

IN THE
Supreme Court of Missouri

No. SC92978

JOHN ROE,
Appellant,

v.

COLONEL RON REPLOGLE, et al.,
Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Peggy Stevens McGraw, Circuit Judge

RESPONDENTS' BRIEF

MISSOURI ATTORNEY GENERAL

P. Benjamin Cox

Missouri Bar No. 60757

Assistant Attorney General

615 E. 13th Street, Suite 401

Kansas City, Missouri 64106

Phone: 816-889-5090

ben.cox@ago.mo.gov

Attorney for State Respondents

Abbe M. Feitelberg

MO Bar # 57352

Assistant County Counselor

Jackson County Courthouse-2nd Floor
415 East 12th Street
Kansas City, MO 64106
afeitelberg@jacksongov.org
(816) 881-3279
FAX (816) 881-3398

Attorney for County Respondent

Jurisdictional Statement

For the reasons stated in the Respondents' Motion to Transfer, jurisdiction over this case properly lies with the Court of Appeals of Missouri, Western District. The "constitutional" questions that the Appellant raises are insubstantial. *See Kasch v. Dir. of Revenue*, 18 S.W.3d 97, 98 (Mo. App. E.D. 2000) (holding that the Supreme Court's jurisdiction over constitutional questions does not extend when the issues are insubstantial).

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Statement of Facts

The Respondents object to the Appellant's Statement of Facts. By rule, "[t]he statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04(c). Here, the Appellant submitted self-serving statements (for example, that he is innocent of the crime to which he pled guilty, *see* Brief at pg. 12); argumentative statements (for example, that he was not "convicted" of the subject offense, *see* Brief at pg. 16); and pages of statements that are irrelevant to the questions presented by this appeal.

Indeed, the only facts that are relevant to the questions presented are as follows. Roe pled guilty to a sex offense before the federal sex offender registration requirement went into effect: on November 28, 1994, he pled guilty to sodomy. (LF 88). The victim was his seven-year-old stepdaughter. (LF 87). He now disclaims any responsibility to register as a sex offender. (LF 19). He sought declaratory relief and injunctive relief, arguing that Missouri's requirement that he register as a sex offender violated both the U.S. Constitution and the Missouri Constitution. (LF 7-19). The circuit court granted the Respondents' motion for summary judgment. (LF 104-06).

Argument

Roe has essentially conceded that all of his points, with the exception of Point I (non-delegation), raise insubstantial questions.¹ But non-delegation fares no better than Roe's other arguments. Such is the case because it is well-settled that Congress can delegate some policy-making authority to the executive branch, so long as it provides an "intelligible principle" to guide the Executive. Only two congressional acts in history—and none since 1935—have been stricken for failure to meet the low burden of "intelligibility." Indeed, every court that has addressed the issue has held that Congress's purpose in enacting the federal sex offender registration requirement was sufficiently intelligible to pass muster with the Constitution. Roe relies heavily on the views of Justice Scalia, but Justice Scalia rejects the "intelligible principle" doctrine entirely. And, even while rejecting the "intelligible principle" doctrine, Justice Scalia *still* thinks that the federal registration act is constitutional. Accordingly, Roe's non-delegation

¹ The Respondents moved to transfer this case because the "constitutional" questions it raises are insubstantial. In response, the Appellant argued that one, and only one, of his points raised a substantial question. The "substantial" point, he argued, was the issue of non-delegation.

argument fails every bit as much as do his other, oft-discredited attempts to invalidate the registration requirements.

Standard of Review

For each of his points, Roe sought injunctive and declaratory relief. “The standard of review for grant of preliminary relief or denial thereof (when appealable) is a review for abuse of discretion, because trial courts are allowed broad discretion as to preliminary injunctive relief.” *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 648 (Mo. App. W.D. 1995). Moreover, the standard of review for a denial of declaratory relief is ordinarily governed by *Murphy v. Carron*, 536, S.W.2d 30, 32 (Mo. banc 1976). *Carroll v. Mo. Bd. Of Prob. & Parole*, 113 S.W.3d 654, 656 (Mo. App. W.D. 2003). However, when, as here, the questions presented are purely legal in nature, the appellate court applies *de novo* review. *Carroll*, 113 S.W.3d at 656.

