IN THE MISSOURI SUPREME COURT

SC100296

JOHN DOE,

Appellant

v.

ERIC T. OLSON, et al

Respondent.

Appeal from the Circuit Court, Twenty-First Judicial Circuit
The Honorable David L. Vincent, III, Circuit Judge
Case # 21SL -CC01326

APPELLANT'S REPLY BRIEF

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REPLY TO CHALLENGE AGAINST POINTS

Constitutional challenges against statutes, such as the ones brought by John Doe, are complex undertakings, requiring the plaintiff to painstakingly address multiple essential elements to justify relief. Summarizing all of that into the (hopefully) few words of an appellate point relied on takes much practice. In formulating the points here, undersigned counsel has brought his 40+ years of experience in drafting hundreds of briefs to craft the three points presented now, so as to cover all the bases, and still make decent English sense in what, of necessity, is a run-on-sentence.

Learned Counsel for Respondent Olson has the distinction of registering the first-ever complaints against points drafted by undersigned counsel. Respect for Counsel warrants addressing these claims. However, the complaints seem farfetched.

Respondent Olson contend that Doe's points do not follow the template set forth under V.A.M.R. 84.04(d)(1) (Olson Brief, p. 19-20). To the contrary, each point contains the rule-suggested clauses citing

- a trial court error,
- the "because" of that error, and
- the "in that" details of wherein and why there was error.

Respondent Olson further avers that the points are multifarious, supposedly setting forth six, three and four claims respectively (Olson Brief, p. 19-20). However, Respondent Olson never explains what are the multiple claims which have been combined in any point. To the contrary, Mr. Doe has even separated his substantive due process challenge into two distinct points. It seems Respondent Olson conflates multifarious claims, which is improper, with a single, multifaceted claim, which is proper, even essential.

The least understandable of Respondent Olson claims is his likening the points here to those rejected in ***Lexow v. Boeing Co.***, 643 S.W. 3d 501 (Mo.banc 2022) (Olson Brief, p. 19, 21). A side-by-side comparison between Mr. Doe's Points versus the Points deemed improper in ***Lexow v. Boeing Co.***, at 506 demonstrates they are not remotely similar.

Finally, Respondent Olson complains that he has somehow been unable to "properly evaluate" Mr. Doe's points to formulate his response (Olson Brief, p. 21). Perhaps the best argument against this complaint is the fact that Respondent Olson has joined all of the issues raised by Mr. Doe in a form which follows the outline offered by Mr. Doe's points.

For all of these reasons, Respondent Olson's complaints about Mr. Doe's Points should be overruled.

REPLY REGARDING POINT ONE

I. Summary of Appellant's Point One Argument

For his Point One, Mr. Doe has urged that the Circuit Count erred in failing to find, and grant relief for, MO-SORA's violation of the protections of substantive due process of law with respect to a fundamental right (Appellant's Brief, p. 21-26). Mr. Doe made seven interconnected and interdependent arguments.

First, Mr. Doe observed that this Court has recognized that, though not spelled out word-for-word in any provision of the Constitution, there is a fundamental right for an individual to keep his/her private information private (Appellant's Brief, p. 26-27, 28-29).

Second, by operation of Sections 610.105.1 and 610.120 RSMO, information held by the State about John Doe's pleas of guilty to sexual offenses was taken out of the public domain and made private, forbidden from public disclosure from all state sources (Appellant's Brief, p. 30).

Third, MO-SORA avoids a direct conflict with Sections 610.105.1 and 610.120 RSMO, but still violates John Doe's fundamental right to privacy, by forcing John Doe himself to reveal, every 90 days, the private information about his pleas of guilty to sexual offenses (Appellant's Brief, p. 29-30). Mr. Doe also

explained that this issue was never addressed by this Court in ***R.W. v. Sanders***, 168 S.W.3d 65, 71 (Mo.banc 2005).

Fourth, because John Doe's fundamental right to privacy has been impinged, the State must show that such impingement has been narrowly tailored to advance a compelling state interest (Appellant's Brief, p. 30-31). ***Doe v. Phillips***, 842.

Fifth, though it has been suggested that there are multiple interests which are reasonably related to the provisions of MO-SORA, protection of children is the only interest which is arguably compelling (Appellant's Brief, p. 32-33).

Sixth, in light of the evidence, the findings of the Circuit Court regarding John Doe's background and character, and the input by Courts of other states, forcing Doe to register cannot even be shown to advance protection of children, much less in a narrowly tailored fashion (Appellant's Brief, p. 33-35). ***Doe v. Department of Safety***, 444 P.3d 116, 132 (Ak.banc 2019); ***Powell v. Keel***, 860 S.E.2d 344, 349 (S.C.banc 2021).

Seventh, Mr. Doe has urged that this Court find that the appropriate way to remedy the abridgment of this fundamental right is to grant to John Doe removal from the registry upon a showing that he does not constitute a danger to offend in the future (Appellant's Brief, p. 36-37).

II. Respondents express disagreements about the right to privacy and that the information about John Doe's guilty pleas is private

Respondent Olson agrees, and Respondent Kiefer does not disagree, that there is a fundamental right to keep private information private, and that any state enactment which infringes upon a fundamental right must be narrowly tailored in order to advance a compelling state interest (Olson Brief, p. 24-25). Both Respondents agree that information about Mr. Doe's guilty pleas was closed by Court Order pursuant to Section 610.105.1 RSMO (Kiefer Brief, p. 16; Olson Brief, p. 25).

