
**IN THE
MISSOURI SUPREME COURT**

R. L.,)	
)	
Respondent,)	
)	
)	
v.)	Case No. SC88644
)	
STATE OF MISSOURI)	
DEPARTMENT OF)	
CORRECTIONS,)	
)	
Appellant.)	

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge**

APPELLANT'S BRIEF

Ryan Bertels
Assistant Attorney General
Mo. Bar No. 55167

P.O. Box 899
Jefferson City, MO 65102
Phone No. (573) 751-3321
Fax No. (573) 751-9456
ryan.bertels@ago.mo.gov
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 5

STATEMENT OF FACTS 7

POINTS RELIED ON 11

STANDARD OF REVIEW 13

ARGUMENT..... 14

 I. The trial court erred in holding that the School Residency Law is an unconstitutional retrospective law because it is procedural and remedial in nature and does not affect the vested rights or affects past transactions to the substantial prejudice of a person. 14

 II. The trial court erred in holding that the School Residency Law is an unconstitutional ex post facto law because the Law is civil and regulatory in nature, not criminal..... 19

 III. The trial court erred in holding that the School Residency Law violates equal protection in violation of the United States and Missouri Constitutions because the law is rationally related to the State’s legitimate interest in protecting the safety of children. 22

 IV. The trial court erred in holding that the School Residency Law violates procedural due process in violation of the United States and Missouri

Constitutions because the criminal process has already afforded sex offenders
all the process required. 25

CONCLUSION..... 27

CERTIFICATION OF SERVICE AND COMPLIANCE WITH RULE 84.06(b) and (c)28

APPENDIX..... 29

TABLE OF AUTHORITIES

Cases

<i>Connecticut Dept. of Public Safety v. Doe</i> , 538 U.S. 1 (2003).....	12, 25
<i>Deimeke v. State Highway Commission</i> , 444 S.W.2d 480 (Mo. 1969)	15
<i>Denson v. State</i> , 600 S.E.2d 645 (Ga.Ct.App. 2004).....	21
<i>Doe v. Baker</i> , 2006 WL 905368 (N.D.Ga. 2006).....	20
<i>Doe v. Miller</i> , 405 F.3d 700 (8 th Cir. 2005).....	11, 12, 20, 26
<i>Doe v. Phillips</i> , 194 S.W.3d 833 (Mo. banc 2006).....	11, 12, 13, 19, 22, 23
<i>Doe v. Roman Catholic Diocese of Jefferson City</i> , 862 S.W.2d 338 (Mo. banc 1993).....	13
<i>Elliott v. Carnahan</i> , 916 S.W.2d 239 (Mo.App. W.D.1995).....	22
<i>Fisher v. Reorganized School Dist. No. R-V</i> , 567 S.W.2d 647 (Mo. banc 1978).....	11, 14
<i>Hyle v. Porter</i> , 2006 WL 2987735 (Ohio App. 1 Dist., 2006)	16, 17
<i>In re R.W. v. Sanders</i> , 168 S.W.3d 65 (Mo. banc 2005)	12, 19, 25
<i>J.S. v. Beaird</i> , 28 S.W.3d 875 (Mo. banc 2000)	11, 12, 16, 19, 23
<i>Jerry-Russell Bliss, Inc., v. Hazardous Waste Mgt. Comm’n</i> , 702 S.W.2d 77 (Mo. banc 1985)	14
<i>La-Z-Boy Chair Co. v. Director of Economic Dev.</i> , 983 S.W.2d 523 (Mo. banc 1999)	11, 14
<i>Mo. Nat. Educ. v. Mo. State Bd. of Educ.</i> , 34 S.W.3d 266 (Mo.App. W.D. 2000)	11, 15, 18
<i>Nasal v. Dover</i> , 862 N.E.2d 571 (Ohio App. 2 Dist., 2006).....	17
<i>Nasal v. Dover</i> , 862 N.E.2d 115 (Table) (Ohio 2007)	16, 17
<i>Smith v. Doe</i> , 538 U.S. 84 (2003).....	11, 20

