IN THE

Supreme Court of Missouri

No. SC86573

JANE DOE I, et al.,
Appellants,

v.

THOMAS PHILLIPS, et al.,
Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Jon R. Gray, Circuit Judge

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the Memorandum Order and Judgment of the Circuit Court of Jackson County, Missouri, the Honorable Jon R. Gray, denying a petition for declaratory and injunctive relief which sought to declare Missouri's Sexual Offender Registration Act (SORA), MO. REV. STAT. §§ 589.400 *et seq.*[1], unconstitutional under the Missouri Constitution and enjoin its enforcement. *Jane Doe I v. Thomas Phillips*, Memorandum and Order Denying Injunctive Relief and Judgment, Case No. 03-CV-219085 (January 6, 2005). L.F. 198; App. A1-A7. Appellants[2] contend that SORA denies them of substantive due process under Article I, Sections 2 and 10; constitutes an impermissible *ex post facto* and/or retrospective law under Article I, Section 13; violates the Missouri Constitution's guarantee of equal protection under Article I, Section 2; constitutes an impermissible bill of attainder under Article I, Section 30; and, violates the prohibition in Article III, Section 40(30) against passage of special laws. Accordingly, this appeal involves the validity of a Missouri statute and falls

[1]The statutory sections comprising Chapter 589 appear in consecutive order in the Appendix at App. A8-A19. Inasmuch as the Appendix Table of Contents clearly indicates where each provision can be found, references to statutes will be to the statutory section designation only.

[2]Collectively referred to herein as "the Does".

within the exclusive appellate jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 3.

STATEMENT OF FACTS

1. Introduction

Missouri enacted, in 1994, as did all states eventually – at the insistence of the federal government – a Megan's Law, a sex offender registration act ("SORA"). By an amendment in 2002, it became generally applicable instead of applicable only to those offenders moving into a county.[3] Unlike other states, however, *see infra* at 24-30, Missouri applied its SORA broadly, deeply, harshly, retroactively to 1979, and for life, to thousands of Missourians – as well as those convicted in other states who move to Missouri – including many without final judgments or convictions.

Missouri's SORA imposes its registration requirements and consequent burdens, *see infra* at 23 and 48, identically to serial child rapists and a thirty-three year old mother of five who thirteen years ago, at age twenty, had consensual sex with a minor boy she believed to be eighteen. *See infra* at 31 (Jane Doe I). Missouri imposes the burdens of its registration on pedophile child molesters and equally on a man who, seventeen years ago, in Lawrence County, Missouri, at age seventeen, was

[3]2002 Mo. Laws S.B. Nos. 969, 673, and 855, 2002 Mo. Legis. Serv. 855 (occasioned by *J.S. v. Beaird*, 28 S.W.3d 875 (Mo. banc. 2000)).

caught petting with his fifteen year old girlfriend and prosecuted. *See infra* at 32 (John Doe I). Missouri imposes the burden of quarterly registration for life on an offender released from prison after serving a sentence for kidnaping and brutally injuring a child and equally upon a man who, in the midst of a bitter divorce twelve years ago, was accused of spanking his son with a belt and leaving a bruise *two years earlier*. *See infra* at 35 (John Doe VII).

One aspect of their situations that Jane Doe I, John Doe I, and John Doe VII share is that they, as have hundreds or thousands of others, pled guilty, usually on the advice of counsel, *before SORA was enacted in 1994*, in exchange for an agreement with the State of Missouri that the effects of their guilty pleas were known, defined as to severity, and limited in duration. In 1994 – or, for most registrants, in 2002 – Missouri unilaterally reneged on the terms of its prior plea agreements and imposed the lifetime burdens of quarterly or annual registration with immense, never-ending consequences for even those almost inconsequential acts.

Missourians have, for nearly two centuries, directed their government to provide for the general well-being of its citizens. The current iteration of that directive, Article I, Section 2, declares it to be "*the principal office*" of "constitutional government" to "confer" the "security" of "*all persons*" to "life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry." MO. CONST. art. I, § 2 (emphases added). This "principal" duty, the only obligation in the Constitution

identified as "principal" – hence, most important – to protect the general welfare of "*all*" persons – from child spankers with a suspended imposition of sentence ("SIS") to child molesters with twenty-year sentences – requires government to act in an appropriately nuanced manner when imposing the penalties and burdens it may otherwise lawfully exact. The nature of the general welfare to which all persons are entitled must necessarily depend on circumstances. Missouri government may discharge its obligations to safeguard its citizens with a Megan's Law while still promoting the general welfare of all persons. Its bordering eight states have done so. *See infra* at 24-30. Missouri's SORA fails to do so. When teenagers caught petting and recidivist child molesters are equally burdened by the harsh requirement of quarterly registration for life, Missouri government has failed in its "principal office" to provide justly for the general welfare of "all persons."