Respondent Olson notes three of the cases cited by Mr. Doe regarding the fundamental right to privacy, ***State ex rel Cummings v. Witthaus***, 219 S.W.2d 383, 390 (Mo.banc 1949); ***State ex rel Bostelmann v. Aronson***, 235 S.W.2d 384, 389 (Mo.banc 1950); ***State ex rel Delmar Gardens North Operating, LLC v. Gaertner***, 239 S.W.3d 608, 611-612 (Mo.banc 2007) (Olson Brief, p. 34). However, Respondent Olson complains that these cases are somehow "off point", recognize a right to privacy with limitations, and relate to matters of discovery, which Respondent Olson considers "markedly different" from an application to MO-SORA (Olson Brief, p. 34-35).

Mr. Doe notes that his reliance upon these cases has been limited to the proposition that, under Missouri law, there exists a fundamental right to keep private information private (Appellant's Brief, p. 26-27, 28-29). This Court also held same in ***Doe v. Phillips***, supra. Respondent Olson never explains, and

undersigned counsel cannot perceive, why there would be any difference, much less a marked one, in employing the fundamental right in judging a discovery dispute or a dispute over the constitutionality of a statute. Finally, Mr. Doe has never contended that this fundamental right to keep private things private is absolute. In fact, as all parties seem to agree, intrusion upon a fundamental right is allowed, but only if that intrusion is narrowly tailored to advance a compelling state interest.

III. Respondents fail to account for the power of Section 610.105.1

Respondent Kiefer asserts that "information cannot be drawn back from the public domain once it is inserted" (Kiefer Brief, p. 18). Respondent Olson incredulously complains that it makes "little sense" to him that Mr. Doe could argue that that records of his guilty pleas could become private after the plea court had ordered Doe to report to the Registry and after state records pertaining to the pleas were open for years during the term of Mr. Doe's probation (Olson Brief, p. 27, 31).

Actually, per Section 610.105.1 RSMO, records can be drawn back.

> The obvious legislative purpose of the sentencing alternative of suspended imposition of sentence is to allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow. That legislative purpose is further evidenced in statutes concerning closed records; under § *610.105, RSMo 1986,* if imposition of sentence is suspended, the official records are closed following successful completion of probation and termination of the case. ***Yale v. City of Independence***, 846 S.W.2d 193, 195 (Mo.banc 1993).

Thus it is, through the power of Section 610.105.1, what was once public becomes closed and private.

IV. Respondent Olson Misinterprets holdings by various courts

Respondent Olson also argues that Mr. Doe's claims about the privacy of his guilty pleas cannot be squared with the holdings in sixteen different Federal and State cases (Olson Brief, p. 26, 28, 30, 47-48). None of the cases stand for the propositions suggested by Respondent Olson.

As for thirteen of the cases, ***Paul v. Davis***, 424 U.S. 693, 710-713 (1976), ***Doe v. Moore***, 410 F.3d 1337, 1345 (11th Cir. 2005), ***Russell v. Gregoire***, 124 F.3d 1079, 1094 (9th Cir. 1997), ***Corbin v. Chitwood***, 145 F.Supp.2d 92, 96-100 (D.Me. 2001), ***Akella v. Michigan Department of State Police***, 67 F.Supp.2d 716, (E.D.Mich. 1999), ***In re Wentworth***, 651 N.W. 2d 773, 777-778 (Mich.App. 2002), ***People v. Cornelius***, 821 N.E.2d 288, 299-304 (Ill.banc 2004), ***People v. Malchow***, 739 N.E.2d 433, 441-442 (Ill.banc 2000), ***Martinez v. Commonwealth***, 72 S.W.3d 581, 585 (Ky.banc 2002), ***State v. Williams***, 728 N.E.2d 342, 356-357 (Oh.banc 2000), ***Cutshall v. Sunquist***, 193 F.3d 466, 481 (6th Cir. 1999), ***A.A. ex rel M.M. v. New Jersey***, 341 F.3d 206, 210-214 (3rd Cir. 2003) and ***In re W.M.***, 851 A.2d 431, 450-451 (D.C.App. 2004), the reason those Courts held the records in those cases to be open was because in none of Kentucky, Florida, Washington, Maine, Michigan, Illinois, Ohio, Tennessee, New Jersey and the District of

Columbia, was there operation of a closing-of-records statute like Missouri's 610.105.1.

As for ***Roe v. Replogle***, 408 S.W.3d 759, 767 (Mo.banc 2013), the challenge there was over the Constitutionality of FED-SORNA, and no Section 610.105.1 claim was made.

In ***Thurman v. Franklin***, 810 S.W.2d 694, 699-700 (Mo.App.S.D. 1991), when an insurance company was seeking information about the criminal case of one of its insured, the Southern District found that Section 610.105.1 forbid access to any state records about the matter; however, the Southern District went on that Section did not amount to a "general gag order" in that the County Sheriff would be allowed to testify about any independent recollection of the incident he might have to the extent he was accounting personal knowledge as a participant in the investigation and arrest, and not information gleaned from the closed records.

And, in ***State ex rel Pulitzer Missouri Newspaper Inc. v. Seay***, 330 S.W.3d 823, 826-828 (Mo.App.S.D. 2011), the Southern District allowed for the common law right to public access to records which had been closed pursuant to a Section 610.105.1 order, but only because the request had been made prior to the time that the records were ordered closed.

V. Respondents' novel efforts to create exceptions to 610.105 are illogical and violate basic tenets of statutory construction

Without one whiff of authority, Respondents offer an array of claims that there are exceptions which keep certain caches of records about John Doe's guilty pleas open and public. None of these make logical or legal sense.

1. Respondent Olson misinterprets the final phrase of Section 610.105.1

The first sentence of Section 610.105.1 reads as follows:

> If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records when such case is finally terminated except as provided in subsection 2 of this section and Section 610.120 and except that the court's judgment or order or the final action taken by the prosecutor in such matters may be accessed.