Spudich v. Smarr, 931 F.2d 1278 (8th Cir.1991)..... 23

State ex rel. May Dep’t Stores Co. v. Koupal, 835 S.W.2d 318 (Mo. banc 1992)..... 22

State v. Cook, 700 N.E.2d 570 (Ohio 1998) 16

State v. Mitchell, 563 S.W.2d 18 (Mo. banc 1978) 22

Weems v. Little Rock Police Department, 453 F.3d 1010 (8th Cir. 2006) 12, 20, 23

Constitution Statutes and Rules

§566.141 RSMo 2000 7, 8

§566.147, RSMo 2004 7

§566.147, RSMo 2006 5, 7, 8, 9, 15, 27

§566.151, RSMo 2000 7

§589.400-§589.425, RSMo..... 7

Missouri Constitution, Article I, Section 2..... 5, 10, 22

Missouri Constitution, Article I, Section 10..... 5

Missouri Constitution, Article I, Section 13..... 5, 14, 19

Missouri Constitution, Article I, Section 30..... 5

Missouri Constitution, Article III, Section 40(30)..... 5

Missouri Constitution, Article V, Section 3 6

Ohio Constitution, Article II, Section 28..... 16

United States Constitution, Article I, Section 10..... 5, 19

United States Constitution, Fourteenth Amendment 5, 10, 22, 24

JURISDICTIONAL STATEMENT

This suit involves the question of whether § 566.147, RSMo 2006, as amended in 2006, violates the Missouri Constitution and the United States Constitution. More specifically, R.L. filed a petition for preliminary and permanent injunction and a petition for declaratory judgment in the Circuit Court of Cole County contending that § 566.147, RSMo 2006, as applied to him: (1) constitutes an retrospective law impermissible under Article I, Section 13 of the Missouri Constitution; (2) constitutes an ex post facto law impermissible under Article I, Section 13 of the Missouri Constitution and Article I, Section 10 of the United States Constitution; (3) violates the guarantees of equal protection contained in Article I, Section 2 of the Missouri Constitution, and the Fourteenth Amendment of the United States Constitution; (4) deprives him of his property without notice or an opportunity to be heard in violation of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution; (5) deprives him of his substantive due process rights in violation of Article I, Section 2 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution; (6) constitutes an impermissible bill of attainder under Article I, Section 30 of the Missouri Constitution and Article I, Section 10 of the United States Constitution; (7) violates the prohibition in Article III, Section 40(30) of the Missouri Constitution against passage of special laws; and (8) is unconstitutionally vague and overbroad both on its face and as applied to R.L. in violation of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

On May 24, 2007, the Circuit Court of Cole County issued an Order and Judgment declaring the School Residency Law to be unconstitutional as applied to R.L. and other

similarly situated registered sex offenders who already resided within one thousand feet of a daycare or school at the time of the 2006 amendment. L.F. 55-61. The circuit court also issued a permanent injunction preventing DOC from enforcing the provisions of the School Residency Law against R.L. and other similarly situated registered sex offenders who already resided within one thousand feet of a daycare or school at the time of the 2006 amendment. L.F. 55-61. Accordingly, this appeal involves the validity of a Missouri statute and falls within the exclusive appellate jurisdiction of the Missouri Supreme Court pursuant to Article 5, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

In 2004, the Missouri General Assembly enacted §566.147, RSMo, which provided in relevant part that any individuals who were required to register as sex offenders “shall not establish residency within one thousand feet of any public grade school . . . or any private school giving instruction in a grade or grades not higher than the twelfth grade, or any child care facility . . . which is in existence at the time such residency is established.” L.F. 16.

On or about December 7, 2005, Respondent R.L. was charged with attempted enticement of a child in violation of §566.151, RSMo 2000. L.F. 5. On or about December 12, 2005, R.L. pled guilty to a charge of attempted enticement of a child, for which he received a three year suspended execution of sentence and was placed on probation for five years. L.F. 5. Persons convicted of attempted enticement of a child in violation of §566.151, RSMo are required to register as sex offenders pursuant to §589.400-§589.425, RSMo.

