2, RSMo. (2000), as amended by House Bill 1055, states as follows:

Any person to whom sections 589.400 to 589.425 apply shall, within ten days of conviction, release from incarceration, or placement upon probation, register with the chief law enforcement official of the county in which such person resides unless such person has already registered in that county for the same offense. Any person to whom sections 589.400 to 589.425 apply if not currently registered in their county of residence shall register with the chief law enforcement official of such county within ten days of August 28, 2003. The chief law enforcement official shall forward a copy of the registration form required by section 589.407 to a city, town, village, or campus law enforcement agency located within the county of the chief law enforcement official, if so requested. Such request may ask the chief

law enforcement official to forward copies of all registration forms filed with such official. The chief law enforcement official may forward a copy of such registration form to any city, town, village, or campus law enforcement agency, if so requested.

8. Section 589.400.3 provides that “[t]he registration requirements of sections 589.400 through 589.425 are lifetime registration requirements unless all offenses requiring registration are reversed, vacated or set aside or unless the registrant is pardoned of the offenses requiring registration.”

9. On October 26, 2004, Crystal D. Cottrell, Probation and Parole Officer, and Sheila Bowlin, her supervisor, on behalf of Defendant Missouri Department of Corrections, Division of Probation and Parole, District 8C, filed a Field Violation Report (the “Report”), a copy of which included in the Legal File, with Division 1 of the Circuit Court of St. Louis County, Missouri, Judge Robert Cohen presiding. The Report recommended that Appellant’s probation be revoked for failure to register as a sexual offender, as purportedly required as a result of the passage of House Bill 1055. (See “Exhibit 2”, L.F. 157-159).

10. On October 29, 2004, Judge Cohen issued a Notice to the Defendant of Hearing on Revocation of Probation and ordered the suspension of Appellant’s probation.

11. On November 18, 2004, Judge Cohen vacated the suspension of Appellant's probation and continued the revocation hearing to February 24, 2005. On February 24, 2005, the matter was continued again to May 26, 2005, which thereafter should be continued until the issues herein are resolved.

12. Exhibit 3 in the Legal File is an accurate reproduction of the provisions of the truly agreed version of House Bill 1055, whose title is, "To repeal sections 43.540, 50.550, 537.046, 558.019, 559.021, 565.082, 565.083, 556.037, 566.083, 566.093, 566.140, 566.141, 573.037, 573.040, 589.400, 589.425, and 660.520, RSMo, and to enact in lieu thereof twenty new sections relating to sexual offenses, with a penalty provision." (See "Exhibit 3", L.F. 160-175).

13. Exhibit 4 in the Legal File is an accurate reproduction of the original House Bill 1055, whose title is, "To repeal section 573.037, RSMo, and to enact in lieu thereof one new section relating to possession of child pornography, with a penalty provision." (See "Exhibit 4", L.F. 176).

14. Exhibit 5 in the Legal File is an accurate reproduction of House Committee Substitute for House Bill 1055 as reported from the Committee on Crime Prevention and Public Safety of the House of Representatives of the Missouri General Assembly on February 25, 2004, with recommendation

that the House Committee Substitute for House Bill No. 1055 do pass. The title of House Committee Substitute for House Bill 1055 is “To repeal sections 566.140, 566.141, and 573.037, RSMo, and to enact in lieu thereof three new sections relating to sexual offenses, with a penalty provision.” (See “Exhibit 5”, L.F. 177-179).

15. Exhibit 6 in the Legal File is an accurate reproduction of the perfected version of House Bill 1055, which was ordered perfected as amended by House Committee Substitute for House Bill 1055 on March 10, 2004. The title of the perfected version of House Bill 1055 is “To repeal sections 556.037, 566.083, 566.093, 566.095, 566.140, 566.141, 573.037, 573.040, 589.400 and 589.425, RSMo, and to enact in lieu thereof thirteen new sections relating to sexual offenses, with a penalty provision.” (See “Exhibit 6”, L.F. 180-185).

16. Exhibit 7 in the Legal File is an accurate reproduction of the Senate Substitute for the House Bill Substitute for House Bill 1055 (the “House Substitute”). The title of the House Substitute is “To repeal sections 565.082, 565.083, 556.037, 566.083, 566.140, 566.141, 573.037, 573.040, 589.400, 589.425, and 660.520, RSMo, and to enact in lieu thereof fourteen new sections relating to sexual offenses, with a penalty provision.” (See “Exhibit 7”, L.F. 186-199).

