IN THE SUPREME COURT OF MISSOURI
No. SC90164

STATE OF MISSOURI,
Appellant,

CHARLES A. RAYNOR,
Respondent.

On Appeal from the Circuit Court of Audrain County
12th Judicial Circuit
The Honorable Linda R. Hamlett, Judge Presiding

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN SUPPORT OF RESPONDENT AS *AMICUS CURIAE*

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STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amicus adopts the jurisdictional statement and statement of facts as set forth in Respondent's brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 600,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Eastern Missouri is an affiliate of the ACLU with over 4,800 members in Eastern Missouri. As part of its mission, the ACLU of Eastern Missouri has participated, either as counsel or as *amicus*, in numerous cases supporting the civil liberties citizens enjoy because of the Constitution. On behalf of its members, the ACLU of Eastern Missouri files this brief to highlight the significant federal constitutional issues implicated by the statute at issue and to make this Court aware of the data demonstrating that children are at no special risk of being victimized by a sexual offender on Halloween.

The ACLU of Eastern Missouri also has an interest in this case because it represents several persons who are challenging R.S.Mo. § 589.426 under the state and federal constitutions. In *Doe I, et al. v. Nixon, et al.*, filed in the United States District Court for the Eastern District of Missouri on October 3, 2008, the ACLU of Eastern Missouri represents six

individuals challenging the statute. In that case, the district court entered a preliminary injunction enjoining the Defendants, who include the Governor and the Attorney General, as well as "their agents, and any persons acting in concert with them … from enforcing the provisions of § 589.426.1 (1) and § 589.426.1 (2), Mo.Rev.Stat., on October 31, 2008." *Doe v. Nixon*, No. 4:08-cv-1518-CEJ, 2008 WL 4790304 (E.D.Mo.). Although the preliminary injunction was stayed for less than a week pending an appeal by some Defendants, the appeal was dismissed as moot without the preliminary injunction being vacated. On September 25, 2009, the district court stayed further proceedings out of deference to this Court and instructed Plaintiffs to seek any interim relief from the Missouri state courts.[1] *Doe v. Nixon*, No. 4:08-cv-1518-CEJ, 2009 WL 3180940 (E.D.Mo.). Accordingly, the Plaintiffs filed an action challenging the statute in the circuit court for Cole County, where it is docketed as *Jane Doe I, et al. v. State of Missouri, et al.*, No. 09AC-CC615. Although Plaintiffs applied for a temporary restraining order, no judge in the circuit was available to hear the motion. The ACLU

[1] Earlier the district court denied Plaintiffs' motion to certify a question to this Court pursuant to Mo. Rev. Stat. § 477.004, finding that this Court has held that it does not have jurisdiction to answer certified questions. *Doe v. Nixon*, No. 4:08-cv-1518-CEJ, 2009 WL 2957925 (E.D.Mo.).

of Eastern Missouri also represents a single Plaintiff challenging application of the challenged statute to him in *Doe v. Crane*, No. 2:09-cv-4220-NKL, a case pending in the United States District Court for the Western District of Missouri. A temporary restraining order was entered on October 30, 2009 to prevent enforcement of the statute against the Plaintiff; further proceedings on the merits have been stayed pending resolution of this case. *Doe v. Crane*, No. 2:09-cv-4220-NKL, 2009 WL 3678255(W.D.Mo.).

This brief presents empirical evidence that the challenged statute diverts law enforcement resources to address a non-existent problem and explains the shortcomings of R.S.Mo. § 589.426 under the federal constitution to provide this Court with the appropriate context in which to consider the state constitutional claim raised in this case.

SUMMARY OF ARGUMENT

In this case the State appeals from a decision finding that R.S.Mo. § 589.426 cannot be applied to Respondent under the Missouri Constitution's proscription on laws that operate retrospectively. Respondent was charged with a crime because he is alleged to have failed to undertake the affirmative obligations imposed on him by R.S.Mo. § 589.426 effective August 28, 2008 as a result of his 1990 conviction for a sexual offense in the State of Washington. Accordingly, this Court should affirm the lower court's judgment that § 589.426 violates Article I, Section 13, of the Missouri Constitution. The Missouri Constitution prohibits application of R.S.Mo. § 589.426 to individuals, like Respondent, who are required to comply with the statute's affirmative obligations because of convictions or pleas entered prior to the statute's effective date of August 28, 2008.