R.L. has resided at his current residence since 1997. L.F. 55. A grade school is within one thousand feet of this residence; a grade school that has been in existence since 1988. L.F. 55.

In 2006, the Missouri General Assembly amended §566.141 to state that any individual who has pled guilty or been convicted of various sex offenses against a minor “shall not reside within 1,000 feet of any public grade school . . . or any private school . . . which is in existence at the time the individual begins to reside at the location.” Section 566.147.1, RSMo 2006 (the “School Residency Law”). A violation of the School Residency Law constitutes a class D felony, with any second or subsequent offense being a class B

felony. §566.141.4, RSMo 2006. The School Residency Law also makes a distinction between persons who establish residence within one thousand feet of an existing school or child-care facility, and persons who have a school or child-care facility built within one thousand feet of their existing homes. Those individuals who have a school built within one thousand feet of their home need to take steps to notify their county sheriff that a school is being built within one thousand feet of their home, and must provide proof that he or she has resided at the location prior to the opening of the school or child-care facility. §566.141.2, RSMo 2006.

A subdivision of Appellant Missouri Department of Corrections (“DOC”), the Missouri Board of Probation and Parole, is responsible for determining whether those under its jurisdiction, including R.L., have violated the terms and conditions of parole. L.F. 55-56.

R.L. received a letter from an employee of DOC stating that pursuant to the provisions of §566.147, he was committing a felony by residing within one thousand feet of a school and that he needed to establish a plan to relocate. L.F. 56-57. This letter also informed R.L. that “[t]he local prosecutor may choose to file a new criminal charge if [R.L.] remain[ed] at the prohibited location.” L.F. 18. Nowhere in the record in this case is there any indication that any local prosecutor has taken any steps to do this.

R.L. brought a cause of action in the Circuit Court of Cole County seeking both a declaration that the School Residency Law is unconstitutional, and an injunction barring DOC from enforcing the Law against him and other similarly situated individuals who resided within one thousand feet of a school or child-care facility at the time of the 2006

amendment. L.F. 4-18. The only named defendant in this lawsuit was DOC. R.L.'s Amended Petition brought eight constitutional challenges to the School Residency Law.

On May 24, 2007, the Circuit Court of Cole County issued an Order and Judgment declaring the School Residency Law to be unconstitutional as applied to R.L. and other similarly situated registered sex offenders who already resided within one thousand feet of a daycare or school at the time of the 2006 amendment. L.F. 55-61. The circuit court also issued a permanent injunction preventing DOC from enforcing the provisions of the School Residency Law against R.L. and other similarly situated registered sex offenders who already resided within one thousand feet of a daycare or school at the time of the 2006 amendment. L.F. 55-61.

Specifically, the circuit court held the School Residency Law was an unconstitutional retrospective law because it "attaches a new disability with respect to offenders subject to §566.147 who lived within one thousand (1,000) feet of an existing school/daycare center at the time of the 2006 amendment, with respect to a transaction or consideration that had already passed." L.F. at 58. It also held that the School Residency Law violates the ban on ex post facto laws contained in both the Missouri and United States Constitutions by now criminalizing the action of residing in his own home; and even if the legislature intended the law to be nonpunitive, it was so punitive in purpose and effect because the law requires sex offenders to either move or be incarcerated through the revocation of their probation or a new charge of a class D felony. L.F. 59. The court held that the School Residency Law violates the Equal Protection Clauses of both the Fourteenth Amendment to the United States and Article. I, § 2, of the Missouri Constitution because it treats similarly situated persons

differently by distinguishing between sex offenders who establish residence within one thousand feet of an existing school and sex offenders who have a school built within one thousand feet of their home. L.F. 59-60. Finally, the circuit court held that the School Residency Law violates the Due Process Clause of the Missouri and the United States Constitutions by depriving R.L. and others similarly situated of their property without notice and an opportunity to be heard. L.F. 60. The circuit court did not address the remainder of R.L.'s constitutional challenges to the School Residency Law because it had already held the law to be unconstitutional. L.F. 60.