17. The First Amendment to the Constitution of the United States, which applies to the State of Missouri and to the Defendants herein, states as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

18. The first clause of the Fourteenth Amendment to the Constitution of the United States, which applies to the State of Missouri and the other Defendants herein, states as follows: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

19. Section 23 of Article III of the Constitution of Missouri states as follows: “No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.”

20. Section 21 of Article III of the Constitution of Missouri states as follows: “The style of the laws of this state shall be: ‘Be it enacted by the General Assembly of the State of Missouri, as follows.’ No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house.”

POINTS RELIED ON WITH AUTHORITIES

POINT RELIED ON – I

The trial court erred in denying declaratory and injunctive relief under Count I, because the registration provisions of Section 589.400, *et seq.*, contravene Appellant’s substantive due process rights, in that the provisions required Appellant to register as a sexual offender despite the admission that he does not have the characteristics of a sexual offender (other than being subject to the registration requirements of Section 589.400) and this is fundamentally unfair and shocks the conscience.

1. Rochin v. California, 342 U.S. 165, 172-73 (1952).
2. Mo. Const., art. I, section 10.
3. U.S. Const., amend. XIV, section 1.

POINT RELIED ON – II

The trial court erred in denying declaratory and injunctive relief under Count II, because the registration provisions of Section 589.400, *et seq.*, as amended by HB 1055, violate Section 13, Article I, of the Missouri Constitution, in that its registration provisions are “retrospective in operation” by imposing new obligations on Appellant for past transactions and by creating new crimes.

1. Doe I, et al., v. Phillips, 194 S.W.3d 434, 442 (Mo.App. W.D. 2004).
2. Corvera Abatement Techs., Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 856 (Mo. 1998) (*en banc*).
3. MO. CONST. art I, section 13.

POINT RELIED ON – III

The trial court erred in denying declaratory and injunctive relief under Count III, because HB 1055 as enacted violates the “clear title” mandate of Section 23, Article III of the Missouri Constitution, in that it is under-inclusive and misleading by failing to give notice of the varied and sundry matters with which HB 1055 deals.

1. Nat’l Solid Waste Mgmt. Ass’n v. Dir., Dep’t of Natural Res., 964 S.W.2d 818, 821 (Mo. 1998) (*en banc*).
2. McEuen ex rel. McEuen v. Missouri State Bd. of Educ., 120 S.W.3d 207, 210 (Mo. 2003) (*en banc*).
3. MO. CONST. art III, section 23.

POINT RELIED ON – IV

The trial court erred in denying declaratory and injunctive relief under Count IV, because HB 1055 as enacted violates Section 23, Article III of the Missouri Constitution, in that all of its provisions do not fairly

relate to the same subject, have a natural connection therewith nor are they incidents or means to accomplish its purpose, by making many changes to many chapters and even different titles.

1. SSM Cardinal Glennon Children’s Hosp. v. State, 68 S.W.3d 412, 416 (Mo. 2002) (*en banc*).

2. ACI Plastics v. City of St. Louis, 724 S.W.2d 513, 515 (Mo. 1987) (*en banc*).

3. MO. CONST., art III, section 23.

POINT RELIED ON – V

The trial court erred in denying declaratory and injunctive relief under Count V, because HB 1055 violates Section 21, Article III of the Missouri Constitution, in that as amended and ultimately enacted its provisions are not germane to the original purpose of HB 1055, by encompassing broader topics and purposes than stated in the original title: “[t]o repeal section 573.037, RSMo., and to enact in lieu thereof one new section relating to possession of child pornography, with a penalty provision.”

1. McEuen ex rel. McEuen v. Missouri State Bd. of Educ., 120 S.W.3d 207, 210 (Mo. 2003) (*en banc*).

2. Home Builders Ass'n of Greater St. Louis v. State, 75 S.W.3d 267, 268-69 (Mo. 2002) (*en banc*).

3. MO. CONST., art III, section 21.

POINT RELIED ON – VI

The trial court erred in denying declaratory and injunctive relief under Count VI, because Section 589.400 as amended by HB 1055 violates Section 21, Article III of the Missouri Constitution, in that it violates the First Amendment to the United States Constitution by perpetuating the untoward consequences of Section 573.060.1, an unconstitutionally overly broad criminal statute and by compelling persons subject to Section 589.400, *et seq.*, to speak against their will.

1. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).

2. Wooley v. Maynard, 430 U.S. 705 (1977).

3. MO. CONST. art III, section 21.

4. U.S. CONST. amend. I

ARGUMENT

Standard Of Review

The standard of review in a declaratory judgment action is the oft-repeated standard for any court-tried case. “This Court will affirm the decision of the trial court ‘unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law’” Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 442 (Mo.App. W.D. 2004) (quoting Kerpien v. Lumberman’s Mut. Cas. Co., 100 S.E.3d 778, 780 (Mo. banc 2003) (quoting Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976))).

