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## **ADDITIONAL STATEMENT OF FACTS**

R.L. correctly points out in his statement of facts that DOC's statement of facts in its opening brief contained an error. In 2006, the Missouri General Assembly amended §566.147, RSMo (the "School Residency Law") 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." This amended School Residency Law makes a distinction between persons who reside within 1,000 feet of an existing school or daycare facility, and persons who have a school or child-care facility later 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 they resided at the location prior to the opening of the school or child-care facility. §566.141.2, RSMo 2006.

In its opening brief, DOC stated that the distinction drawn in the statute was 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. This is incorrect as that was the distinction in the original version of §566.147, RSMo 2004, and not the 2006 version at issue in this appeal.

## ARGUMENT

**I. The School Residency Law is not 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.**

In his brief, R.L.'s argues that the School Residency Law violates Missouri's ban on retrospective laws based on this Court's holding in *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. banc 2006). R.L. argues that the School Residency Law imposes a new obligation or duty upon him retrospectively in that it requires him to move from his home, or face a criminal charge or the revocation of his probation. Brief of Respondent at p.5-7. But here, the School Residency Law only criminalizes a failure to move, and R.L. could not have failed to move from his residence until after the School Residency Law became effective. The School Residency Law is therefore not retrospective because it imposes an obligation on R.L. only after the Law was enacted.

While it is undisputed that the School Residency Law requires R.L. to move from his home, it does not effect a vested right, nor does it affect past transactions to the substantial prejudice of Respondent as is required for a retrospective law. *See La-Z-Boy Chair Co. v. Director of Economic Dev.*, 983 S.W.2d 523, 525 (Mo. banc 1999). The School Residency Law does not involve a total divestiture of Respondent's property rights as he claims in his Brief. Brief of Respondent at p.7. The School Residency Law only prohibits R.L. from residing within one thousand feet of a school. 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. He has therefore not been deprived of his right to possession, use and enjoyment of his property as he claims in his Brief. Respondent's argument that he has been deprived of a vested property right is therefore in error. 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. *See Deimeke v. State Highway Commission*, 444 S.W.2d 480, 482-83 (Mo. 1969). Even by prohibiting the most beneficial use of property, restrictions promoting "the health, safety, morals, or general welfare" may be permissible government actions. *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163, 168 (Mo.App.E.D. 1995).

Missouri's 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.

As mentioned in DOC’s Brief, an Ohio appellate court in examining a virtually identical issue, held that Ohio’s version of the School Residency 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.” *Hyle v. Porter*, 2006 WL 2987735, \*1, \*5 (Ohio App. 1 Dist., 2006) (emphasis in original). For this reason, the court found that the law “is remedial and does not offend Ohio’s prohibition against retroactive laws.”<sup>1</sup> *Id.*

Missouri’s School Residency Law, like the Ohio statute addressed in *Hyle*, 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. Any substantial prejudice

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<sup>1</sup> Another Ohio 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). At the time of the filing of this Reply Brief, this case is still pending.

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 required for a retrospective law. *Mo. Nat. Educ. v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 284 (Mo.App. W.D. 2000). The trial court therefore erred in holding that the School Residency Law is an unconstitutional retrospective law.

## **II. The School Residency Law is not an unconstitutional ex post facto law because the Law is civil and regulatory in nature, not criminal.**

R.L. argues that the School Residency Law is an invalid ex post facto law because it is criminal and punitive in nature, rather than civil and regulatory in nature. Brief of Respondent at p.9-11. This Court held in *Doe v. Phillips* that the Missouri Sex Offender Registration Act ("SORA") did not violate the ex post facto clause because "the trust of the registration and notification requirements [of SORA] are civil and regulatory in nature." 194 S.W.3d at 842 (citing *In re R.W. v. Sanders*, 168 S.W.3d 65, 70 (Mo. banc 2005)). That holding leads to the same conclusion in this case.

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). Here, the legislative intent for enacting the School Residency Law was to protect children from violence at the hands of sex offenders who reside within close proximity of a school or child-care facility. The Missouri Legislature reasonably could conclude that the law would protect society by minimizing the risk of repeated sexual offenses against minors. That the School Residency Law advances the legitimate, non punitive purpose of public safety and protecting children from sex offenders just like SORA, is confirmed by decisions of the Eighth Circuit Court of Appeals upholding similar statutes in other states. *See Doe v. Miller*, 405 F.3d 700, 718-19 (8<sup>th</sup> Cir. 2005) (rejecting ex post facto challenge to Iowa’s version of a school residency law because the purpose of the Iowa legislature in the law was regulatory and non punitive); *Weems v. Little Rock Police Department*, 453 F.3d 1010, 1017 (8<sup>th</sup> Cir. 2006) (upholding Arkansas’ school residency law from an ex post facto challenge because the Arkansas legislature intended to create a civil, non-punitive regulatory scheme).