Respondent Olson, supported by nothing but his will to say so, novelly suggests that the last 21 words of that sentence be interpreted to nullify the effect of the rest of the sentence, and leave open to the public the judgment of the plea court (Olson's Brief, p. 30-31). Nothing in law or logic permits such an interpretation.

As noted already above, this Court has found that the obvious legislative purpose for permitting suspended impositions of sentences and providing further relief pursuant to Section 610.105 was to close official records pertaining to pleas of guilty. ***Yale v. City of Independence***, supra. In addition, basic rules of statutory construction require Courts to not torture the meaning of words and to harmonize multiple provisions of an enactment to serve the obvious purpose of the enactment. ***Hanger v. Dawson***, 584 S.W.3d 798, 802 (Mo.App.W.D. 2019).

Following these tenets and simple logic, the statutory words attracting Repondent Olson's interest, are "may be accessed" not shall remain open. Moreover, in context, it is clear that the sort of access to the Court's Judgment contemplated would be that as specifically noted in the remainder of the statute, which would be only to the victim of the crime for specific purposes or to officials who would continue to keep the records private, and use them solely for specific, non-public, purposes.

2. Section 610.120 provides no "carve out" for the records in the Registry

The first sentence of Section 610.120.1 RSMO is

> Except as otherwise provided under section 610.124, records required to be closed shall not be destroyed; they shall be inaccessible to the general public and to all persons other than the defendant except as provided in this section and chapter 43.

Respondent Olson, with no authority to back him up, proposes that reading of subsection 1 should stop there, and thereby permit an exception for the records in the registry under Section 43.650 RSMO (Olson Brief, p. 31-32). Once again, Respondent Olson runs afoul of logic and principles of statutory interpretation.

As noted already above, a reviewing Court is to harmonize multiple provisions of an enactment to serve the obvious purpose of the enactment. ***Hanger v. Dawson***, supra. In addition, to the extent that a statute speaks in generalities, and then follows up with specifics, the general language is limited by the specifics. ***Kansas City v. J.I. Case Threshing Mach. Co.***, 87 S.W.2d 195, 205 (Mo.banc

1935). Finally, it is assumed that the legislature has not inserted idle or superfluous language in its legislation. ***In re Incorporation of Village of Table Rock***, 201 S.W.3d 543, 547 (Mo.App.S.D. 2006).

Under these principles, the first sentence of Section 610.120.1 should be read together with, and limited by, the specific, delineated sections of Chapter 43. It should be noted that none of those specified portions of Chapter 43 allow for opening to the public of the records accumulated there. Moreover, if Respondent Olson was right, and all of the provisions of Chapter 43 were "carved out" as exceptions to 610.105 and 610.120, specific reference to particular sections under Chapter 43 would amount to idle and superfluous language. For all of these reasons, Respondent Olson's proposal must be rejected.

As an adjunct, Respondent Olson goes on that Sections 610.105 and 610.120 should be seen to apply only to "criminal records" and not "civil records" (Olson Brief, p. 29, 35). To the contrary, Section 610.105.1 directs broadly to "official records". Moreover, Section 610.120.2 commands that such records are to be kept from the public by " the courts, administrative agencies, and law enforcement agencies". There is nothing in those provisions which would allow the distinction which Respondent Olson wishes to draw.

VI. There are no other sorts of public records which provide information

Respondents postulate that there are other publicly available resources where information about John Doe's guilty pleas can be found (Respondent Kiefer's Brief, p. 12-13, 18; Respondent Olson's Brief, p. 30-31, fn. 5. Respondents' claims are wrong.

Respondent Kiefer claims that, despite all else, FED-SORNA provides public records regarding John Doe's guilty pleas (Kiefer Brief, p. 12-13). This is wrong for two reasons.

First, FED-SORNA does not maintain its own registry, but rather relies upon each state to maintain a registry to carry out the requirements of Federal law. 34 U.S.C. 20912(a),

Second, and most importantly, John Doe's obligations under FED-SORNA have ended. FED-SORNA obligations were made retroactive to persons like John Doe when the United States Attorney General published final rules on the subject. ***Reynolds v. United States***, 565 U.S. 432, 439-446 (2012); ***Vaughn v. Missouri Dept. of Corrections***, 385 S.W.3d 465, 468 (Mo.App.W.D. 2012). By means of Rules promulgated by the United States Attorney General, the date of the offender's plea of guilty or finding of guilt has been established as the starting date for the running of the duration of the reporting requirement. *Office of the Attorney General; the National Guidelines for Sex Offender Registration and Notification*, 73 FR 38030-01, *38036, *38046-*38047. As the parties have agreed, and as the

Circuit Court found, on August 28, 1997, John Doe entered his pleas of guilty (Appendix A-004). The Circuit Court found, and Respondents both agree, that John Doe is a Tier II offender under FED-SORNA (Appendix A-006; Kiefer Brief, p. 12-13; Olson Brief, p. 15). The FED-SORNA Tier II reporting obligation expires after 25 years. 34 U.S.C. 20915(a)(2). Doing the math, it is clear that John Doe's FED-SORNA obligation ended on August 28, 2022.

Respondent Olson globally claims that there are publicly available Federal Records which prove up Mr. Doe's guilty pleas; however, unlike Respondent Kiefer, Respondent Olson identifies no particular source to justify his claim (Olson Brief, p. 30-31, fn. 5). For his part, undersigned counsel has found no such publicly available Federal repository containing information regarding Mr. Doe's guilty pleas.

Finally, Respondent Kiefer avers that newspapers, news outlets and unnamed other sources contain information regarding John Doe's guilty pleas (Kiefer Brief, p. 18). However, Respondent Kiefer cites to not one such source. Undersigned counsel, for his part, has found no such repository of information regarding John Doe's guilty pleas.