The constitutionality of a statute is a question of law. Doe I, et al., v. Phillips, 194 S.W.3d 833, 842 (Mo. banc 2006). “Questions of law are matters reserved for de novo review by the appellate court, and we therefore give no deference to the trial court’s judgment in such matters”. Commerce Bank, supra, (quoting H & B Masonry Co., Inc. v. Davis, 32 S.W.3d 120, 124 (Mo.App. E.D. 2000)). A “statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision.” Doe I, supra, quoting Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338, 340 (Mo. banc 1993). Further, “it should be obvious that a statute cannot supercede a constitutional

provision,” *Id.*, 341. Finally, in Doe I, *supra*, this court held that “[n]either the language of the statute nor judicial interpretation thereof can abrogate a constitutional right.” (quoting State v. Bolin, 643 S.W.2d 810 (Mo. banc 1983); see also State ex rel. Liberty Sch. Dist. v. Holden, 121 S.W.3d 232, 234 n. 6 (Mo. banc 2003)). This Standard Of Review Applies to each Point Relied On and is incorporated into each Point as if fully set forth therein.

Point Relied On – I

The trial court erred in denying declaratory and injunctive relief under Count I, because the registration provisions of Section 589.400, *et seq.*, contravene Appellant’s substantive due process rights, in that the provisions required Appellant to register as a sexual offender despite the admission that he does not have the characteristics of a sexual offender (other than being subject to the registration requirements of Section 589.400) and this is fundamentally unfair and shocks the conscience.

The registration provisions of Sections 589.400 *et seq.* contravene Appellant’s substantive due process rights, under both the Missouri and U.S. Constitutions. MO. CONST. art. I, Section 10; U.S. CONST. amend. XIV, Section 1. A law that “shocks the conscience” of the Court violates substantive due process. Rochin v. California, 342 U.S. 165, 172-73 (1952).

Appellant has been convicted of violating a law that runs afoul of the First Amendment. While Appellant cannot contest his conviction – and Appellant is not trying to do so – it is fundamentally unfair to compel Appellant, on penalty of arrest and prosecution, to register as a sexual offender because of his violation of an unconstitutional law. Even if the law were constitutional, it would be fundamentally unfair for Appellant, who poses no risk to re-offend and who has none of the characteristics of the sexual offenders who are likely to re-offend (such as pedophiles, molesters and rapists), to be required to register as a sex offender.

Point Relied On – II

The trial court erred in denying declaratory and injunctive relief under Count II, because the registration provisions of Section 589.400, *et seq.*, as amended by HB 1055, violate Section 13, Article I, of the Missouri Constitution, in that its registration provisions are “retrospective in operation” by imposing new obligations on Appellant for past transactions and by creating new crimes.

HB 1055 violates the constitutional prohibition on laws that are “retrospective in operation.” MO. CONST., art I, section 13. By its express terms, Section 589.400 as amended by HB 1055 subjects Appellant to the registration requirements of Sections 589.400 to 589.425. Yet when

Appellant’s conviction was entered, these registration requirements did not apply to Appellant. This is a hallmark of a law “retrospective in operation.” In fact, this Court recently decided Doe I v. Phillips, wherein it answered affirmatively the question: “does Missouri’s Megan’s Law [not including the portions of Section 589.400 being challenged herein] violate article I, section 13 to the extent it operates retrospectively on persons who pleaded or were found guilty prior to its effective date?” 194 S.W.3d 833, 850 (Mo. banc 2006). This is the same question presented in Appellant’s assignment of error on this Point.

This Court has long interpreted Missouri’s broad constitutional bar as:

A retrospective law is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give something already done a different effect from that which it had when it transpired.

Doe I, supra, quoting Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S.W. 12, 16 (1911) (noting that this ban remained the same through the 1945 constitutional amendments).