The State justifies its intrusion upon the liberty of Respondent and others required to register in urgent tones by asserting it must take action to protect children from unspeakable harm. In reality, however, it has been demonstrated that children are not at any heightened risk of sexual abuse by strangers at Halloween. There is no justification in this case for the State to abandon its pledge that laws will not be applied retrospectively.

In addition to the limitations on the government power contained in the Missouri Constitution, the General Assembly must legislate within the bounds of the federal constitution. R.S.Mo. § 589.426 overreaches by infringing on the citizenry's liberty interests in being free from the imposition of additional punishment for actions committed before the enactment of the new law, the freedom to travel, and the right against self-incrimination. The statute also is so poorly drafted that persons of common intelligence will come to different conclusions as to the meaning of its key terms, which will inevitably result in arbitrary and discriminatory enforcement.

ARGUMENT

I. There is No Unusual Rate of Sex Offenses or Significant Increase in Risk for Child Sexual Abuse Associated With Halloween

The State repeatedly claims that R.S.Mo. § 589.426 is constitutional because it protects children. The State advances no other purpose that could justify restricting the rights of persons who are required to register as sexual offenders.[2] And the State cites not a stitch of evidence that joins § 589.426's restrictions to its purported purpose. The reason for the State's silence is that there is no such evidence. To the contrary, it is empirically true that there is no unusual rate of sex offense or significant increase in risk for child sexual abuse associated with Halloween. The statute diverts law enforcement resources to attend to a problem that does not exist: the antithesis of a compelling government interest.

Although Missouri is the only state that imposes Halloween-related obligations on persons required to register as sexual offenders who are no longer on probation or parole, other states, municipalities, and parole

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[2] As pointed out by Respondent, the State's purpose—compelling or otherwise—is not relevant to a determination whether R.S.Mo. § 589.426 operates retrospectively.

departments have prohibited "known sexual offenders from engaging in holiday festivities, particularly on or around Halloween." Mark Chaffin, Jill Levenson, Elizabeth Letourneau, & Paul Stern, *How Safe Are Trick-or-Treaters?: An Analysis of Child Sex Crime Rates on Halloween*, 21 SEXUAL ABUSE: J. RES. & TREATMENT 363 (2009). This trend led researchers to evaluate the problem such restrictions are designed to combat.

Policies like R.S.Mo. § 589.426 "are premised on the theory that Halloween provides an opportunity for sex offenders to make contact with youngsters for improper purposes or to use costumes to conceal their identities and avoid detection." *Id.* at 364 (internal citation omitted). Underlying that theory are perceptions that sexual offenders have alarmingly high recidivism rates and children are in particular danger of being sexually abused by strangers. *Id.* It is well established, as an empirical matter, that these perceptions are inaccurate.

The majority of convicted sexual offenders do not go on to be rearrested for new sex crimes. *Id.* (*citing* Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, No. NCJ 182990 (2003); G.C. Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802 (1995); R.Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-*

Analysis of Sexual Offender Recidivism Studies, 66 J. CONSULTING & CLINICAL PSYCHOL. 348 (1998); R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis*, PUB. WORKS & GOV'T SERVICES CAN. (2004); Andrew J.R. Harris & R. Karl Hanson, *Sex Offender Recidivism: A Simple Question*, PUB. SAFETY & EMERGENCY PREPAREDNESS CAN. (2004)). The widespread perception otherwise was premised on long-ago discounted research from the early 1980's though it still resonates in the political sphere and is assumed to be true in some court decisions. At a minimum, this Court should not give further credence to such myths.