VII. Contrary to Respondent Kiefer's contention, this Court has never addressed the Section 610.105 issue raised by Mr. Doe

In his Brief, Mr. Doe explained in detail how this Court's prior decisions have not addressed the Section 610.105 issue which he has raised in this case (Appellant's Brief, p. 29-30).

Respondent Kiefer retorts that Mr. Doe has "parroted" a claim of denial of equal protection of the law made by plaintiffs in ***Doe v. Phillips***, at 839. A careful search of all pleadings and arguments demonstrate the contrary, that Mr. Doe has never contended that MO-SORA abridges equal protection of law precepts. Overlooking this gaffe, Mr. Doe opines Respondent Kiefer actually wishes to contend that this Court must have considered and rejected the contention regarding privacy afforded his guilty plea records under Section 610.105 because

- in ***Doe v. Phillips***, at 839, in the process of ruling on an equal protection claim, this Court observed that certain of the plaintiffs received suspended impositions of sentence, and
- though Section 610.105 was in effect at the time ***Doe v. Phillips*** was decided, this Court denied relief to those suspended imposition of sentence plaintiffs, and
- this Court decided that the information regarding arrest and conviction was already in the public domain (Kiefer Brief, p. 17-18).

This contention was already answered in Appellant's Brief, at page 28, by noting this Court's observation, ***Doe v. Phillips***, at 844, that the plaintiffs in that case

never made the argument Mr. Doe is making and actually admitted that records about their pleas of guilty were in the public domain. Specifically, this Court said only that "…the Does admit such information is already in the public domain."

VIII. Rightfully, neither Respondent has claimed that the MO-SORA registration requirement, as applied to John Doe, is narrowly tailored to advance a compelling state interest

To their credit, neither Respondent contends that MO-SORA is narrowly tailored to further a compelling state interest. Clearly it is not. As the Alaska and South Carolina Supreme Courts have observed, requiring a person to register for a lifetime advances the arguably compelling state interest of protection of children only if that registrant poses a risk of offending in the future. ***Doe v. Department of Safety***, 132; ***Powell v. Keel***, 349. As for the narrow tailoring, that is accomplished by requiring a mechanism whereby a person can be removed from the registry upon a showing that that he is unlikely to offend in the future. ***Doe v. Department of Safety***, 135; ***Powell v. Keel***, 348-349, 351-352.

The contentions of Respondents, instead, are that the requirement for lifetime registration is rationally related to legitimate state interests (Kiefer Brief, p. 14, 18, 20-22; Olson Brief, p. 36, 38, 40-41, 48-49). Those arguments will be addressed under Point Two.

REPLY REGARDING POINT TWO

I. Summary of Appellant's Point Two Argument

In the alternative to Point One, Mr. Doe has brought his Point Two, that even if MO-SORA intrusions do not offend against a fundamental right, those intrusions still do not meet a lesser but still strict standard that they be rationally related to legitimate state interests (Appellant's Brief, p. 38-39, 42, 44).[1] Mr. Doe acknowledged that this Court, in ***Doe v. Phillips***, 845, held that the version of MO-SORA then in existence was rationally related to the legitimate state interest of protecting children from violence at the hands of sex offenders (Appellant's Brief, p. 42, 45). Mr. Doe also noted two United States Supreme Court cases which are oft-cited to the same effect, ***Smith v. Doe***, 538 U.S. 84, 99, 103 (2003); ***Connecticut Dept. of Pub. Safety v. Doe***, 538 U.S. 1, 4 (2003) (Appellant's Brief, p. 47). As to the United States Supreme Court cases, Mr. Doe cautioned that neither of those cases addressed a substantive due process claim, much less the specific claim made in this case (Appellant's Brief, p. 47). And, Mr. Doe explained that the petitioners in ***Doe v. Phillips*** did not raise, and so this Court did not consider and address, the more specific contention, raised in this point, that it is actually counterproductive, to the point of irrationality, to muddle the Registry by including, for a lifetime, a person who, as John Doe, establishes that he does not constitute a danger to commit a subsequent offense (Appellant's Brief, p. 45-46).

[1] Respondent Olson asserts that Mr. Doe's argument is somehow "inverted", but does not explain how that term is apropos, or what difference the perceived inversion makes (Olson Brief, p. 37).

John Doe reminded that he qualifies for such consideration in light of the strong proof he presented about his own excellent character and comportment (Appellant's Brief, p. 52). As against the notion that a "known danger of recidivism among sex offenders" standing alone justifies a lifetime of reporting for one like John Doe, Mr. Doe countered that such a notion is undercut by contrary data, by the failure of the State to test that theory with the data Respondents have in the registry, and by the fact that if the rules applicable to John Doe under FED-SORNA held sway, John Doe would be deemed so little a risk that he would already be removed from the Registry (Appellant's Brief, p. 47-48). In light of the lack of Missouri precedent to address the particular question raised, Mr. Doe offered the whereins and whys set forth by the South Carolina Supreme Court in ***Powell v. Keel***, 349-352:

- that, in justifying any sexual offender registration system, "a likelihood of reoffending lies at the core",
- that initial registration, coming close in time to the offense and the plea for it, has been found to have a rational relationship to the legitimate interest of child protection,
- that, on the other hand, lifetime registration for those who have little risk of reoffending in light of positive performance on probation and the tasks of life "is arbitrary and cannot be deemed rationally related" to the core

purpose of the registry, and furthermore "renders the registry overinclusive and dilutes its utility by creating an ever-growing list of registrants that is less effective at protecting the public and meeting the needs of law enforcement", and

- that, to remedy the constitutional error, an opportunity for judicial review must be allowed to effect removal of registrants deemed to not constitute a future danger.