Even if the ban on retroactive laws applies only to substantive (i.e., non-procedural) laws, M & P Enters., Inc. v. Transamerica Fin. Servs., 944

S.W.2d 154, 160 (Mo. 1997) (*en banc*),¹ HB 1055’s amendment of Section 589.400 was substantive. That is, it “imposes a new obligation, duty, or disability with respect to a past transaction[.]” Corvera Abatement Techs., Inc. v. Air Conservation Comm’n, 973 S.W.2d 851, 856 (Mo. 1998) (*en banc*). Here, the past transaction was Appellant’s guilty plea and consequent conviction and sentence; the “new obligation, duty, or disability,” the requirement that Appellant register as a sex offender – a humiliating ordeal analogous to the shaming punishments of old (such as the branding of adulterers with a scarlet “A”). Not only does HB 1055’s expansion of the registration requirements of Sections 589.400, *et seq.* impose a new obligation on Appellant, it creates new crimes. An initial failure to register by Appellant would be a misdemeanor, and any subsequent non-registration a felony. Section 589.425 RSMo. (2000). Because it imposes new obligations on a past transaction and because it creates new crimes, HB 1055 is substantive, and its retrospective obligation is forbidden. See U.S. Title Ins. Co. v. Brents, 676 S.W.2d 839, 842 (Mo. App. W.D. 1984) (“Laws providing for penalties and forfeitures are always given only prospective

¹ It should not. Section 13 contains no qualifying language restricting its clear prohibition on retrospective laws to substantive laws.

application, and retrospective application would render such a statute unconstitutional.”).

The Missouri Supreme Court has settled the question regardless of the above analysis in Doe I, *supra*. In Doe I the Court addressed facts directly on point to the facts of this case. Appellants in Doe I argued that when the various appellants either pleaded guilty to, or were found guilty of, their crimes, they were not required to register under Sections 566.60 to 566.625 RSMo 1994 (in fact, the law was not even effective until January 1, 1995, after some appellants pleaded or were found guilty), and that, therefore, the 2006 amendments of H.B. 1698 impermissibly imposed such a registration requirement in violation of Mo. Const., art. I, sec. 13. Doe I, 839. This Court agreed, holding that the “obligation to *register* by its nature imposes a new duty or obligation.” (italics in original). Doe I, 852. Further, this Court found that the appellants were complaining “about application of the registration requirement to them, based solely on their pre-criminal conduct.” Id. This is exactly this Appellant’s complaint in this appeal. Logically, this Court held:

It [H.B. 1698 as enacted] looks solely at their past conduct and uses that conduct not merely as a basis for future decision-making by the state, in regard to things such as the issuance of a

license, or as a bar to certain future conduct by the Does, such as voting. Rather, it specifically requires the Does to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on offenses prior to its enactment. This violates the standard set out in Bliss and violates our constitutional bar on laws retrospective in operation.”²

Consequently, this Court struck down the portions of H.B. 1698 as enacted that required registration “as to, *and only as to*, those persons who were convicted or pleaded guilty prior to the law’s January 1, 1995, effective date.” (italics in original).

In the case *sub judice*, Appellant is making the same complaint – H.B. 1055, as enacted, imposes on him the duty to register and to maintain and update the registration regularly, based solely on offenses occurring prior to its enactment. At the time Appellant pleaded guilty he was not required to register and he cannot, therefore, now be required to register and endure such a new burden. To the extent that H.B. 1055, as enacted, requires Appellant to so register, it should be held to violate the Mo. Const., art. I,

² Doe I, 852, citing Jerry-Russell Bliss v. Hazardous Waste, 702 S.W.2d 77 (Mo. banc 1985).

sec. 13 prohibition against laws that operate retrospectively and Appellant should not be required to register pursuant thereto.

Point Relied On – III

The trial court erred in denying declaratory and injunctive relief under Count III, because HB 1055 as enacted violates the “clear title” mandate of Section 23, Article III of the Missouri Constitution, in that it is under-inclusive and misleading by failing to give notice of the varied and sundry matters with which HB 1055 deals.

HB 1055 does not have a clear title; thus, it violates the “clear title” mandate of Section 23 of Article III of the Constitution of Missouri. A bill has a clear title only if the title provides notice of the contents of the bill. It provides such notice if it “indicate[s] in a general way the kind of legislation that was being enacted.” Nat’l Solid Waste Mgmt. Ass’n v. Dir., Dep’t of Natural Res., 964 S.W.2d 818, 821 (Mo. 1998) (*en banc*). There are two ways a title can be unclear – (1) by being “too broad and amorphous”, and (2) by being “too restrictive and underinclusive.” McEuen, 120 S.W.3d at 210. Here, the title of HB 1055³, which relates to “sexual offenses,” is

³ “To repeal sections 43.540, 50.550, 537.046, 558.019, 559.021, 565.082, 565.083, 556.037, 566.037, 566.083, 566.093, 566.140, 566.141, 573.037,

underinclusive. It fails to give any notice of the variegated matters with which HB 1055 deals. *See supra*.