A. Roe is required to register as a sex offender.

Missouri requires a person to register as a sex offender if he “has been or is required to register [as a sex offender] under . . . federal . . . law.” § 589.400.1(7).² Federal law requires “sex offenders” (people who have been

² Statutory references are to RSMo. 2000, as updated, unless otherwise indicated.

convicted of a sex offense) to register in the jurisdiction in which they reside. 42 U.S.C.A. § 16913(a).³

Roe was convicted of a sex offense before either the state or the federal registration requirement was enacted. (LF 88). Nevertheless, Congress provided that the United States Attorney General could enforce the federal registration requirement against sex offenders who were convicted before SORNA went into effect, 42 U.S.C.A. § 16913(d), and the Attorney General issued a rule providing that the registration requirement will be so enforced. *Vaughan v. Mo. Dep't of Corr.*, 385 S.W.3d 465, 468 (Mo. App. W.D. 2012) (noting that, as against pre-enactment sex offenders, the federal act became effective “on August 1, 2008, when the Attorney General published final rules and regulations concerning [SORNA]”).

Accordingly, federal law requires that Roe register in Missouri, and, by extension, so does Missouri law. § 589.400.1(7); *Doe v. Toelke*, 389 S.W.3d 165, 167 (Mo. banc 2012). “The mandatory registration requirement of [the state registration requirement] applies to ‘[a]ny person who ... has been or is

³ This brief will refer to the Sex Offender Registration and Notification Act, 42 U.S.C.A. § 16901, *et seq.*, as either “the federal registration requirement” or “SORNA.” It will refer to § 589.400 *et seq.* as “the state registration requirement.”

required to register in another state or has been or is required to register under tribal, federal, or military law....” *Toelke*, 389 S.W.3d at 167 (quoting § 589.400.1(7)).

Thus, there is no dispute that the registration requirement, *as enacted*, applies to Roe. Roe’s only argument is that the Court should *invalidate* the acts of Congress and/or the General Assembly.

B. The federal registration requirement does not violate the non-delegation doctrine in that Congress provided the Attorney General with an intelligible principle to guide him or her (responds to Point I).

Roe argues that SORNA violates the U.S. Constitution in that it delegates to the Attorney General the authority to legislate, which, under the separation of powers doctrine, can only be exercised by Congress. U.S. CONST. art. I, § 1; *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). The argument has no merit.

“All legislative Powers herein granted shall be vested in a Congress ...” U.S. CONST. ART. I, § 1. In *Panama Refining* and *Schechter Poultry*, the Court held that, by implication, Article I prevents Congress from delegating to the Executive *wholesale authority* to enact legislation. *Panama Ref.*, 293 U.S. at 430 (striking an act for which “Congress ha[d] declared no policy,

ha[d] established no standard, ha[d] laid down no rule”); *Schechter Poultry*, 295 U.S. at 539 (striking an act that “extend[ed] the President’s discretion to *all the varieties of laws* which he may deem to be beneficial in dealing with the *vast array* of commercial and industrial activities throughout the country”) (emphasis added).

However, as noted above, no court has stricken an act of Congress due to a violation of the non-delegation doctrine since 1935, *see United States v. Ross*, 778 F. Supp. 2d 13, 26 (D. D.C. 2011); and only twice in history (*Panama Refining* and *Schechter Poultry*) has the Court done so. *Misretta v. U.S.*, 488 U.S. 361, 373 (1989). Such is the case because post-New Deal courts have recognized that Congress may, in fact, delegate policy-making authority to the executive branch, so long as there is an “intelligible principle” to guide the Executive. *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012).

Indeed, an act survives a non-delegation challenge so long as Congress clearly designated (1) the general policy; (2) the agency that will apply it; and (3) the boundaries of the delegated authority. *Misretta*, 488 U.S. at 372-73.

The latter two requirements are not seriously in dispute: the relevant “agency” is the Attorney General, and the boundaries of the delegated authority could not be more sharply drawn. 42 U.S.C.A. § 16913(d).

SORNA ... contains boundaries on the authority delegated to the Attorney General. Essentially, section 16913(d) delegates *one narrow question* to the Attorney General: Do SORNA’s requirements apply retroactively to offenders whose convictions predate SORNA’s enactment? The question of retroactivity has a *defined, narrow universe of answers*. “[T]he Attorney General cannot do much more than simply determine whether or not SORNA applies to [individuals convicted of covered sex offenses prior to SORNA’s enactment].”

United States v. Kuehl, 706 F.3d 917, 920 (8th Cir. 2013) (quoting *United States v. Guzman*, 591 F.3d 83, 93 (2d Cir. 2010)) (emphasis added).