II. The question posed by John Doe is not whether initial registration is rationally related to a host of legitimate interests, but rather whether lifetime registration is rationally related to those interests

Respondents spent a good deal of briefing space reminding about cases in which initial registration of sex offenders has been found to be rationally related to a host of state interests (Kiefer Brief, p. 14, 18, 20, 22; Olson Brief, p. 38-39, 49-50).[2]

To repeat the concession in Appellant's Brief at 42, 45, in light of the immediate temporal proximity between offense, plea of guilty, and initial

[2] Some of the cited cases are of very limited import. For example, in ***United States v. Kebodeaux***, 570 U.S. 387, 396, 399 (2013), the United States Supreme Court held only that, under the necessary and proper clause, it was reasonable for Congress to determine that safety needs justify post-release regulation. Even worse, in ***Shaw v. Patton***, 823 F.3d 556, 562-563 (10th Cir. 2016), the Tenth Circuit undercut the moment of its holdings by rejecting an ex post facto challenge to Oklahoma's enhanced registry on grounds for which the Oklahoma Supreme Court itself granted relief. ***Starkey v. Oklahoma Department of Corrections***, 305 P.3d 1004, 1030-1031 (Ok.banc 2013).

registration, it is easy to find a rational relationship between initial registration and the legitimate interests of the State. However, none of Respondents' cited cases address, much less answer, the point made it this case, as found by the South Carolina Supreme Court, that it is irrationally counterproductive against the professed state interests to require the lifetime registration of those who have little risk of offending in the future (Appellant's Brief, p. 45-46). ***Powell v. Keel***, 349-352.

III. Prior holdings that "future dangerousness is irrelevant" relate to procedural due process complaints, are themselves irrelevant to the substantive due process issue raised by Mr. Doe, as well as contrary to future dangerousness calculations called for in the current MO-SORA regime

Respondent Kiefer says that the "threat to reoffend" should be considered "immaterial" (Kiefer Brief, p. 27). Respondent Olson reminds of this Court's words that "future dangerousness is irrelevant" (Olson Brief, p. 39). ***Doe v. Phillips***, 842. Respondent Olson also contends that the Eighth Circuit has similarly held that individualized procedures for future dangerousness assessment are "unnecessary" (Olson Brief, p. 39). ***Doe v. Miller***, 405 F.3d 700, 709 (8th Cir. 2005). And, from the other side of things, Respondent Olson contends, without citation to supporting authority, that the facts that a registrant's is a law abiding citizen with a good reputation has no purpose in determining whether MO-SORA is rationally related to a legitimate state interest (Olson Brief, p. 43).

In reply, Mr. Doe reminds that the quoted words of this Court harken to the limited procedural due process holding by the United States Supreme Court in ***Connecticut Dept. of Pub. Safety v. Doe***, 538 U.S. 1, 4 (2003); that holding was that, since petitioners in that case did not make a substantive due process claim, but only a procedural due process claim, and since the Connecticut statute provided no process for calculation of future dangerousness, future dangerousness was not relevant in the context of that case. Similarly, in ***Doe v. Miller***, supra, the Eighth Circuit was considering a procedural due process claim and reached conclusions based on the limited holding in ***Connecticut Dept. of Pub. Safety v. Doe*** and the lack of an individualized-determination-of-dangerousness provision in the statute. Since this case raises no procedural due process arguments, and does involve a substantive due process claim, these particular lines of thought are themselves irrelevant.

Over and above that, the current version of MO-SORA purports[3] to make a crucial factor in removal from the registry that a registrant "is not a current or potential threat to public safety". Section 589.401.11(5) RSMO. Thus, contrary to

[3] Unfortunately, the promises of the MO-SORA Tier system have proven to be illusory, as will be detailed below.

Respondent Olson's notion, law abidingness and good reputation have purpose after all.[4]

Respondent Kiefer has hedged that future dangerousness is one of many state interests served by the MO-SORA registry system, along with other interests like keeping law enforcement and the public informed (Kiefer Brief, p. 14, 18, 20, 22). For his part, Respondent Olson noted MO-SORA's rational relation to the same, multiple state interests (Olson Brief, p. 48-49). Respondent Kiefer went on to repeat the words of the South Carolina Supreme Court that "likelihood of reoffending lies at the core" of justification for the sexual offender registry (Kiefer Brief, p. 22). Unfortunately, neither Respondent takes the words of the South Carolina Supreme Court to heart in that both ignore that interests of disseminating information to law enforcement and the public have no moment if the disseminated information is about persons who are not dangerous to offend in the future. [5]

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[4] Both Respondents observe that, despite the evidence and positive findings regarding John Doe's comportment and reputation, the Circuit Court did not make any ultimate conclusions or grant relief (Olson Brief, p. 43; Kiefer Brief, p. 23). That is certainly part of the error about which Mr. Doe complains.

[5] Respondent Kiefer makes two additional arguments. First, at p. 20-21, release from probation does not preclude lifetime registration (Kiefer Brief, p. 20-21). Mr. Doe does not argue that lifetime registration is precluded in toto, by probation terms or otherwise, but rather that it cannot be for one who is provably non-dangerous. Then, at p. 25-26, even though John Doe would be released from the registry if FED-SORNA release standards applied, states are permitted to set stricter standards. Respondent Kiefer still misses the point that the FED-SORNA policy to release those situated as John Doe severely undercuts the argument that John Doe is so dangerous to warrant, instead, a lifetime of registration.