The statute of limitations for an action in tort does not pertain to sexual offenses; torts are matters of civil law. The new probation conditions, while applicable to sex offenders, are not restricted to them. Assaults on emergency personnel, such as firefighters, is not even tangentially related to sexual offenses. When a reasonable person thinks of sexual offenses and offenders, the existence of a county-level executive agency dealing with restitution does not readily come to mind. Query: How *can* a rapist or pedophile make “restitution” to his victim? (The perpetrator *qua* rapist, pedophile, or child pornographer does not deprive the victim of money or property.) A bill’s title should not force the reader to “search out the commonality” of matters in the bill. McEuen, 120 S.W.3d at 210. And yet HB 1055’s title, by sending the reader on a snipe hunt, does precisely that.

The title of HB 1055 is also unclear because it states that it contains “a penalty provision.” (underscoring added). The bill however, has multiple penalty provisions. One expands the scope of actions that constitute second-

573.040, 589.400, 589.425. and 660.520, RSMo, and to enact in lieu thereof twenty new sections relating to sexual offenses, with a penalty provision.”

and third-degree assault of a law enforcement officer or emergency personnel; another expands the definition of the crime of sexual assault in the second degree. These are just two of the many penalty provisions in HB 1055. By stating that the bill has only one penalty provision, when, in fact, it has multiple penalty provisions, the title of HB 1055 goes beyond failing to give adequate notice of the bill's contents; it actively misleads the public about its contents.

HB 1055 does not comport with Section 23's "clear title" requirement, thus making it unconstitutional. HB 1055's purported amendment of Section 589.400 so as to require the Appellant to register as a sex offender is void.

Point Relied On – IV

The trial court erred in denying declaratory and injunctive relief under Count IV, because HB 1055 as enacted violates Section 23, Article III of the Missouri Constitution, in that all of its provisions do not fairly relate to the same subject, have a natural connection therewith nor are they incidents or means to accomplish its purpose, by making many changes to many chapters and even different titles.

HB 1055, having more than one subject, violates Section 23 of Article III of the Constitution of Missouri, which provides that "[n]o bill shall

contain more than one subject[.]” The number of subjects in a bill is revealed by its title, at least where the purpose of the bill is clearly expressed in the title. SSM Cardinal Glennon Children’s Hosp. v. State, 68 S.W.3d 412, 416 (Mo. 2002) (*en banc*). Where the purpose of the bill is not clearly expressed in the title, it is necessary to examine the provisions of the bill as enacted, as well as the title.⁴ Id.; Hammerschmidt v. Boone County, 877 S.W.2d 98, 102 (Mo. 1994) (*en banc*) (stating that the Court must determine

⁴ If the title were the sole determinant of the number of subjects in a bill, then a bill entitled, “AN ACT to subsidize soy farmers,” but which expanded the death penalty and declared October 22, 1972, “Homer Simpson Day,” would have but a single subject (subsidizing soy farmers or, perhaps, farming), though, in fact, the bill has two subjects, neither of which are reflected in the title. A title that clearly expresses the purpose of the bill does not necessarily mean the bill has only one subject. For instance, suppose the title in the hypothetical were “AN ACT to expand the death penalty and to subsidize soy farmers.” It would clearly state the bill’s purpose, and yet the bill nevertheless has two subjects. Notwithstanding, the Court is bound to follow the latest precedent from the Supreme Court on the subject, Mo. Const., art. V, Section 5, which holds that a title that clearly states the purpose of the bill has a single subject. SSM, 68 S.W.3d at 416.

“whether all provisions of the bill fairly related to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose”). *But cf. State v. Miller*, 45 Mo. 495, 498 (“[The] character of the act [is] to be determined by its provisions, and not by its title.”).

The multiplicity of subjects in HB 1055 is manifested by the great number and broad variety of changes it made. The bill made 20 changes to the following 11 chapters: Chapter 43, “Highway Patrol, State”; Chapter 50, “County Finances, Budget and Retirement Systems”; Chapter 537, “Torts and Actions for Damages”; Chapter 556, “Preliminary Provisions (Criminal Code)”; Chapter 558, “Imprisonment”; Chapter 559, “Probation”; Chapter 565, “Offenses Against the Person”; Chapter 566, “Sexual Offenses”; Chapter 573, “Pornography and Related Offenses”; Chapter 589, “Crime Prevention and Control Programs and Services”; and Chapter 660, “Department of Social Services.” Only one of these chapters, Chapter 566, is dedicated to sexual offenses. Because of the broad swath of chapters affected by HB 1055, the Court should presume that the bill contains multiple subjects. Martha Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 142 (2001). The changes made by HB 1055 are not even limited to same title; Title V,

“Military Affairs and Police”; Title VI, “County Township and Political Subdivision Government”; Title XXXVI, “Statutory Actions and Torts”; Title XXVIII, “Crimes and Punishment; Peace Officers and Public Defenders”; and Title XL, “Additional Executive Departments” are all modified by HB 1055. Given the many unrelated provisions in HB 1055, *see supra*, the Court should conclude that HB 1055 violates the single subject rule. *See SSM*, 68 S.W.3d at 417.