Furthermore, Congress clearly designated “the general policy” for the Attorney General to follow. “In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes *a comprehensive national system* for the registration of those offenders.” 42 U.S.C.A. § 16901 (emphasis added). The U.S. Supreme Court has held that general declarations of policy—even when more general than Congress’s statement of policy here—satisfy the “intelligible principle” standard. *See, e.g., Yakus v. United States*, 321 U.S. 414, 420-27 (1944) (upholding a delegation of legislative authority based on the general policy to

set prices that are “generally fair and equitable”); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216-23 (1943) (upholding a delegation of legislative authority based on the general policy to regulate in the “public interest”).

That Congress wanted the registration system to be “comprehensive” and “national” indicates a policy to register, if possible, all sex offenders, irrespective of whether their crimes occurred before the act was officially made retroactive. Indeed, the declaration of policy goes on to list 17 victims—all of whom were attacked by pre-act offenders—as examples of why there was a need for a comprehensive, national registration system. 42 U.S.C.A. § 16901. Further, the act provides, in an all-inclusive manner, that “[a] sex offender shall register,” without regard to when the offender committed his or her crime. 42 U.S.C.A. § 16913(a). The act then provides the Attorney General with some degree of discretion to determine whether to require pre-act offenders to register, 42 U.S.C.A. § 16913(d); however the “general policy”—that the registration was to be comprehensive, national, and, to the extent possible, retroactive—cannot credibly be described as unintelligible.

Indeed, every court that has addressed this issue has found SORNA’s principles to be sufficiently intelligible to survive a non-delegation challenge. *Felts*, 674 F.3d at 606 (“Congress’s delegations under SORNA possess a suitable ‘intelligible principle’ and are ‘well within the outer limits of [the

Supreme Court’s] nondelegation precedents.”) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 458 (2001)); *United States v. Burns*, 418 Fed. Appx. 209, 211–12 (4th Cir. 2011); *Guzman*, 591 F.3d at 93 (2d Cir. 2010); *United States v. Whaley*, 577 F.3d 254, 264 (5th Cir. 2009) (“The delegation to the Attorney General to determine the retroactive applicability of [the federal act] is well within the limits of permissible delegation.”); *United States v. Ambert*, 561 F.3d 1202, 1213–14 (11th Cir. 2009); *United States v. Dixon*, 551 F.3d 578, 583–84 (7th Cir. 2008). And notably, the Eighth Circuit has recently affirmed the principle that the federal registration requirement does not violate the non-delegation doctrine. *Kuehl*, 706 F.3d at 920.

Roe’s heavy reliance on Justice Scalia’s dissent in *Reynolds v. United States*, is misplaced. 132 S. Ct. 975, 985 (U.S. 2012) (Scalia, J., dissenting). Justice Scalia would not have held that SORNA is unconstitutional;⁴ rather,

⁴ Justice Scalia would overrule the “intelligible principle” doctrine entirely because he thinks that *any* delegation of legislative authority is unconstitutional. *Misretta*, 488 U.S. at 419 (Scalia, J., dissenting) (“Strictly speaking, there is *no* acceptable delegation of legislative power.”). However, with respect to SORNA, Justice Scalia *saw no delegation of legislative authority*, *Reynolds*, 132 S. Ct. at 985 (Scalia, J., dissenting), and, pursuant to the principles articulated in his *Misretta* dissent, he would uphold the act.

he would have held that SORNA did not delegate to the Attorney General any discretion to make the act retroactive. *Id.* (“In my view, the registration requirements of [SORNA] apply of their own force, without any action by the Attorney General.”). Hence, Justice Scalia would have held that pre-act offenders were required to register in the *absence* of any action by the Attorney General. *Id.* Indeed, the dispute in *Reynolds* was whether SORNA’s terms were so explicit that action by the Attorney General was unnecessary to trigger the registration duty of pre-act offenders. *Id.* That the Court was divided as to whether SORNA was so explicit as to deny the Attorney General *any* discretion at all would seem to answer the question of whether Congress’s policy on the relevant point was “intelligible.” That is, one side’s view was that the policy favoring registration for pre-act offenders was so *intelligible* as to be self-enacting. *Id.*

See Misretta, 488 U.S. at 419. Accordingly, his musings about what the result might have been for SORNA *if there had been a delegation of legislative authority* do not stand for much: Justice Scalia himself thinks that SORNA did not delegate legislative authority, *Reynolds*, 132 S. Ct. at 985, and, in any case, no other justice would join him in jettisoning the “intelligible principle” doctrine. *See Misretta*, 488 U.S. at 413-22 (Justice Scalia dissenting alone).