On June 26, 2007, DOC filed its Notice of Appeal. L.F. 62-64.

POINTS RELIED ON

I. The trial court erred in holding that the School Residency Law is an unconstitutional retrospective law because it is procedural and remedial in nature and does not affect the vested rights or affects past transactions to the substantial prejudice of a person.

La-Z-Boy Chair Co. v. Director of Economic Dev., 983 S.W.2d 523 (Mo. banc 1999).

Fisher v. Reorganized School Dist. No. R-V, 567 S.W.2d 647 (Mo. banc 1978)

Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W.3d 266 (Mo.App. W.D. 2000).

J.S. v. Beaird, 28 S.W.3d 875 (Mo. banc 2000)

II. The trial court erred in holding that the School Residency Law is an unconstitutional ex post facto law because the Law is civil and regulatory in nature, not criminal.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006)

Smith v. Doe, 538 U.S. 84 (2003).

J.S. v. Beaird, 28 S.W.3d 875 (Mo. banc 2000)

Doe v. Miller, 405 F.3d 700 (8th Cir. 2005)

III. The trial court erred in holding that the School Residency Law violates equal protection in violation of the United States and Missouri Constitutions because the law is rationally related to the State's legitimate interest in protecting the safety of children.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006)

Weems v. Little Rock Police Department, 453 F.3d 1010 (8th Cir. 2006)

J.S. v. Beaird, 28 S.W.3d 875 (Mo. banc 2000)

IV. The trial court erred in holding that the School Residency Law violates procedural due process in violation of the United States and Missouri Constitutions because the criminal process has already afforded sex offenders all the necessary process required.

Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003)

In re R.W. v. Sanders, 168 S.W.3d 65 (Mo. banc 2005)

Doe v. Miller, 405 F.3d 700 (8th Cir. 2005)

STANDARD OF REVIEW

The Circuit Court of Cole County held that the School Residency Law was unconstitutional because it violates Missouri's ban on retrospective laws, violates the ban on ex post facto laws, violates equal protection, and violates due process. Construction of a statute is a question of law that this Court reviews de novo. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). A "statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993).

ARGUMENT

I. The trial court erred in holding that the School Residency Law is an unconstitutional retrospective law because it is procedural and remedial in nature and does not affect the vested rights or affects past transactions to the substantial prejudice of a person.

R.L.'s first constitutional challenge to the School Residency Law is that the law violates Missouri's ban on retrospective laws. Article I, Section 13 of Missouri's Constitution provides "that no law . . . retrospective in its operation . . . can be enacted." The constitutional prohibition on retrospective laws applies when the law at issue impairs some vested right or affects past transactions to the substantial prejudice of a person. *La-Z-Boy Chair Co. v. Director of Economic Dev.*, 983 S.W.2d 523, 525 (Mo. banc 1999). A vested right is one guaranteed by "a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another." *Fisher v. Reorganized School Dist. No. R-V*, 567 S.W.2d 647, 649 (Mo. banc 1978). But a vested right is something more than a mere expectation based on a supposed continuation of past law. *Fisher*, 567 S.W.2d at 649. Additionally, a "statute is not retrospective or retroactive . . . because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation." *Jerry-Russell Bliss, Inc., v. Hazardous Waste Mgt. Comm'n*, 702 S.W.2d 77, 81 (Mo. banc 1985). The constitutional prohibition on against retrospective laws does not apply, however, to a statute that is procedural or remedial in nature because a litigant has no

vested right in matters of procedure. *Mo. Nat. Educ. v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 284 (Mo.App. W.D. 2000).