R.L. argues that the School Residency Law is punitive in nature because it changes the legal consequences of the crime he pled guilty to. Brief of Respondent at p.10. The ex post facto clauses of the United States and Missouri apply to laws that are retroactive and that either alter definition of crimes or increase punishment for criminal acts already committed. *Nylon v. Missouri Bd. of Probation and Parole*, 940 S.W.2d 3 (Mo.App.W.D. 1997). But any additional punishment under the School Residency 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 chooses to violate the law by failing to move from his current residence. There is no increase in punishment for the crime R.L. committed; the crime only occurs if he violates the School Residency Law. For all these reasons, the School Residency Law is civil and regulatory in nature; just as the SORA is.

R.L. argues that even if the School Residency Law is intended to be civil and regulatory in nature, the law is so punitive in purpose or effect as to negate the State's nonpunitive intent. R.L. alleges that being forced to move from his home is so punitive in purpose or effect that it negates the State's nonpunitive intent. Brief of Respondent at p.11-13. An identical ex post facto challenge to Georgia's version of the School Residency Law was recently rejected by a district court. *Doe v. Baker*, 2006 WL 905368 (N.D.Ga. 2006). The Georgia 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. Like Missouri's version, Georgia's does not contain a grandfather clause. The district court rejected the ex post facto challenge, finding that the law was enacted with a clear regulatory intent. *Id.* at \*5-6. In analyzing the ex post facto claim, the court took note of the fact that the United States Supreme Court had held that the involuntary commitment of a mentally ill sex offender was non-punitive in nature. *Id.* at \*4 (citing *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)). It then stated that "[e]ven though the Plaintiff is being forced to move from his home, this disability is nowhere near as significant as the involuntary commitment approved in *Hendricks*. 2006 WL 905368 at \*4. Thus, the fact that a plaintiff had been forced to move from his home by Georgia's school residency law did not overcome the important state interests that inspired the legislation. *Id.* at \*6.

Missouri's School Residency Law was enacted with the nonpunitive intent of protecting children from violence at the hands of sex offenders. Just as in *Doe v. Baker*, the fact that R.L. would be forced to move from his home by the School Residency Law does not overcome this important state interest. The Law therefore does not violate the ex post facto clauses of the United States or the Missouri Constitutions.

**III. The School Residency Law does not violate equal protection because the law is rationally related to the State's legitimate interest in protecting the safety of children.**

As Respondent correctly points out, Appellant's analysis of the equal protection challenge in its opening brief contained an error. In 2006, the School Residency Law was amended 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." This amended School Residency Law therefore makes a distinction between persons who reside within 1,000 feet of an existing school or daycare facility, and persons who have a school or child-care facility built within one thousand feet of their existing homes.

In its opening brief regarding the equal protection issue, DOC stated that the distinction drawn in the statute was 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. This is incorrect as that was the distinction in the original version of §566.147, RSMo 2004, and not the 2006 version at issue in this appeal.

However, the analysis on the equal protection issue remains the same. As was stated in DOC's opening brief, 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 (8<sup>th</sup> Cir.1991). In this case, Respondent does not allege in his First Amended Petition that he is a member of suspect class or that a fundamental right is affected. See L.F. p.7, ¶13(c); p.11, ¶23(c). Therefore, rational basis review applies. *Doe v. Phillips*, 194 S.W.3d at 845.

With the School Residency Law, Missouri has chosen to prohibit individuals who have committed various sexual offenses from living within one thousand feet of a school or day care facility. 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 currently reside within one thousand feet of an existing school or child-care facility, and persons who have a school or child-care facility later 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, officials of the school or child-care facility can check the sex offender registry 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 are therefore rationally related to the State’s legitimate interest in protecting the safety of children and does not violate equal protection.

Despite not making this claim in his First Amended Petition, R.L. claims the School Residency Law impacts his fundamental right to live where he chooses and, therefore, his equal protection challenge is subject to strict scrutiny. Brief of Appellant at p.16. R.L. cites no authority in support of the proposition that living where he chooses is a fundamental right subject to strict scrutiny analysis. Again, it is worth noting that the School Residency Law does not involve a total divesture of R.L.’s property rights. The School Residency Law only places a restriction on R.L. from residing within one thousand feet of a school. It does not prohibit him from owning, renting, or leasing property within one thousand feet of the school. 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. R.L. fails to cite a case for the proposition that a restriction being placed on one particular use of his property implicates a fundamental right in order to rise to the level of strict scrutiny analysis.