Thus, SORNA survives any challenge based on non-delegation because Congress articulated a general policy, specified that the Attorney General would enact it, and narrowly bound the parameters of the Attorney General's discretion. *See, e.g., Kuehl*, 706 F.3d at 920. It is not a novel concept to grant the executive branch some level of prosecutorial discretion. *See, e.g., Morales v. State*, 104 S.W.3d 432, 437 (Mo. App. E.D. 2003) (noting that the prosecutor's review committee has the discretion to determine whether to charge the accused as a sexually violent predator). In enacting 42 U.S.C.A. § 16913(d), Congress merely provided that the Attorney General could enforce the federal registration requirement against pre-act offenders, provided that practical considerations did not dictate otherwise. That does not violate separation of powers. *Kuehl*, 706 F.3d at 920; *Felts*, 674 F.3d at 606.

C. Point II should be denied in that it is well-settled that the federal registration requirement does not violate the *Ex Post Facto* clause.

Missouri appellate courts have already rejected Roe's *Ex Post Facto* argument. *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006) (holding that requiring pre-enactment sex offenders to register violates neither the U.S. Constitution's *Ex Post Facto* clause nor the Missouri Constitution's *Ex Post Facto* clause); *Doe v. Keathley*, 344 S.W.3d 759, 769 (Mo. App. W.D. 2011)

(describing the sex offender’s *Ex Post Facto* argument as “not a colorable claim”). The registration requirement is civil and regulatory in nature, and, since the *Ex Post Facto* clause applies to *criminal* sanctions, it does not apply to the registration requirement. *Phillips*, 194 S.W.3d at 842; *see also Smith v. Doe*, 538 U.S. 84, 92 (2003) (reaching the same conclusion).

D. Point III should be denied because, irrespective of whether SORNA *required* the General Assembly to enact a registration requirement that includes Roe, the General Assembly *did* enact such a registration requirement.

In Point III, Roe argues that SORNA does not *mandate* that Missouri require him to register.⁵ But that is a moot point because, irrespective of whether the federal act *mandates*⁶ that Missouri require registration of

⁵ Since the argument is such an obvious red herring (given that Missouri *does* require Roe to register), this brief will not address the merits of whether the federal act “requires” states to register pre-enactment offenders. It certainly permits states to do so, and Missouri has done so.

⁶ The Respondents note that Congress does not purport to *require* Missouri to do anything; rather, Congress has conditioned certain federal funding on state compliance with SORNA. 42 U.S.C.A. § 16925.

persons like Roe, Missouri does, in fact, require such persons to register. § 589.400.1(7) (requiring state registration of anyone who is or has been required to register under federal law); *Toelke*, 389 S.W.3d at 167; *Doe v. Keathley*, 290 S.W.3d 719, 720 (Mo. banc 2009).

Thus, even if the federal act *allowed* Missouri to provide for non-registration of pre-enactment sex offenders (which need not be decided here), the fact remains that Missouri *does* require such persons to register, via its requirement that a person who is or has been subject to federal registration is also subject to state registration. § 589.400.1(7); *Toelke*, 389 S.W.3d at 167.

Roe's point is that the General Assembly *need not* have required have *all* persons subject to SORNA to be subject to the state registration requirement. But that is what the General Assembly *did*, and it violated no provision of either the Missouri Constitution or the U.S. Constitution in so doing. *Toelke*, 389 S.W.3d at 167. The relevant Missouri statute requires Roe to register, § 589.400.1(7), and, in asking the court to decide that the statute *need not have been enacted*, Roe is explicitly asking the court to undo

a policy decision made by the General Assembly. The court should decline to do so.⁷

E. Point IV appears to be a restatement of Point III, and it should be denied in that it is well-settled that Section 589.400.1(7) does not violate the Missouri Constitution.

Point IV appears to be arguing the same point as Point III—that SORNA did not require the General Assembly to apply the state registration requirement to him. As discussed above, whether SORNA so requires is a moot point because the General Assembly *did* apply the state registration requirement to anyone who is or has been subject to SORNA’s registration requirement. § 589.400.1(7).

⁷ Roe also claims in Point III that “the Attorney General’s own guidelines would exempt Roe from registration.” (Brief at 38). That is patently false. The Attorney General’s intent that SORNA’s provisions be applicable to all sex offenders has been reiterated in federal regulations issued time and again, most recently in January of 2011: “SORNA’s requirements apply to *all* sex offenders, regardless of when they were convicted.” 76 FR 1630-01, *1639. (emphasis added)).