IV. For legal, logical and practical reasons, Respondents' "categorical" approach to accounting for lack of future danger cannot work

In what appears to be concession to the ***Powell v. Keel*** principle that future dangerousness is the lynchpin for the substantive due process evaluation, Respondent Olson touts the current MO-SORA Three-Tiered system, claiming it is a proper, "categorical" determination of dangerousness, in the alternative to individual scrutiny urged in ***Powell v. Keel*** (Olson Brief, p. 40-42). This argument suffers two fatal flaws.

First, from a practical standpoint, there is a catch which works mischief with the Tier system removal process. Since all sex offenders must register with FED-SORNA, and since MO-SORA requires FED-SORNA registrants to register for life, that provision takes precedence, rendering meaningless any of the purported offerings of registry removal through the Tier system. ***Smith v. St. Louis County Police***, 659 S.W.3d 895, 900-903 (Mo.banc 2023); ***Wilkerson v. State***, 533 S.W.3d 755, 758-762 (Mo.App.W.D. 2017). Thus, in practice, MO-SORA has no categorical system.

Second, even a workable categorical approach to lifetime reporting, by nature, cannot serve the State's interests. Now that there is agreement about the critical nature of a future dangerousness determination, there should also be agreement that continued registry of a person who, regardless of the category of his offense, does not pose a future danger detracts from each and all of the interests

which the Respondents tout. ***Powell v. Keel***, 349-352. Only an individual evaluation can eliminate non-dangerous person from the registry, and thereby assure that lifetime registration actually serves the touted state interests.

Still, Respondent Olson argues that, since there is debate in the cases about what statistics show regarding future dangerousness based solely on the fact of a guilty plea to a sex offense, the MO-SORA categorical approach should withstand a substantive due process challenge (Olson Brief, p. 43-46). As noted above, Respondent Olson's first problem is that MO-SORA's categorical approach is illusory. Just as importantly, by not accounting for an individual's proven lack of danger, the categorical approach forces such a non-dangerous person's registrarion, muddling the registry, thereby working against the interests of the state. ***Powell v. Keel***, supra.

Respondent Olson also claims his position is supported by the Fourth Circuit in ***Doe v. Settle***, 24 F.4th 932, 947-953 (4th Cir. 2022). Respondent Olson does not acknowledge critically distinguishing features of that case:

- that case involved an ex post facto law claim, not a substantive due process claim, and
- in that case, there was never raised or considered the point made it this case, as found by the South Carolina Supreme Court, that it is irrationally counterproductive against the professed state interests to require the lifetime

registration of those who have little risk of offending in the future. ***Powell v. Keel***, 349-352.

Respondent Olson similarly reaches out for support to ***Belleau v. Wall***, 811 F.3d 929, 932-933 (7th Cir. 2016) (Olson Brief, p. 45). Unfortunately, Respondent Olson fails to note that, in that case, there was an individualized presentation of dangerousness from a psychologist that Belleau is a pedophile, that this condition will not change and predisposed Belleau to commit sexually violent acts, and that Belleau had shown that he could not or would not suppress or manage his lawless urges.

V. No law kept the State from using its data to test its categorical approach

As mentioned in the summary above, Mr. Doe faulted Respondents, and by implication the State of Missouri, for not using the data in the registry to test notions about future danger owing strictly to the commission of a sex offense (i.e., to see what sex offenders, if any reoffend (Appellant's Brief, p. 72). Mr. Doe noted that the United States Court of Appeals for the Sixth Circuit drew adverse inferences from a similar failure by the State of Michigan. ***Does #1-5 v. Snyder***[6], 834 F.3d 696, 705 (6th Cir. 2016).

[6] In citing to this case, Respondent Olson repeatedly misspells "Snyder" as "Synder" (Olson Brief, p. 5, 43, 44, 54, 59).

Respondent Olson harrumpfs that the law forbids him from conducting any such study, citing particularly to Sections 43.531 and 43.532 RSMO (Olson Brief, p. 47). Neither statute restricts the State of Missouri generally or Respondent Olson's Highway Patrol particularly from conducting studies with the registry information, with both placing restrictions on persons and entities outside State government.

VI. Missing the forest for the trees

Respondent Kiefer urges two additional perceptions.

First, Respondent Kiefer claims that there are differences between MO-SORA tiered system and the South Carolina registration regime from ***Powell v. Keel***, most notably that no one was allowed to petition for release in South Carolina. As explained above, since the tiered system is illusory, there is no such distinction.

Second, Respondent Kiefer offers his perception that John Doe's offenses of having sex with a fifteen year old were worse than the conviction of the petitioner in ***Powell v. Keel***, 345, soliciting sex with an undercover policeman pretending to be a twelve year old. While many would side against Respondent Kiefer in such a debate, that misses the bigger picture, that the ruling of the South Carolina Supreme Court applied to all sex offenses, and that the South Carolina legislature

amended its registry law in keeping with the Court ruling. ***Powell v. Keel***, 349-352; ***Grant-Davis v. Wilson***, 2023 WL 7272105, *1 (4th Cir. 2023).

REPLY REGARDING POINT THREE

I. Summary of Appellant's Point Three Argument

Mr. Doe began his Point Three argument by admitting that, if it was still 2006, and MO-SORA was as it was then, he would have nothing to say by way of an ex post facto challenge; that is because, then and there, ***R.W. v. Sanders*** held that that version of MO-SORA did not violate the prohibition against ex post facto laws (Appellant's Brief, p. 64). Since it is nearly twenty years later, and since, in the interim, the Missouri legislature has changed MO-SORA significantly, Mr. Doe could and did go forward with plenty to say, starting with itemizing the changes.