The circuit court held the School Residency Law was an unconstitutional retrospective law because it “attaches a new disability with respect to offenders subject to §566.147 who lived within one thousand (1,000) feet of an existing school/daycare center at the time of the 2006 amendment, with respect to a transaction or consideration that had already passed.” L.F. at 58. While it is true the School Residency Law requires the Plaintiff to move from his home, it does not effect a vested right, as is required for a retrospective law. The School Residency Law does not involve a total divestiture of R.L.’s property rights. The Law only prohibits R.L. from residing within one thousand feet of a school. But it does not prohibit him from owning, renting, or leasing property within one thousand feet of the school. There are no facts in the records suggesting that R.L. had to sell his home, nor are there any facts to indicate that the value of his property has been decreased in any way. R.L. does not allege that he has been denied any income or employment as a result. He is deprived of no benefit otherwise available to him with regards to use of the property. He is not prevented from moving about, from changing his domicile, or from associating and living with whomever he chooses. While the use of his property is restricted in some manner, the State can restrict use of property through its police powers if doing so is reasonably necessary for promotion of public health, safety, morals or welfare. *Deimeke v. State Highway Commission*, 444 S.W.2d 480, 482-83 (Mo. 1969).

The School Residency Law is reasonably necessary for promotion of public health, safety, morals or welfare. The Missouri Supreme Court has stated that the “obvious legislative intent for enacting [the Missouri Sex Offender Registration Act] was to protect children from violence at the hands of sex offenders.” *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. banc 2000). The School Residency Law also advances the legitimate, non punitive purpose of public safety and protecting children from sex offenders by preventing sex offenders from living within close proximity to schools and day cares. The restriction on R.L.’s property that he cannot reside there is reasonably necessary to advance this purpose.

The Ohio Court of Appeals examined a retrospective law challenge in a virtually identical case to this one in when it reviewed whether a law prohibiting certain sexual offenders from living within one thousand feet of a school can be applied to an offender who bought his home and committed his offense before the statute was enacted. *Hyle v. Porter*, 2006 WL 2987735, *1 (Ohio App. 1 Dist., 2006). Although this case has been consolidated and certified for appeal by the Ohio Supreme Court, *Nasal v. Dover*, 862 N.E.2d 115 (Table) (Ohio 2007), the analysis of the retrospective law claim is still persuasive. The Ohio Constitution’s provision regarding retrospective laws is quite similar to Missouri’s. Ohio’s Constitution states that “[t]he general assembly shall have no power to pass retroactive laws.” *State v. Cook*, 700 N.E.2d 570, 576 (Ohio 1998), *quoting* Ohio Constitution, Article II, Section 28. As in Missouri, the Ohio prohibition does not apply to statutes that are remedial and procedural in nature. *Id.* at 577. In *Hyle*, the court held that the law “does not concern a total divesture of [plaintiff’s] property rights” because while the law “prohibits an offender from *residing* within 1,000 feet of a school” . . . “it does not prohibit an offender from

owning, renting, or leasing property within the 1,000 foot zone.” 2006 WL 2987735, *5 (emphasis in original). For this reason, the court found that the law “is remedial and does not offend Ohio’s prohibition against retroactive laws.”¹ *Id.*

Like in *Hyle*, Missouri’s School Residency Law has not affected a vested right or caused substantial prejudice to R.L., or anyone else. As was the case in *Hyle*, Missouri’s School Residency Law does not involve a total divesture of R.L.’s property rights so as to effect a vested right. It only prohibits a certain limited area where R.L. can live; it does not prohibit him from owning, renting, or leasing his property in any way. While it may very well be an inconvenience for the R.L. to move to a different location, this potential inconvenience does not rise to the level of substantial prejudice because it is a restriction on the use of his property, not a taking of it. Any substantial prejudice this may cause R.L. is outweighed by the State’s legitimate interest in protecting children from violence at the hands of sex offenders. Additionally, any additional punishment under the School Residency Law could only be imposed on R.L or anyone else if the sex offender prospectively chose to violate the Law by failing to move from his current residence.