It is also clear that "apprehensions about 'stranger danger' can be misleading…" Chaffin, 21 SEXUAL ABUSE: J. RES. & TREATMENT at 364. More than ninety percent of child victims of sexual abuse know the perpetrator, usually a relative or close acquaintance. *Id.* (*citing* Bureau of Justice Statistics, *Sexual Assault of Young Children as reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, No. NCJ 182990 (2000) and Bureau of Justice Statistics, *National Crime Victimization Survey*, NCJ 205455 (2004)). As a result, the imagined problem targeted by R.S.Mo. § 589.426—the increased risk of nonfamilial

sex crimes against children on Halloween—is a small fraction of the incidents of sexual abuse of children.

Chaffin, *et al.* empirically examined data sets over a nine-year period publicly available from the National Incident Based Reporting System to study "whether there is a Halloween effect on nonfamilial sex crimes against children—that is, whether the rate of these crimes on Halloween differs from what we would expect if it were just another day." 21 SEXUAL ABUSE: J. RES. & TREATMENT at 365. "This study found no significant increase in risk for nonfamilial child sexual abuse on or just prior to Halloween." *Id.* at 371. While hypothetically one might think that a potential sexual abuse perpetrator might use Halloween traditions for ulterior purposes, "this logic does not appear to translate into any actual unusual rate of sex offenses on Halloween." *Id.* at 372. What is more, the absence of a Halloween effect remained constant over the nine-year period studied, beginning long before the recent interest in Halloween sexual offender restrictions and continuing beyond. The study showed, "Any Halloween policies that have been adopted by reporting jurisdictions during [the period studied] appear not to have affected the overall sex offense rate." *Id.*

For the sexual offenses that did occur on or near Halloween—in numbers that would be expected for any other autumn day—the

characteristics are unremarkable. "Halloween was also typical in terms of victim and offender characteristics, the types of child sex offenses reported, and the categories of victim-offender relationships involved." *Id.*

The study concluded that policies like that embodied in R.S.Mo. § 589.426 do not respond to a real problem.

> In this case, worries and good intentions might have inspired advocates and lawmakers to propose legislation that combats a nonexistent problem. The findings suggest that Halloween policies may in fact be targeting a new urban myth similar to past myths warning of tainted treats. *Id.*

The data also suggest that Halloween restrictions on persons required to register as sexual offenders actually put children at increased risk of harm by diverting law enforcement from real risks to an imagined one.

> For example, a particularly salient threat to children on Halloween comes from motor vehicle accidents. Children aged 5 to 14 years are four times more likely to be killed in a pedestrian-motor vehicle accident on Halloween than on any other day of the year. *Id.* at 373 (*citing* Centers for

Disease Control, *Childhood Pedestrian Deaths During Halloween – United States, 1975-1996*, 46 MORBIDITY & MORTALITY WKLY. REP. 987-990 (1997)).

As for criminal activity, alcohol-related offenses and vandalism are crimes truly increased on Halloween. 21 SEXUAL ABUSE: J. RES. & TREATMENT at 373 (internal citation omitted). The findings indicate that sex crimes against children by nonfamily members account for two out of every one thousand Halloween crimes. *Id.*

The only justification offered by the State for § 589.426's restrictions on the liberty of persons required to register as sexual offenders is the safety of children. The State offers not a scintilla of evidence—empirical or even anecdotal – to support its claim that § 589.426 will or has protected any child from any harm. The reason the State cites no evidence is because none exists; the notion that children are at heightened risk of falling victim to sexual abuse by a stranger on Halloween is imagined.

II. R.S.Mo. § 589.426 Violates the Federal Constitution

A. R.S.Mo. § 589.426 Violates the *Ex Post Facto* Clause of the Federal Constitution.

The Constitution is clear that, "No state shall . . . pass any . . . ex post facto law." U.S. Const. art I, § 10, cl. 1. This clause "forbids the application of any new punitive measures to a crime already consummated." *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). Because R.S.Mo. § 589.426 is an *ex post facto* law, it is an impermissible exercise of legislative power under the federal Constitution.

To determine whether a given statute imposes a punishment, a court must first "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). If the legislature intended to impose a punishment, the inquiry is complete. *Id.* If, however, the intention of the legislature "was to enact a regulatory scheme that is civil and non-punitive," this Court must further examine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (quoting *Hendricks*, 521 U.S. at 361 (*quoting United States* v. *Ward*, 448 U.S. 242, 248-249 (1980))).