2. SORA

Missouri first enacted SORA in 1994. L.F. 49, STIP. ¶ 1. As amended in 2002, SORA requires that specified sex offenders register "within ten days of conviction, release from incarceration, or placement upon probation" with the chief law enforcement official of the county in which that person resides. MO. REV. STAT. § 589.400.2; L.F. 49, STIP. ¶ 2.

Any person who is required to register under SORA but does not meet all its

requirements may be charged with a Class A misdemeanor.[4] § 589.425; L.F. 49-50, STIP. ¶ 3. Any person who commits a second or subsequent violation of SORA's registration requirements may be charged with a Class D felony.[5] *Id.*

[4]If the person has been convicted under Chapter 566 of an unclassified felony, Class A felony, Class B felony, or any felony involving a child under the age of 14, the person may be charged with a Class D felony. § 589.425; L.F. 49-50, STIP. ¶ 3.

[5]If the person has been convicted under Chapter 566 of an unclassified felony, Class A felony, Class B felony, or any felony involving a child under the age of 14, in which case the person may be charged with a Class C felony. § 589.425; L.F. 49-50, STIP. ¶ 3.

SORA contains no express indication of legislative purpose or intention or objective within its text and the Missouri General Assembly does not maintain a record of legislative history that provides any direct evidence of the intent of or purpose for SORA. HEARING TRANSCRIPT[6], November 24, 2003, at 7 (citing L.F. 37, STOTTLEMYRE STIPULATION[7], November 24, 2003, at ¶ 1). However, SORA is codified in Title 38, Crimes and Punishment, of the Missouri Revised Statutes, Chapter 589, Crime Prevention and Control Programs and Services.[8] As of November 21, 2003, there were 9,212 persons registered under SORA in Missouri. TR. at 8 (citing L.F. 37, STOTTLEMYRE STIP. at ¶ 2).

SORA applies to those individuals who, since July 1, 1979:

> (1) have been or are thereafter convicted of, been found guilty of, or pled guilty to committing, or attempting to commit, a felony offense of Chapter

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[6]Hereinafter, "TR.".

[7]Hereinafter, "STOTTLEMYRE STIP."

[8]Chapter 589, Crime Prevention and Control Programs and Services, also contains provisions concerning Sexual Assault Prevention, Motor Vehicle Theft, Missouri Crime Prevention Information Center, and the Interstate Compact for Adult Offender Supervision.

566 or any offense of Chapter 566 in which the victim is a minor[9];

(2) have been or are thereafter convicted of, been found guilty of, or pled guilty to committing, or attempting to commit one or more of the following offenses: kidnaping, pursuant to MO. REV. STAT. § 565.110; felonious restraint; promoting prostitution in the first, second, or third degree; incest; abuse of a child, pursuant to MO. REV. STAT. § 568.060; use of a child in a sexual performance; promoting sexual performance by a child; and committed or attempted to commit the offense against a victim who is a minor;

(3) have been committed to the department of mental health as a criminal sexual psychopath;

(4) have been found not guilty as a result of mental disease or defect of any offense listed in § 589.400.1(1) or (2);

(5) have been convicted of, been found guilty of, or pled guilty to or *nolo contendere* in any other state or under federal jurisdiction to committing, or attempting to commit, an offense which, if committed in Missouri, would be a violation of Chapter 566 or a felony violation of the offenses listed in § 589.400.1(2) or who has been or is required to register in another state or under federal or military law; and,

[9]A "minor" is a person under the age of eighteen years. § 589.400.1(2).

(6) has been or is required to register in another state or under federal or military law and who works or attends school or training on a full or part-time (more than fourteen days in a twelve-month period) basis in Missouri.

§ 589.400.1(1)-(6); *see also* L.F. 52, STIP. ¶ 20.

Persons are required to register when they are found guilty by a jury of or pled guilty to the enumerated offenses even if they were given a suspended imposition of sentence ("SIS") or suspended execution of sentence ("SES"), and even though a final judgment of conviction from which an appeal will lie does not result from an SIS. L.F. 53, STIP. ¶ 24.