Because the School Residency Law only restricts R.L. from residing within one thousand feet of a school, it is remedial in nature, and does not effect a vested right as is

¹ Another Ohio state appellate court held that the same law was an unconstitutional retrospective law. *See Nasal v. Dover*, 862 N.E.2d 571 (Ohio App. 2 Dist., 2006). The Supreme Court of Ohio has certified this issue for appeal to resolve the conflict. *See Nasal v. Dover*, 862 N.E.2d 115 (Table) (Ohio 2007).

required for a retrospective law. *Mo. Nat. Educ.*, 34 S.W.3d at 284. The trial court therefore erred in holding that the School Residency Law is an unconstitutional retrospective law.

II. The trial court erred in holding that the School Residency Law is an unconstitutional ex post facto law because the Law is civil and regulatory in nature, not criminal.

The circuit court held that the School Residency Law violates the ban on ex post facto laws contained in Article I, Section 13 of the Missouri Constitution, and Article I, Section 10 of the United State Constitution, by now criminalizing the action of residing in his own home. L.F. 59. The circuit court also held that even if the legislature intended the law to be nonpunitive, it was punitive in purpose and effect because the law requires sex offenders to either move or be incarcerated through the revocation of their probation or a new charge of a class D felony. L.F. 59. This Court has held that the federal and state due process clauses are to be interpreted the same under the law. *See Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006).

In *Doe*, the Court denied an ex post facto challenge to the Missouri Sex Offender Registration Act (“SORA”) because the ex post facto clause applies only to criminal laws and “the trust of the registration and notification requirements are civil and regulatory in nature.” *Id.* at 842 (citing *In re R.W. v. Sanders*, 168 S.W.3d 65, 70 (Mo. banc 2005)). Just like the requirements of SORA, the School Residency Law requirement is civil and regulatory in nature. The Missouri Supreme Court has previously stated that the “obvious legislative intent for enacting SORA was to protect children from violence at the hands of sex offenders.” *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. banc 2000). When a statute is “an incident of the State’s power to protect the health and safety of its citizens,” it will be considered “as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.” *Smith*

v. Doe, 538 U.S. 84, 93-94 (2003). That the School Residency Law also advances the legitimate, non punitive purpose of public safety and protecting children from sex offenders is confirmed by decisions upholding similar statutes in other states.

In analyzing an ex post facto challenge to a similar law in Iowa prohibiting registered sex offenders from residing within two thousand feet of a school, the Eighth Circuit held that like the restrictions in Iowa's version of SORA, the restrictions at issue in their version of a school residency law, were intended to protect the health and safety of Iowa citizens. *Doe v. Miller*, 405 F.3d 700, 718-19 (8th Cir. 2005). The Eighth Circuit therefore found the purpose of the Iowa legislature in passing their version of a school residency law to be regulatory and non punitive. *Id.* at 719. The Eighth Circuit went on to find that given the high risk of recidivism posed by sex offenders, the legislature reasonably could conclude that the law would protect society by minimizing the risk of repeated offenses against minors. *Id.* at 721. The Eighth Circuit reiterated this conclusion in upholding a similar residency law in Arkansas from an ex post facto challenge because the Arkansas legislature intended to create a civil, non-punitive regulatory scheme. *Weems v. Little Rock Police Department*, 453 F.3d 1010, 1017 (8th Cir. 2006).

A district court in Georgia also rejected an ex post facto challenge to that state's version of the School Residency Law (virtually identical to the School Residency Law in Iowa), finding that the law was enacted with a clear regulatory intent. *Doe v. Baker*, 2006 WL 905368 at *5-6 (N.D.Ga. 2006). The law prohibited registered sex offenders from residing within one thousand feet of any child care facility, school, or area where minors congregate. *Id.* at *1. The court noted that the fact that a plaintiff had been forced to move

from his home did not overcome the important state interests that inspired the legislation. *Id.* at *6.