The Missouri legislature made no findings that indicate whether R.S.Mo. § 589.426 is intended to be civil and non-punitive, or criminal and punitive. The obligations imposed by R.S.Mo. § 589.426 appear punitive, as described more fully *infra*. Perhaps the best evidence of the legislature's

intent, however, is that rather than simply place obligations on persons required to register as sexual offenders, R.S.Mo. § 589.426 criminalizes any non-compliance with the statute. In other words, the statute criminalizes acts that have never before been criminal. Hence, it can be determined from the statute's text alone that it is punitive in nature.

Assuming, *arguendo*, the statute's punitive purpose is not clear from the statute on its face, the factors courts consider to determine whether a law imposes punishment compel the same result. A court's obligation is to consider whether the effect of the law is so punitive that it negates the State's attempt to craft civil restrictions. *See Smith v. Doe*, 538 U.S. at 92; *Rem v. United States Bureau of Prisons*, 320 F.3d 791, 794 (8th Cir. 2003) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144; 168-169 (1963)). To evaluate whether the statute imposes "punishment," and is therefore punitive, the Supreme Court noted that "[a]bsent conclusive evidence of congressional intent as to the penal nature of a statute, [certain] factors must be considered in relation to the statute on its face." *Mendoza-Martinez*, 372 U.S. at 169. The factors to be evaluated include:

> Whether it involved an affirmative disability or restraint,
>
> whether it has historically been regarded as punishment,
>
> whether it comes into play only on a finding of scienter,

> whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69. These factors are "neither exhaustive nor dispositive." *Doe v. Miller*, 405 F.3d 720, 719 (8th Cir. 2005). "The ultimate question always remains whether the punitive effects of the law are so severe as to constitute the "clearest proof" that a statute intended by the legislature to be nonpunitive and regulatory should nonetheless be deemed to impose *ex post facto* punishment." *Id.*

The Supreme Court and the Eighth Circuit Court of Appeals have applied the *Mendoza-Martinez* factors to minor and indirect restrictions on sexual offenders in the past and found the restrictions are not punitive. In *Smith v. Doe,* the Supreme Court held "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." 538 U.S. at 100 (holding that compelling registration of sex offenders is a minor and indirect restraint). And the Eighth Circuit has held that a requirement that a person register as a sexual offender is not punitive. *Doe v. Miller,* 405 F.3d 720-22

(8th Cir. 2005). The statute at issue in this case is distinguishable in all meaningful respects.

1. Confinement to One's Home Has Historically Been Viewed as Punishment

In *Doe v. Miller*, the Eighth Circuit rejected the argument that a residency requirement was the functional equivalent of banishment and, therefore, like banishment, a traditional form of punishment. *Doe v. Miller*, 405 F.3d at 719-20. The Court "conclude[d] [the residency restriction] is unlike banishment in important respects, and we do not believe it is of a type that is traditionally punitive." *Id.* at 720.

There is nothing esoteric or nontraditional about the punishment imposed by R.S.Mo. § 589.426 upon persons required to register as sexual offenders. The statute places registered sexual offenders under house arrest by confining them to their homes. House arrest involves an affirmative restraint on one's freedom and has historically been regarded as a punishment. *Ilchuk v. Attorney General of the United States,* 434 F.3d 618 (3d Cir. 2006). *See also United States v. Wickman,* 995 F.2d 592, 595 (8th Cir. 1992) (Lay, J., dissenting) ("there is no question that an individual confined to his or her home is detained and incurs a substantial loss of liberty"). The confinement of registered sex offenders to their homes on the

evening of October 31 of every year amounts to a substantial affirmative restraint and loss of liberty in a manner that has historically been characterized as a punishment, making this statute particularly punitive in nature.

2. Confinement to One's Home Imposes an Affirmative Disability and Restraint

When determining whether a law subjects those within its purview to an "affirmative disability or restraint," *Martinez-Mendoza*, 372 U.S. at 168, a court inquires "how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith v. Doe*, 538 U.S. at 99-100. The affirmative restraint imposed by R.S.Mo. § 589.426 is neither minor nor indirect. To the contrary, the statute very specifically restricts persons subject to it from leaving their homes on the evening of October 31 of every year for the rest of their lives.