Roe argues that the General Assembly could not “elect” to apply the registration requirement to him without violating the principles of *Phillips*, 194 S.W. 3d at 849-52, but he cites no authority for that proposition. He fails to cite such authority because the Court has held the exact opposite: in enacting § 589.400.1(7), the General Assembly did not violate the Missouri Constitution. *Toelke*, 389 S.W.3d at 167; *Keathley*, 290 S.W.3d at 720.

When, as in this case, the state registration requirement is based on an independent federal registration requirement, article I, section 13 [of the Missouri Constitution] is not implicated because the state registration requirement is not based solely on the fact of a past conviction. Instead, the state registration requirement is based on the person’s present status as a sex offender who “has been” required to register pursuant to SORNA. *Toelke*, 389 S.W.3d at 167. Accordingly, Point IV should be denied.

F. Point V should be denied because the state registration requirement contains no “travel between states” element.

Roe next argues that he should not have to register as a sex offender because he cannot be convicted of violating the *federal* act until he travels between states, which he claims not to have done since the federal act came

into effect. The argument is without merit because none of these defendants has threatened to convict Roe of violating the federal act.

In general, jurisdiction to prosecute a federal crime lies with the U.S. Attorney, 28 U.S.C. § 547, not the state or county authorities, who are the respondents here. If Roe fails to register as a sex offender, the State of Missouri (and its agents) will prosecute Roe for violating the *state* registration requirement. The state registration requirement has no interstate travel element, and therefore Roe’s argument on this point fails.⁸ Roe argues in Point V that he cannot be prosecuted for violating § 589.400.1(7) because it violates the Missouri Constitution, but that is simply not the law. *Toelke*, 389 S.W.3d at 167.

⁸ As discussed in section “A” of this brief, there is no question that Roe is “required to register” under the federal act, 42 U.S.C.A. § 16913(a), and, by extension, under the state act as well. § 589.400.1(7). Whether Roe can be *federally prosecuted* is simply not an issue that is relevant to this appeal.

G. Point VI should be denied because it is well-settled that the registration requirements do not violate substantive Due Process.

This Court has already rejected Roe’s substantive due process argument. The state registration requirement “bears a rational relation to [a] legitimate state interest and is not violative of substantive due process principles.” *Phillips*, 194 S.W.3d at 845. That Roe is a sex offender is already a matter of public record, and he has no fundamental right to avoid registering his name to a list that merely reflects information in the public domain. *Id.* The registration requirement does not violate substantive due process.

Conclusion

This Court has already rejected all but one of Roe’s arguments. Further, SORNA does not violate the non-delegation doctrine in that Congress met the low bar of articulating an intelligible principle. Every court that has addressed this issue, including the Eighth Circuit Court of Appeals and at least six other Circuit Courts of Appeal, has concluded that SORNA survives a non-delegation challenge. Indeed, the non-delegation doctrine has not been used to invalidate *any* act of Congress—much less one with as clear a purpose as SORNA—for over 75 years. Accordingly, the Respondents respectfully request that the Court affirm the Circuit Court’s judgment.

Respectfully submitted,

MISSOURI ATTORNEY GENERAL

/s/ P. Benjamin Cox
P. Benjamin Cox,
Missouri Bar No. 60757
Assistant Attorney General
615 E. 13th Street, Suite 401
Kansas City, Missouri 64106
Phone: 816-889-5090
ben.cox@ago.mo.gov

Attorney for State Respondents

Abbe M. Feitelberg
MO Bar # 57352
Assistant County Counselor
Jackson County Courthouse-2nd Floor
415 East 12th Street
Kansas City, MO 64106
(816) 881-3279
FAX (816) 881-3398

Attorneys for County Respondents

Certificate of Service and Compliance

I certify that this brief was prepared using Microsoft Word 2007, in 13-point, proportionally spaced typeface, and that it otherwise complies with Rule 84.06(a) and (b). I also certify that the argument section of the brief contains 3,339 words.

I further certify that on April 22, 2013, I submitted the electronic version to the Clerk of the Supreme Court of Missouri.

A copy of this notification was sent through the eFiling system on April 22, 2013, to:

Arthur A. Benson II Mo. Bar #21107
Jamie Kathryn Lansford Mo. Bar #31133
4006 Central Avenue (Courier Zip 64111)
P.O. Box 119007
Kansas City, MO 64171-9007
(816)531-6565
(816)531-6688 (facsimile)
abenson@bensonlaw.com
jlansford@bensonlaw.com
ATTORNEYS FOR APPELLANT

/s/P. Benjamin Cox

Assistant Attorney General