By ignoring the title of HB 1055, one can abstract from it a concern with crime prevention. But not all of HB 1055 deals with crime prevention; the extension of the statute of limitations for a tort action certainly does not. Besides, the title of HB 1055 cannot be ignored in determining whether HB 1055 has a single subject; the title is a key factor in determining the subject of a bill. *SSM*, 68 S.W.3d at 416. HB 1055’s title is “AN ACT . . . relating to sexual offenses,” not “AN ACT . . . relating to crime prevention.” While the phrase “one subject” can be read broadly, it cannot be read “so broadly that [it] becomes meaningless.” *Hammerschmidt*, 877 S.W.2d at 102. Virtually any proposed law – lowering or raising taxes, extending or reducing welfare benefits, increasing or decreasing the penalties for lawbreakers, increasing or decreasing spending on schooling – has some arguable effect on crime prevention. (Term limits legislation, for instance,

might increase or decrease the caliber of the average legislator, thus resulting in better or worse crime-prevention legislation, but certainly a bill containing a term limitations provision would not be solely a “crime prevention” bill.) The mere ability of a litigant to create an umbrella category into which one can classify the provisions of a bill does not insulate the bill from being invalidated for having a multiplicity of subjects. In ACI Plastics v. City of St. Louis, for instance, the bill under review contained two revenue raising measures, but since they were unrelated, the monies raised by these measures, not going to implement similar policies, the Court held that the bill did not have a common subject. 724 S.W.2d 513, 515 (Mo. 1987) (*en banc*). This case is analogous to ACI Plastics: the sundry provisions of HB 1055, like revenue provisions in that case, are not all aimed at deterring or dealing with “sexual offenses.”

Since HB 1055 does not involve a single subject, as required by the Missouri constitution, it is void. HB 1055’s purported amendment of Section 589.400 so as to require Appellant to register as a sex offender is invalid.

Point Relied On – V

The trial court erred in denying declaratory and injunctive relief under Count V, because HB 1055 violates Section 21, Article III of the

Missouri Constitution, in that as amended and ultimately enacted its provisions are not germane to the original purpose of HB 1055, by encompassing broader topics and purposes than stated in the original title: “[t]o repeal section 573.037, RSMo., and to enact in lieu thereof one new section relating to possession of child pornography, with a penalty provision.”

The General Assembly’s passage of HB 1055 violated the “original purpose” requirement of Section 21 of Article III of the Constitution of Missouri. Section 21 provides that that “[n]o law shall be passed except by bill, and *no bill shall be so amended in its passage through either house as to change its original purpose.*” MO. CONST. art III (emphasis added). The test for an original purpose violation is whether the new matters introduced into a bill are germane or unrelated to the bill’s original subject. McEuen ex rel. McEuen v. Missouri State Bd. of Educ., 120 S.W.3d 207, 210 (Mo. 2003) (*en banc*); Stroh Brewery Co. v. State, 954 S.W.2d 323, 326 (Mo. 1997) (*en banc*); Akin v. Dir. of Revenue, 934 S.W.2d 295, 302 (Mo. 1996) (*en banc*).

The original purpose of HB 1055 is quite narrow. As its first title stated, the original purpose was “[t]o repeal section 573.037, RSMo., and to enact in lieu thereof one new section relating to possession of child

pornography, with a penalty provision.” The penalty provision – the substance of HB 1055 – was a reclassification of possession of child pornography from “a class A misdemeanor unless the person has pleaded guilty to or has been found guilty of an offense under this section, in which case it is a class D felony” into a class D felony.