The Supreme Court has recognized that "[i]mprisonment is the 'paradigmatic' affirmative disability or restraint." *Smith v. Doe*, 538 U.S. at 100. The confinement to the home that R.S.Mo. § 589.426 mandates is much closer to imprisonment than it is to the affirmative registration requirements at issue in *Smith v. Doe*. It imposes a disability and restraint

greater than the residency requirement that the Eighth Circuit recognized imposed a degree of disability and restraint in *Doe v. Miller*. The residency restriction at issue in *Doe v. Miller* simply limited where individuals could reside. R.S.Mo. § 589.426, on the other hand, actually limits the liberty of individuals to move about in society – including the ability to travel, intrastate or interstate, away from their home – one day of every year for the rest of their lives. It also limits their freedom of association for one day of every year for the rest of their lives.

While the Eighth Circuit discounted this consideration in *Doe v. Miller* because "the residency restriction is certainly less disabling than the civil commitment scheme at issue in *Hendricks,* which permitted complete confinement of affected persons," the same distinction is not available in this case. In *Hendricks*, the person subjected to involuntary commitment complained of the "potentially indefinite duration as evidence of the State's punitive intent." *Hendricks*, 521 U.S. at 363-64. The Court rejected such concerns as misplaced because the statute only permitted the state "to hold the person until his mental abnormality no longer causes him to be a threat to others." *Id.* at 363. Indeed, a person no longer dangerous was statutorily entitled to release. *Id.* at 364. The Court noted that the confinement was subject to periodic judicial review designed to ensure a person would not

"remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness." *Id.* For persons required to register as sexual offenders in Missouri, R.S.Mo. § 589.426 is a restriction for life. There is no procedure by which the vast majority (if any) of the persons required to register as sexual offenders can be relieved of the obligation to register as a sexual offender, so there is no way to escape R.S.Mo. § 589.426's yearly restriction on personal liberty. This is true without regard to whether any individual sexual offender is currently a danger to anyone. Their mental state and non-dangerousness do not matter; they are required to comply with restrictions regardless.

3. Confinement to One's Home Promotes the Traditional Aims of Punishment: Deterrence and Retribution

The third *Martinez-Mendoza* factor requires courts to consider "whether the operation [of the statute] will promote the traditional aims of punishment – retribution and deterrence." *Martinez-Mendoza*, 372 U.S. at 168. Before the Supreme Court in *Smith v. Doe*, the State of Alaska conceded that its sex offender registration law might deter future crimes. *Smith v. Doe*, 538 U.S. at 102. Though *amicus* denies the statute has any actual deterrent effect, it submits that the legislature surely passed the law with that principle in mind. It is likewise apparent that a life-long

imposition of annual house arrest might deter individuals from committing offenses requiring them to register as sexual offenders.

In *Doe v. Miller*, the Eighth Circuit recognized that "any restraint or requirement imposed on those who commit crimes is at least potentially retributive in effect." *Doe v. Miller*, 405 F.3d at 720. Nevertheless, the court discounted the factor and found the requirement that a person required to register as a sexual offender not reside near a school or daycare "is consistent with the legislature's regulatory objective of protecting the health and safety of children." *Id*.

In contrast to the apparent punitive nature of forcing persons required to register as sexual offenders to remain confined to their homes, there is a dearth of evidence showing R.S.Mo. § 589.426 would, in fact, protect any child's health or safety. Persons have been required to register as sexual offenders in Missouri since 1995 without any statute in place restricting their activities on October 31. But there is not a single documented instance of any individual ever being harmed by a person required to register as a sexual offender that would have been avoided had R.S.Mo. § 589.426 been in effect. To the extent the Missouri legislature conjured a connection between allowing persons who are required to register as sexual offenders to maintain the same liberty on October 31 as they have on every other day of the year

and a risk to the health or safety of children, the connection has been lost on every other state. While states have generally not been reluctant to impose restrictions on persons required to register as sexual offenders, when it comes to confining persons like Plaintiffs (as opposed to persons on probation or parole) to their homes and imposing other restrictions on them on October 31 of every year for life, Missouri is a lone leader with no followers.