First, right after the ***Sanders*** decision, Section 489.400 was modified to introduce internet broadcast of the registry (Appellant's Brief, p 64). ***Doe v. Phillips*** was decided shortly thereafter, but since those parties did not brief regarding that change, it was "not addressed by this opinion" (Appellant's Brief, p. 65). Second, was Section 589.414.1 RSMO (2009), changed to newly require in-person reporting of information changes (Appellant's Brief, p. 65). Third, there

were the 2013 changes in the classification of John Doe's offenses (Appellant's Brief, p. 65).[7] Finally, in 2018, there were changes,

- allowing for removal from the registry, but not for those in John Doe's reclassified offense category (Section 589.400.4 and 5 RSMO),
- increasing in-person reporting to every ninety days for those in John Doe's reclassified offense category (Sections 589.401.1(3)(a) an 589.414.7 RSMO),
- requiring the giving of a DNA sample (Section 589.407.1(4) RSMO), and
- increasing the amount of information published and the means for publication (Section 589.402 RSMO) (Appellant's Brief, p. 65-66).

Mr. Doe also noted that, though his petition brought these changes to the attention of the Circuit Court, the Order of that Court never mentioned the changes, much less the significance of the changes (Appellant's Brief, p. 67).

Having so detailed the changed MO-SORA, and having explained that Missouri had not yet addressed those changes, Mr. Doe accounted the opinions of the Courts of Pennsylvania and Michigan who had addressed how those very same

[7] At pages 63-64, Respondent Olson rightly points out that Mr. Doe has miscited the current statutes in which John Does offenses now reside, but then cites to other, incorrect provisions. Actually, the current statutes are Second Degree Statutory Rape, Section 566.034, and Second Degree Statutory Sodomy, Section 566.064.

changes in their SORA's had altered the ex post facto violation calculus (Appellant's Brief, p. 66-73).

Mr. Doe started with ***Commonwealth v. Muniz***, 164 A.3d 1189, 1211, 1213, 1217-1218 (Pa.banc 2017). At pages 67-70 of his Brief, Mr. Doe honed in on the provisions of the revised Pennsylvania SORA, different from the Alaska SORA judged in ***Smith v. Doe***, but the same as the revised provisions of MO-SORA, which the Pennsylvania Supreme Court found, when accumulated, violated the prohibition against ex post facto laws:

- in-person reporting requirements coupled with the sanction of incarceration for failure to comply, which the Pennsylvania Supreme Court found to "resemble" the punishment of probation
- internet accumulation and dissemination of extensive registration information, which the Pennsylvania found, "…when viewed in the context of our current internet-based world-to be comparable to shaming punishments" and
- lifetime reporting without the ability to petition for removal from the registry, which the Pennsylvania Supreme Court deemed excessive for those who could prove that they did not pose a danger to offend in the future.

Mr. Doe then detailed the aftermath, whereby the Pennsylvania legislature reduced in-person reporting and instituted a means for any registrant to be removed from

the registry upon a showing of lack of dangerousness to offend in the future. ***Commonwealth v. Lacombe***, 245 A.3d 602, 616-627 (Pa.banc 2020).

Mr. Doe then turned to the successful challenges to the Michigan SORA starting with ***Does #1-5 v. Snyder***, 834 F.3d 696, 697-698, 700-705 (6th Cir. 2016) (Appellant's Brief, p. 70-72). The Sixth Circuit, after paying heed to the teachings of ***Smith v. Doe***, held that thereafter the Michigan registry evolved to violate the prohibition against ex post facto laws; the Sixth Circuit noted with particularity the problematic additions, of internet publication, especially of information about guilty pleas which would otherwise be private, deemed akin to the punishment of shaming, and in-person reporting, deemed the functional equivalent of probation and parole (Appellant's Brief, p. 71).[8] The Sixth Circuit labeled these requirements as excessive when applied for life to those who were provably not dangerous to offend in the future (Appellant's Brief, p. 71-72). Mr. Doe then noted that the Michigan Supreme Court independently, and upon the same grounds, found Michigan SORA violative of ex post facto law prohibitions, and remedied the violation by instituting a process whereby any registrant could be removed from the registry upon a judicial finding that he/she did not constitute a danger to offend in the future. ***People v. Betts***, 968 N.W.2d 497, 510-515 (Mi.banc 2021).

[8] Mr. Doe noted that the Michigan law also placed restrictions on a registrant's travel, a feature not a part of MO-SORA (Appellant's Brief, p. 71).

To wrap things up, Mr. Doe urged that this Court, like the Courts in Pennsylvania and Michigan, find a violation of the ex post facto prohibition, find that the proper remedy for that violation is a judicially-created means to allow removal from the MO-SORA registry upon a judicial finding that the registrant is not a danger to offend in the future, and in light of the record made in this case about John Doe's lack of danger to offend in the future, order that John Doe be removed from the registry and not be required to register hereafter (Appellant's Brief, p. 73-77).

II. Reminder to Respondents, it's not 2006 anymore

Respondents' briefing is stuck in 2006. Nestled in that timewarp, it might seem appropriate to support every argument by citing copiously to ***R.W. v. Sanders*** (16 times in the Olson Brief and on every page of the Kiefer Brief) and to 1990's and early 2000's ex post facto holdings by 34 other states (Olson Brief, p. 53-54).[9] However, as everyone except Respondents know, time has moved on, and the case at bar asks that a changed MO-SORA be evaluated. In this new world, states like Pennsylvania and Michigan, who were previously included among the 34 states who found the original Registry laws constitutional, employed the legal principles

[9] Even the more recent cases cited by Respondent Olson at brief page 51-52 rely at bottom on ***R.W. v. Sanders***, and break no new ground. ***Doe v. Belmar***, 564 S.W.3d 415, 420 (Mo.App.E.D. 2018); ***Roe v. Replogle***, 408 S.W.3d 759, 767-768 (Mo.banc 2013).

set in the earlier cases and found that the onerous changes enacted in the years since 2006 violate the prohibition against double jeopardy.