As enacted, however, HB 1055’s purpose is much broader and much different from its original purpose, for the provisions added to the original HB 1055 are not germane to the original purpose of HB 1055. The title of the final version of HB 1055 – “To repeal sections 43.540, 50.550, 537.046, 558.019, 559.021, 565.082, 565.083, 556.037, 566.037, 566.083, 566.093, 566.140, 566.141, 573.037, 573.040, 589.400, 589.425. and 660.520, RSMo., and to enact in lieu thereof twenty new sections relating to sexual offenses, with a penalty provision” – shows that its purpose is not limited to reclassifying the crime of possession of child pornography, but rather includes making changes “relating to sexual offenses,” which includes, in addition to child pornography, such disparate crimes as rape, indecent exposure, and public display of explicit sexual material. The victims of these crimes are not just children. The enacted HB 1055 also creates a “County Law Enforcement Restitution Fund,” modifies the kinds of restitution allowed as a restorative justice method in cases where the

imposition or execution of a sentence is suspended, creates new probation conditions, redefines second- and third-degree assault of a law enforcement officer or emergency personnel, and lengthens a statute of limitations for a tort action. A few of these changes pertain to child pornography, but many – namely, the redefinition of second- and third-degree assault of a law enforcement officer or emergency personnel and the creation of the County Law Enforcement Restitution Fund – do not. Many of these changes are not even related to sexual offenses.

Further evidence that the HB 1055 signed into law by Defendant below, then Governor Holden deviated from the original purpose of HB 1055 is that it makes changes to 11 separate chapters of the Missouri statutes, whereas it originally would have changed one statute in one chapter. Cf. Home Builders Ass'n of Greater St. Louis v. State, 75 S.W.3d 267, 268-69 (Mo. 2002) (*en banc*) (invalidating bill that grew from 13 amendments to a single chapter of the Missouri's statutes into 70 amendments to 15 chapters). In addition, HB 1055 grew from a bill only half a page long to one spanning 16 pages.

HB 1055 violates Section 21's "original purpose" mandate. Hence, its purported expansion of the sexual-offender registration requirements so as to require Appellant to register is void.

Point Relied On – VI

The trial court erred in denying declaratory and injunctive relief under Count VI, because Section 589.400 as amended by HB 1055 violates Section 21, Article III of the Missouri Constitution, in that it violates the First Amendment to the United States Constitution by perpetuating the untoward consequences of Section 573.060.1, an unconstitutionally overly broad criminal statute and by compelling persons subject to Section 589.400, *et seq.*, to speak against their will.

Section 589.400 as amended by HB 1055 is unconstitutional because it perpetuates the untoward consequences of Section 573.060.1, a criminal statute that violates the First Amendment to the United States Constitution.⁵ Section 573.060.1 violates Appellant’s free speech rights because it is substantially overbroad, forbidding much speech protected by the First Amendment.

⁵ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Normally, facial challenges to the constitutionality of legislation, such as the one here, are “the most difficult to mount successfully, since the challenger must establish that no set of circumstances exists under which the [legislation] would be valid.” United States v. Salerno, 481 U.S. 739, 745 (1987). However, the First Amendment doctrine of overbreadth is an exception to the normal rule regarding standards for facial challenges. Under this doctrine, “[t]he showing that a law punishes a ‘substantial’ amount of protected speech, ‘judged in relation to the statute’s plainly legitimate sweep[.]’ . . . suffices to invalidate *all* enforcement of the law, ‘until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” Virginia v. Hicks, 539 U.S. 113 (2003) (internal citation omitted) (emphasis in the original). “[E]ven though a statute or ordinance may be constitutionally applied to the activities of a particular [person],” that person has standing to “challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court.” Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

Non-obscene but indecent sexual expression is protected by the First Amendment[.]” Sable Communications of California, Inc. v. FCC, 492 U.S.

115, 126 (1989). And, as a general rule, pornographic speech, which arguably includes the material covered by Section 573.060.1, “can be banned only if obscene.” Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Not all regulations of such non-obscene but indecent speech are disallowed, so long as they promote a compelling governmental interest and they are the “least restrictive means to further the articulated interest.” Sable, 492 U.S. at 126.

Section 573.060.1 provides that “[a] person commits the crime of Public Display of Explicit Sexual Material if he knowingly: (1) Displays publicly explicit sexual material; or (2) Fails to take prompt action to remove such a display from property in his possession after learning of its existence.” “Displays publicly” means:

exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others or from any portion of the person's store, or the exhibitor's store or property when items and material other than this material are offered for sale or rent to the public[.]

Section 573.010(3). “Explicit sexual material” means:

any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of postpubertal human genitals; provided, however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition[.]

Section 573.010(4).