There is no demonstrated civil, non-punitive purpose for R.S.Mo. § 589.426.

4. Confinement to the Home Has No Rational Connection to a Non-Punitive Purpose

Assuming, *arguendo,* there is a non-punitive purpose for confining persons required to register as sexual offenders to their home on the evening of October 31 (and only October 31), there is no rational connection between the restriction and the purpose.

In addressing residency restrictions, the Eighth Circuit held, "In light of the high risk of recidivism posed by sex offenders, *see Smith v. Doe*, 538 U.S. at 103, the legislature reasonably could conclude that [the residency restriction] would protect society by minimizing the risk of repeated sex offenses against minors." *Doe v. Miller*, 405 F.3d at 721. But that cannot be

the end of the analysis when it comes to requiring individuals to be confined to their homes. If it were, then would it not minimize the risk of repeat sex offenses against minors to require persons required to register as sexual offenders to remain confined to their homes on every Holiday evening? Would it not be even better to keep them confined all day on Holidays? Or, better yet, perhaps persons required to register as sexual offenders could be confined to their homes at all times and forbidden any contact whatsoever with any children, including their own. Certainly the constitution draws some line. *Amicus* submits that line is forced confinement to the home.

It is not at all clear how R.S.Mo. § 589.426 is rationally related to an interest in keeping children safe. As discussed *supra*, there is no evidence that children are at any greater risk of harm from persons required to register as sexual offenders on October 31 than they are at any other day of the year (assuming that persons required to register as sexual offenders in Missouri, as a class, pose any greater risk of harm at all than does the general public—an assumption of the State without real evidence). The Halloween connection itself is tenuous: for the significant number of communities that engage in Halloween-related activities on days other than October 31, the selection of October 31 for restrictions on persons required to register as sexual offenders is as meaningless as it is arbitrary. Similarly, the State can

present no evidence that restrictions imposed only on October 31 or on Halloween-related activities are particularly effective or that the selection of the specified evening hours is anything but arbitrary. There is significant doubt that there is any non-punitive purpose for R.S.Mo. § 589.426.

To the extent there is a non-punitive purpose, R.S.Mo. § 589.426 is excessive because it is a restriction for life that is imposed regardless of whether a particular individual whom the statute requires to register as a sexual offender remains a danger to anyone.

5. R.S.Mo. § 589.426 Comes into Play Only on a Finding of Scienter

The consideration of another factor, *scienter* – which was not analyzed in *Doe v. Miller* — militates in favor of a finding that R.S.Mo. § 589.426 is punitive because R.S.Mo. § 589.426 only comes into play on a finding of *scienter*. *See Mendoza-Martinez,* 372 U.S. at 168-69.

An individual can only violate § 589.426 when he or she engages in intentional conduct. The legislature chose to classify R.S.Mo. § 589.426 as a criminal offense but chose not to specify a *scienter* requirement. In such circumstances, Missouri has a default *mens rea*. R.S.Mo. §§ 562.016, 562.021, 562.026. Consequently, R.S.Mo. § 589.426 only comes into play where there is a finding of *scienter*, which further indicates that the statute is

punitive.

B. R.S.Mo. § 589.426 is an Unconstitutional Restriction on the Right to Interstate and Intrastate Travel

R.S.Mo. § 589.426 requires persons required to register as sexual offenders to be in the home on the evening of October 31 of each year. Mandating that such individuals be at fixed locations one evening every year necessarily restricts their rights to interstate and intrastate travel.

The federal constitutional guarantee of interstate travel "protects interstate travelers against … 'the erection of actual barriers to interstate movement[.]'" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n. 6 (1982)). There is "a correlative constitutional right to travel within a state." *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir.1971). R.S.Mo. § 589.426 burdens both the right to interstate travel and the right to intrastate travel. "The constitutional right to travel … has been firmly established and repeatedly recognized" by the Supreme Court. *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969)(Stewart, concurring)(quoting *U.S. v. Guest*, 383 U.S. 745, 757 (1966)).