The Eighth Circuit rejected a similar argument for strict scrutiny analysis in an equal protection challenge to Iowa’s version of the School Residency Law. *Doe v. Miller*, 405 F.3d at 709-710. In that case, the Eighth Circuit concluded that a residency restriction did

not implicate any fundamental rights of the sex offenders that would require strict scrutiny of the statute. *Id.* Because the Iowa statute did not “operate directly on the family relationship,” *id.* at 710, the residency restriction did “not infringe upon a constitutional liberty interest relating to matters of marriage and family in a fashion that requires heightened scrutiny.” *Id.* at 711.

The Eighth Circuit also applied rational basis review in *Weems*, which involved an equal protection challenge to a school residency law in Arkansas. There the Eighth Circuit found that 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. 453 F.3d at 1016. The court also found that a rational basis standard of review applied to this claim because the distinctions drawn by the statute were not based on a suspect classification such as race or religion, and did not implicate a fundamental right. *Id.* at 1016.

Rational basis review is the proper basis of review here, too, because no fundamental right of R.L., or any other sex offender, is implicated. And under rational basis review, Missouri has a legitimate interest in protecting children from violence at the hands of sex offenders. 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.

R.L. then argues that the School Residency Law does not withstand rational basis review applies because the classification at issue is wholly irrelevant to the purpose of the law – which is to prevent sex offenders from living close to schools or child-care centers. Brief of Respondent at p.17-18. According to R.L., this is because the purpose stated by DOC in its opening brief (and above) is not served if a school or day care center does not

check to see if any registered sex offenders live in the area where a proposed school or child care facility would be built. Brief of Respondent at p.18. The distinction made in the School Residency Law allows officials who are planning to build a new school or child-care facility the chance to look at the sex offender registry to see if any sex offenders live in the area of the proposed facility. Those officials can then make an informed determination whether to erect the school in an area of close proximity to a sex offender. The mere fact that they may not choose to do this does not make the Law 'wholly irrelevant' to the achievement of the state's objective as R.L. asserts. The distinction made between sex offenders by the School Residency Law is rationally related to the State's legitimate interest in protecting the safety of children and does not violate equal protection.

#### **IV. The School Residency Law does not violate procedural due process.**

In its initial brief, DOC asserted that R.L.'s due process claim fails as a matter of law because the criminal process below gave him all necessary process. In response, R.L. states this is incorrect because §566.147 was applied retroactively to him. Brief of Respondent at p.20.

Even assuming that R.L. is correct with this argument, R.L. still fails to allege a violation of due process. R.L. asserts that he is being deprived of his "right to possession and use of his property for a lawful purpose (residency) without due process of law." Brief of Respondent at p.19. R.L. essentially appears to be claiming this is akin to a taking. But this is not a takings issue, as again, the School Residency Law does not involve a divestiture of R.L.'s property rights so as to deprive him of possession of his property. The School Residency Law only places a restriction on R.L. from residing within one thousand feet of a

school. He is not forced to sell his property, nor is there any indication the property value has decreased. R.L. cites no authority for the proposition that he now argues for – that the placing of a limited restriction on his property entitles him to protection under the Due Process Clause of the Missouri and United States Constitutions.

R.L.’s argument appears to be that the government cannot interfere with his right to do what he wants with his property. But, this Court has specifically held otherwise, finding with regards to a due process challenge that “[p]rivate property rights are not absolute. They are always subject to the reasonable exercise of the police power.” *Howe v. City of St. Louis*, 512 S.W.2d 127, 131 (Mo. banc 1974). Even by prohibiting the most beneficial use of property, restrictions promoting “the health, safety, morals, or general welfare” may be permissible government actions. *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163, 168 (Mo.App.E.D. 1995).

In this case, while the School Residency Law unquestionably places a restriction on R.L.’s property, it does so in order to advance 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. Even by prohibiting R.L. from arguably the most beneficial use of this property, the restriction is nevertheless permissible because it promotes this important purpose. R.L. cites no authority that the placing of this restriction on his property implicates due process concerns. His due process challenge therefore fails as a matter of law.

## CONCLUSION

For the reasons set forth here and in its opening brief, MDOC urges this Court to reverse the decision of the Circuit Court of Cole County declaring the School Residency Law, §566.147, RSMo 2006, to be unconstitutional, and vacate the injunction entered by that court.

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**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 26<sup>th</sup> day of November, 2007, to:

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I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 4,531 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