The Georgia Court of Appeals also held that the law was not an unconstitutional ex post facto law as applied to a convicted sex offender who already lived within one thousand feet of a day care facility at the time the law was enacted, the same situation as in this case. *Denson v. State*, 600 S.E.2d 645, 647 (Ga.Ct.App. 2004). This was because any additional punishment under the law could only be imposed if the sex offender prospectively chose to violate law by failing to move from his current residence. *Id.*

That analysis leads to the same conclusion in this case: the Missouri School Residency Law does not constitute an invalid ex post facto law because the obvious legislative intent for enacting the law was to protect children from violence at the hands of sex offenders. The Missouri Legislature reasonably could conclude that the law would protect society by minimizing the risk of repeated sexual offenses against minors. The law is not punitive in purpose and effect as the circuit court held because any additional punishment under the law such as the revocation of probation or the new charge of a Class D felony can only be imposed if the sex offender prospectively chose to violate law by failing to move from his current residence.

III. The trial court erred in holding that the School Residency Law violates equal protection in violation of the United States and Missouri Constitutions because the law is rationally related to the State's legitimate interest in protecting the safety of children.

The circuit court held that the School Residency Law violates the Equal Protection Clauses of both the Fourteenth Amendment to the United States and Article. I, Section 2, of the Missouri Constitution because it treats similarly situated persons differently by distinguishing between sex offenders who establish residence within one thousand feet of an existing school and sex offenders who have a school built within one thousand feet of their home. L.F. 59-60. Like the ex post facto analysis in Point II, this Court has held that the federal and state equal protection clauses are to be interpreted the same under the law. *See Doe v. Phillips*, 194 S.W.3d at 841.

A state may chose to differentiate in its treatment of its citizens based on any one or more such factors of its choosing because the “[t]he equal protection clause does not deny the state the power to make classifications, as long as its classifications do not establish invidious discrimination or attack a fundamental interest.” *Elliott v. Carnahan*, 916 S.W.2d 239, 242 (Mo.App. W.D.1995). There is a presumption that the legislature acted within its constitutional power in spite of the fact that its laws may result in some inequality. *State ex rel. May Dep’t Stores Co. v. Koupal*, 835 S.W.2d 318, 322 (Mo. banc 1992). Where the classification in such a law is challenged, if any state of facts, reasonably conceived, can sustain the law, the existence of that state of facts at the time the law was enacted must be assumed. *State v. Mitchell*, 563 S.W.2d 18, 23 (Mo. banc 1978). “A statutory classification does not offend the Fourteenth Amendment unless it rests on grounds ‘wholly irrelevant’ to the achievement of the state's objective.” *Spudich v. Smarr*, 931 F.2d 1278, 1281 (8th Cir.1991).

The Eighth Circuit upheld an equal protection challenge to a similar school residency law in Arkansas because the distinctions made in the law among groups of sex offenders were rationally related to a legitimate state interest of protecting the safety of children. *Weems*, 453 F.3d at 1015-16 (8th Cir. 2006). The Eighth Circuit found that a rational basis standard of review applied to this claim because the distinctions drawn by the Arkansas statute were not based on a suspect classification such as race or religion, and did not implicate a fundamental right. *Id.* at 1016.

In this case, R.L. does not allege that he is a member of suspect class or that a fundamental right is affected, so rational basis review applies. *See Doe v. Phillips*, 194 S.W.3d at 845. Missouri has chosen to prohibit individuals who have committed various sexual offenses from living within one thousand feet of a school or day care that was in existence at the time at that individual resided there. It does so in an effort to “protect children from violence at the hands of sex offenders.” *Beaird*, 28 S.W.3d at 876. This interest is rationally related to the State’s legitimate interest in protecting the safety of children, and therefore does not violate equal protection under the law.