R.S.Mo. § 589.426 is distinguishable from the residency restrictions on sexual offenders upheld by the Eighth Circuit. In *Doe v. Miller* and

Weems, the Court specifically noted that a residency restriction for sexual offenders does not "prevent a sex offender from entering or leaving any part of the State," and it does not "erect any actual barrier to intrastate movement." *Weems*, 453 F.3d at 1016 (quoting *Doe v. Miller*, 405 F.3d at 714-16). In contrast, persons required to register as sexual offenders cannot travel far from their homes or they will not be able to return for the period that R.S.Mo. § 589.426 mandates that they must be home. This limits the individuals' ability to travel within the state. R.S. Mo. § 589.426 thus forces any person required to register as a sexual offender wishing to travel out-of-state on dates including October 31 to choose between a restriction on her liberty or a violation of a criminal statute.

The instant case is also distinguishable from a Seventh Circuit case upholding the City of Lafayette's banishment of persons required to register as sexual offenders from public parks. In that case, the Court noted that the individuals subject to the law "[were] not limited in moving from place to place within [their] locality to socialize with friends and family… or to got to the market to buy food and clothing." *Doe v. City of Lafayette*, 377 F.3d 757, 771 (7th Cir. 2004). With this statute, by contrast, persons required to register as sexual offenders are confined to their homes, not simply prohibited from being in selected public areas. Confinement to one's home

does effectively prohibit persons required to register as sexual offenders from moving from place to place within their locality and from socializing with family and friends.

R.S.Mo. § 589.426 places a very real barrier upon the right of individuals to interstate and intrastate travel and will continue to do so every year for the rest of their lives. While the statute interferes with the fundamental right to travel, this fact does not end a court's inquiry. Courts should apply strict scrutiny to the statute, requiring the State to prove that R.S.Mo. § 589.426 is narrowly tailored to address a compelling State interest using the least restrictive means possible. *See Roe v. Wade*, 410 U.S. 113, 155-56 (1973). The right to travel is a fundamental right subject to strict scrutiny. *Shapiro v. Thompson*, 394 U.S. at 630; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262 (1974).

In its brief—but without supporting evidence of any kind—the State posits that the purpose of R.S.Mo. § 589.426 is to advance the State's interest in protecting children from sexual offenders and, further assuming that there is a compelling interest in keeping children from sexual offenders (as opposed to sexual abuse), the law is not narrowly tailored to meet this end. There is no evidence demonstrating that any of the restraints imposed by R.S.Mo. § 589.426 actually protect children. In the absence of any

evidence showing any connection between the purpose and the end, the statute cannot be said to be narrowly tailored.

Even giving the State the benefit of the same assumptions, R.S.Mo. § 589.426 also fails to apply the least restrictive means necessary to achieve its goal. The purported purpose of R.S.Mo. § 589.426 is to protect children, yet it applies to all persons required to register as sexual offenders without any consideration of whether the individual is actually a danger to the public. The State cannot justify applying R.S.Mo. § 589.426's scheme to all persons required to register as sexual offender regardless of whether they pose a danger to the community.

R.S.Mo. § 589.426 unconstitutionally infringes on the substantive right to travel under the Due Process Clause of the Fourteenth Amendment.

C. R.S.Mo. § 589.426 is Unconstitutional Because it Requires Persons Regarded as Sexual Offenders to Provide Incriminating Evidence Against Themselves

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court has long held:

> "this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."

Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

R.S.Mo. § 589.426 permits persons required to register as sexual offenders to be absent from their homes on the evening of October 31 of each year only upon a showing of "just cause." The statute does not define just cause. The only way for a person required to register as a sexual offender who is not home to defend herself against a charge of violating the statute is to prove to the police, the prosecutor, or a jury that she has "just cause" to be absent. It is impossible to demonstrate just cause for being absent without admitting not being present.