A striking defect of Section 573.060.1, rendering it constitutionally infirm, is that it is not restricted to obscene, let alone, indecent speech. Chapter 573 defines “obscene” consistently with the Supreme Court’s three-pronged test of obscenity. Compare Section 573.010(9) with Miller v. California, 413 U.S. 15, 24 (1973). Nothing in Section 573.010.1 limits the crime of Public Display of Explicit Sexual Material to the obscene or the indecent. (The statute makes no mention of sexual material that is in “nonconformance with accepted standards of morality,” which is the definition of indecent speech. FCC v. Pacifica, 438 U.S. 726, 741 (1978).) That the statute is not limited to the obscene is also supported by the existence of distinct statutes from Chapter 573 which deal with obscenity. *See* SectionSection 573.020, .030, .065.

Granted, “works of art or of anthropological significance” are not covered by Section 573.060.1. Section 573.010(4). Yet the First Amendment protects much more, including kitsch or entertainment that “depict[s] . . . sexual intercourse,” unless one incorrectly equates the portrayal of sexual intercourse as obscene or indecent – an idea the Supreme Court has rejected. See Miller supra. A good many R-rated and NC-17 movies depict sexual intercourse. They may have no artistic or anthropological merit, but the Supreme Court has long held that the First Amendment protects “[e]ntertainment, as well as political and ideological speech.” Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981). Because of Section 573.060.1, a great many professors in our universities who teach in departments other than art and anthropology better take care what they show to their students; just because their materials are neither indecent nor obscene is not enough to protect them from violating Section 573.060.1.

While “pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of postpubertal human genitals” may be offensive to many, “the fact that protected speech may be offensive to some does not justify its

suppression.” Carey v. Population Services Int’l, 431 U.S. 678, 701 (1977). *See also Pacifica*, 438 U.S. at 746 (“Some uses of even the most offensive words are unquestionably protected.”). While protecting children from the harms of such explicit sexual material might amount to a compelling state interest, the means employed in Section 573.060.1 are a blunderbuss, not a scalpel. There are narrower ways to protect children from the public display of such materials – for instance, by prohibiting such displays at times and locations where children are reasonably likely to see them.

An alternative basis for concluding that compelling Appellant to register pursuant to Sections 589.400, *et seq.* infringes his right to free speech is that the statutes compel Appellant to speak. “The government should not be able to force a person who objects to a position to endorse that position absent the most unusual and compelling circumstances, none of which have appeared in the cases [decided by the United States Supreme Court] to date.” John E Nowak & Ronald D. Rotunda, *Constitutional Law* Section 16.11 (5th ed. 1995) (reviewing case law on compelled speech). Here, Sections 589.400, *et seq.* require Appellant to register as a “sexual offender,” thus implicating, like the “Live Free or Die” motto on the license plate in Wooley v. Maynard, 430 U.S. 705 (1977), that Appellant agrees he is similar to child molesters, pedophiles and rapists, with a compulsion or

propensity to re-offend. Appellant does not. As psychological testing has revealed, Appellant does not entertain the beliefs or desires of pedophiles, molesters or rapists, and is unlikely to re-offend. If the State of Missouri wants to brand Appellant as “sexual offender,” fine; but it cannot compel him to brand himself as such in a public record. Perhaps, the State of Missouri has a compelling state interest in compelling rapists and child pornographers and molesters to comply with the registration requirements of Sections 589.400, *et seq.*, but there is no evidence indicating that those such as the Appellant who have on one occasion publicly displayed explicit sexual material, which has not been deemed indecent or obscene, are recidivists on the level of rapists, pedophiles and molesters. Sections 589.400, *et seq.* violates the First Amendment by compelling Appellant to communicate a message with which he disagrees. *See also* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Cook v. Grailke, 531 U.S. 510 (2001) (affirming Eighth Circuit Court of Appeal’s invalidation of provision in Missouri constitution that required, among other things, that the ballots of some incumbent U.S. congressmen include the statement “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” on the grounds that it threatened “a penalty serious enough to compel candidates to speak[.]”).

Section 573.060.1 is inconsistent with the First Amendment, for two reasons. One, it is substantially overbroad. Two, it compels Appellant to relate a message with which he vehemently disagrees. Hence, the Court should declare that Appellant is not required to register as a sex offender pursuant to Sections 589.400, *et seq.*

CONCLUSION

Appellant seeks to have this Court hold that Section 589.400, *et seq.*, are unconstitutional so that he is not required to register as a sex offender under this statute; the natural consequence being that Appellant did not violate the terms of his probation for his failure to so register.

CERTIFICATE OF COMPLIANCE WITH

MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 2004, by which it was prepared, contains 8,232 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing the Appellant's Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Appellant's Brief was mailed, postage-prepaid, first-class U.S. Mail, to:

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