III. The Courts of Pennsylvania and Michigan are the vanguard, with the Tenth Circuit being the outlier

Since the ultimate holdings from Pennsylvania and Michigan were different from the decisions from 2006 and before, Respondents label them "outliers" (Olson Brief, p. 53-54). The truth is that these Courts are the trailblazers as the states, one by one, confront the new and enhanced SORA regimes. And, Pennsylvania and Michigan are not alone, as there are others who like them have found the enhanced SORA regimes have crossed the line into the unconstitutional. ***Doe v. State***, 111 A.3d 1077, 1090-1102 (N.H.banc 2015); ***Starkey v. Oklahoma Department of Corrections***, 305 P3d 1004 (Okla.banc 2013); ***Wallace v. State***, 905 N.E.2d 371, 374-384 (Ind.banc 2009).

Amidst their putting on blast cases of the past, Respondents actually found one, but only one,[10] ***Shaw v. Patton***, 823 F.3d 556 (10th Cir. 2016), which addressed, and found constitutional, a current, enhanced SORA, from Oklahoma (Olson Brief, p. 56-62). However, Respondents fail to note that in reaching the

[10] Respondent Olson also tries to draw support from ***Doe v. Bredesen***, 507 F.3d 998, 1005-1006, 1008 (6th Cir. 2007) and ***Hatton v. Bonner***, 356 F.3d 955, 964-965 (9th Cir. 2003) (Olson Brief, p. 57-58). Respondent Olson does not note that the 6th Circuit case prompted a vigorous dissent in its time, and has been superceded by ***Does #1-Snyder***, supra. And, the California SORA was upheld in ***Hatton v. Bonner*** because it, unlike MO-SORA, restricted dissemination of registry information, specifically forbidding internet broadcast

conclusions they did, the Tenth Circuit panel had to ignore the findings of unconstitutionality against Oklahoma SORA made previously by the Oklahoma Supreme Court itself. ***Starkey v. Oklahoma Department of Corrections***, supra. Thus, if Respondent's "outlier" term is to be properly used, it would be applied to ***Shaw v. Patton***.

IV. Contrary to Respondents' complaints, Mr. Doe detailed the problematic provisions common to the laws of Missouri, Pennsylvania and Michigan

Respondents contend that the laws of Missouri, Pennsylvania and Michigan are "entirely different" and that Mr. Doe has failed to show how any MO-SORA amendments violate ex post facto prohibitions (Olson Brief, p. 54, 55, fn. 24). Nothing could be further from the truth. As noted in the summary above, in pages 64-73 of his Appellant's Brief, Mr. Doe cited to each change to MO-SORA, and then noted wherein and why those very same tenets of Pennsylvania and Michigan law were determined to be unconstitutional.

V. Respondents' search for authority ranges far afield

In what seems an effort to advance support which appears more recent, Respondent Olson relies upon ***Willman v. Attorney General of the United States***, 972 F.3d 819, 823-825 (6th Cir. 2020) (Olson Brief, p. 51-52). However, all that case decided was that FED-SORNA reporting obligations are enforceable even without a corresponding state obligation. That conclusion advances nothing here.

Even more baffling is reliance upon Missouri's sexually violent predator act and ***Matter of Brown v. State***, 519 S.W.3d 848, 852 (Mo.App.W.D. 2017) (Olson Brief, p. 61-62). Under that act, individualized proof of future dangerousness is required, and in that case, that proof came by way of an expert opinion about "Brown's paraphilia" which "caused him serious difficulty controlling his behavior and rendered him more likely than not to engage in predatory acts of sexual violence". That is precisely the individualized assessment which the Courts of Pennsylvania and Michigan have found necessary to make MO-SORA pass the ex post facto law test.

VI. The new and more onerous MO-SORA is excessive because it is counterproductive against safety interests

Relying, as always, on ***R.W. v. Sanders***, Respondents insist that MO-SORA is not punishment because it serves the safety interests of children and the public (Olson Brief, p. 61-62; Kiefer Brief, p. 29-31). Trouble is, as briefed by Mr. Doe, since MO-SORA requires the registration of provably non-dangerous persons like John Doe, the registry becomes a muddle which is actually counterproductive against the State's safety interests (Appellant's Brief, p. 67-72). Neither Respondents, nor any of their cited cases, addresses that argument. On the other hand, the Pennsylvania and Michigan Courts found that not serving state interests shifted the scales of justice in favor of a finding that such registries are punishment in violation of ex post facto law prohibitions. ***Commonwealth v. Muniz***, supra;

Does #1-5 v. Snyder, supra. Respondent Olson also briefly mentions his contention, detailed in connection with other points, that a categorical approach regarding dangerousness obviates the need for an individualized approach (Olson Brief, p. 62-63). Mr. Doe already addressed this argument in full at pages 27-29 of this Reply.

CONCLUSION

WHEREFORE, in light of the foregoing, and in light of the arguments set forth in Appellant's Brief, Mr. Doe prays that this Court find that MO-SORA violates John Doe's constitutional rights and remedy such rights violations by directing John Doe's removal from the MO-SORA registry and relief from further reporting.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Frederick A. Duchardt, Jr., do hereby certify, that pursuant to V.A.M.R. 55.03(a) I have signed the original of this brief, that this brief complies with the word limit set forth in V.A.M.R. 84.06(b) in that it contains 7,745 words as reported by the word processing program used to prepare it, and that a copy of this brief was served upon the following via e-mail and the Court's electronic filing notification service on this 26th day of April, 2024.

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