To be afforded protection under the Fifth Amendment, incriminating communications must be testimonial. *Pennsylvania v. Muniz*, 496 U.S. 582, 594 (1990). "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988). In order to escape prosecution and conviction for being absent from their homes on October 31, persons required to register as sexual offenders must provide information that admits the facts necessary to prove the criminal act (i.e., not being in the home on the evening of October 31), or refrain from providing information and be unable to show "just cause."

D. R.S.Mo. § 589.426 is Unconstitutionally Vague

"The void-for-vagueness doctrine is embodied in the due process clauses of the [F]ifth and [F]ourteenth [A]mendments." *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997) (quoting *D.C. and M.S. v. City of St. Louis, Mo.*, 795 F.2d 652, 653 (8th Cir. 1986)). The due process doctrine under the Fourteenth Amendment "incorporates notions of fair notice or warning." *Smith v. Goguen*, 415 U.S. 566, 572 (1974) (*Goguen II*). Indeed, "the essence of the due process clause of the Fourteenth Amendment, is the rule that all persons 'are entitled to be informed as to what the state commands or forbids.'" *Goguen v. Smith*, 471

F.2d 88, 94 (1st Cir. 1972) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972)). "In short, a [statute] is void-for-vagueness if it 'forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. . . .'" *Stephenson*, 110 F.3d at 1308 (quoting *Goguen II*, 415 U.S. at 573). Moreover, the void-for-vagueness doctrine prevents arbitrary and discriminatory enforcement. *Id.* That is, legislatures must set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement. *Goguen II*, 415 U.S. at 573. Otherwise, a "vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. . . ." *Stephenson*, 110 F.3d at 1308 (quoting *Grayned v. City of Rockford*, 408 U.S. 104,108-09 (1972)); *see also United States v. Reese*, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.").

R.S.Mo. § 589.426 is vague in two respects: (a) its command that Plaintiffs "[a]void all Halloween-related contact with children" and (b) its allowance that Plaintiffs may absent themselves from their homes on

October 31 for "just cause." Vague terms left completely undefined are "avoid" and "Halloween-related contact." While "just cause" is said to "include[d] but not [be] limited to employment or medical emergencies," the scope of "just cause" is mysterious.

To determine whether a statute is unconstitutionally vague, "courts traditionally have relied on the common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct." *Stephenson*, 110 F.3d at 1309 (quoting *D.C. and M.S.*, 795 F.2d at 654) (internal citations omitted). Laws that provide police officers with unfettered discretion to arrest individuals for words or conduct that annoy or offend them have repeatedly been invalidated. *City of Houston v. Hill*, 482 U.S. 451, 465 (1987). "Legislatures may not so abdicate their responsibilities for setting standards of the criminal law." *Goguen II*, 415 U.S. at 575. Law enforcement authorities must be given "sufficient guidelines as to prohibited offenses if they are to act properly, often in situations where emotions are high and a quick evaluation of the circumstances is necessary to effectuate constitutional arrests." *Goguen*, 471 F.2d at 95. Stated differently, "[l]awmaking [must] not [be] entrusted to the moment-to-moment judgment of the policeman on his beat." *Id.* (quoting *Gregory*, 394 U.S. at 120).

R.S.Mo. § 589.426 does not provide law enforcement with sufficient guidance, but rather leaves officers and prosecutors with unfettered discretion to determine what constitutes "Halloween-related contact," and a failure to "avoid" it. Likewise it provides them unfettered discretion to determine whether the cause of a person not being in their home on the evening is "just." As importantly, persons required to register as sexual offenders are at peril because, given the vague terms, they are left to guess how R.S.Mo. § 589.426 will be interpreted by any given law enforcement officer. Persons subject to the statute's requirements are not able to conform their behavior to the law because reasonable minds differ on what the law means.

CONCLUSION

Based on the foregoing and the reasons provided in Respondent's brief, *amicus* ACLU of Eastern Missouri urges this Court to affirm the judgment of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 7,262 words, as determined using the word-count feature of Microsoft Office Word 2003. The undersigned further certifies that the accompanying disk has been scanned and was found to be virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and a copy of the brief on disk were served upon the counsel identified below by United States Mail, postage prepaid, on November 12, 2009:

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