It is true the School Residency Law makes a distinction between persons who establish residence within one thousand feet of an existing school or child-care facility, and persons who have a school or child-care facility built within one thousand feet of their homes. This distinction is a rational one, however. When a new school or child-care facility is being planned, the sex offender registry can be checked by officials of the school or child-care facility to see if any sex offenders live in the area of the proposed school. Those officials can then make an informed determination whether to erect the school in an area of

close proximity to a sex offender. That choice is not an option for schools or child-care facilities that are already in existence when a sex offender moves to a location within one thousand feet of an existing school or child-care facility. The distinction made in the School Residency Law does not “rest on grounds ‘wholly irrelevant’ to the achievement of the state's objective” as is required in order to offend the Fourteenth Amendment. The distinctions made between sex offenders by the School Residency Law is therefore rationally related to the State's legitimate interest in protecting the safety of children and does not violate equal protection.

IV. The trial court erred in holding that the School Residency Law violates procedural due process in violation of the United States and Missouri Constitutions because the criminal process has already afforded sex offenders all the process required.

The circuit court held that the School Residency Law violates the Due Process Clause of the Missouri and the United States Constitutions by depriving R.L. and others similarly situated of their property without notice and an opportunity to be heard. L.F.60. First of all, R.L. is not having his property taken from him by the School Residency Law, so this is not a takings issue as he alleges in his First Amended Petition. As was pointed out earlier, R.L. is not forced to sell his home, nor is there any indication the property value has decreased. He may still lease, rent, and own his property if he chooses to do so; he just cannot reside there.

Perhaps more importantly, R.L.'s argument, like the holding of the trial court, misunderstands the right to procedural due process. As the U.S. Supreme Court stated in connection with a challenge to Connecticut's sex offender registration law, "even assuming, arguendo, that [the sex offender] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [state] statute." *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 7 (2003).

This Court has followed this rationale and held that since future dangerousness is irrelevant under SORA, procedural due process principles do not require a hearing to determine whether a particular offender is likely to be dangerous. *In re R.W.*, 168 S.W.3d 65, 71-72 (Mo. banc 2005). In doing so, this Court relied on the U.S. Supreme Court's finding in *Connecticut v. Doe* that the criminal procedures leading to conviction provided the registrant with a sufficient procedurally safeguarded opportunity to challenge the conviction. *Id.* The

Court noted that the plaintiff in that case was charged with a sex offense and pled guilty, was notified of his legal obligation to register at the time of his plea, and received all procedural safeguards attending a guilty plea. *Id.* The Court held that no further process was necessary. Here, there is no question that the residency requirement statute at issue applies to all offenders who have been convicted of certain sex offenses. Once such a classification has been drawn by the legislature, additional procedures are unnecessary.

The Eighth Circuit followed the same rationale articulated by the United States Supreme Court in holding that a law in Iowa prohibiting registered sex offenders from residing within two thousand feet of a school did not violate procedural due process because States “are not barred by principles of procedural due process from drawing classifications among sex offenders and other individuals” *Doe v. Miller*, 405 F.3d at 709 (citing *Connecticut*, 538 U.S. at 8). Similarly, the State of Missouri did not violate procedural due process in enacting the School Residency Law, and the trial court erred in holding that it did.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Circuit Court of Cole County declaring the School Residency Law, §566.147, RSMo 2006, to be constitutional, and vacate the injunction entered by that court.

Respectfully Submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

RYAN BERTELS
Assistant Attorney General
Missouri Bar. No. 55167
P.O. Box 899
Jefferson City, MO 65102
Phone No. (573) 751-3321
Fax No. (573) 751-9456

ATTORNEYS FOR APPELLANT
MISSOURI DEPARTMENT OF
CORRECTIONS

**CERTIFICATE OF SERVICE
AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)**

I hereby certify that one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, this 19th day of September, 2007, to:

C. John Pleban
Lynette M. Petruska
Pleban & Associates, LLC
2010 S. Big Bend Blvd.
St. Louis, MO 63117

I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 6,043 words, excluding the Table of Contents and Table of Authorities.

I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses, and is virus-free.

Assistant Attorney General

APPENDIX

May 24, 2007, Order and Judgment Issued by the Circuit Court of Cole County A1

Section 566.147, RSMo 2006..... A8