Registrants must complete a form which includes, but is not limited to a statement, signed by the registrant, giving his or her name and address; Social Security number; phone number; place of employment; enrollment within any institution of higher education; the crime requiring registration; whether the registrant was sentenced as a persistent or predatory offender pursuant to MO. REV. STAT. § 558.018; the date, place, and a brief description of the crime; the date and place of conviction or plea regarding the crime; the age and gender of the victim at the time of the offense; whether the registrant successfully completed the Missouri sexual offender program; and the fingerprints and photograph of the registrant. § 589.407; L.F. 225-234, 235 (Exhibits 1, 2[10]). While much of the information collected is available only to courts,

[10]"Exhibit" references are to exhibits admitted at the November 24, 2003,

prosecutors, and law enforcement agencies, any person may request a "short list" which consists of a list of the names, addresses, and crimes for which offenders are registered from a county's chief law enforcement official. § 589.417; L.F. 50, STIP. ¶ 5. The statute contains no restrictions as to what any person may do with that short list. L.F. 50, STIP. ¶ 5. Missouri does not regulate public access to the facts of SORA registration based on any assessment of the level of dangerousness of any given offender. L.F. 50, STIP. ¶ 6.

After initial registration, all registrants are required *annually* to report *in person* in the month of their birth to the county law enforcement agency to verify the information given in their § 589.407 statement. § 589.414.6. If working or attending school or training out of state, Missouri registrants are required to report to the chief law enforcement officer in the area of the state where they work or attend school or training and register in that state. § 589.414.7. If an offender is registered as a predatory or persistent sexual offender, if the victim was less than eighteen years of age at the time of the offense, or if the offender is found guilty of failing to register or submitting false information when registering, he or she must report *in person* to the county law enforcement agency *every ninety days* to verify the information given in their § 589.407 statement. § 589.414.5(1)-(3).

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hearing.

Additional reporting requirements can be triggered by various changes of circumstance. If a registrant changes residence or address within the county, *within ten days*, he or she must inform the county's chief law enforcement officer *in writing* of the new address, and if the phone number is changed, the new phone number. § 589.414.1; L.F. 236 (Exhibit 3). If a registrant changes residence or address to a different county, within *ten days*, he or she must appear *in person* and inform both the chief law enforcement official with whom the registrant last registered *and* the chief law enforcement official of the county of the new address or residence and, if the phone number is changed, the new phone number. § 589.414.2. If the registrant becomes the resident of another state, he or she shall appear *in person within ten days* and inform both the chief law enforcement official with whom he or she was last registered and the chief law enforcement official of the area in the new state of residence or address of the new address. *Id.* Chief law enforcement officials of the previous county of residence are to inform the Missouri State Highway Patrol of intrastate changes of residence; interstate residence changes of registrants are to be reported by the Missouri State Highway Patrol to responsible officials in the new state. *Id.* Any registrant who changes "his or her enrollment or employment status with any institution of higher education within this state by either beginning or ending such enrollment or employment" shall report that change to "the chief law enforcement officer" *within seven days*. § 589.414.3. Similarly, any registrant who changes his or

her name shall report that change to "the chief law enforcement officer" *within seven days* after the change is made. § 589.414.4.

3. Missouri's SORA Is Especially Burdensome

Missouri's SORA imposes lifetime registration requirements with all its provisions unless all offenses requiring registration are reversed, vacated or set aside or unless the registrant is pardoned of the offenses requiring registration. § 589.400.3. L.F. 53, STIP. ¶ 22. Other than the fact of the conviction or guilty plea, SORA does not include, as a pre-condition to its requirement to register, the requirement that a court or government agency make an assessment of a present danger to society or any degree of risk the offender presents to the public. L.F. 53, STIP. ¶ 23.

Missouri imposes registration requirements even though Missouri's registration data administrator acknowledges that some unknown number of registrants will never re-offend. Defendant Stottlemyre's expert on sexual offenders, Ray Lacoursiere, M.D., testified at deposition that there are some offenders not likely ever to offend again and that there are evaluations which can be employed to determine who at least some of them are. L.F. 297, LACOURSIERE DISCOVERY DEPOSITION, September 5, 2002 at 21:22-22:15. SORA treats similarly some unknown number of offenders highly *likely* to re-offend with another unknown number highly *unlikely* to re-offend, without making any effort whatsoever to distinguish between the two. Furthermore, Missouri also sweeps onto the registration list persons who committed or at least pled

guilty to charges that are not commonly recognized as sex offenses (*see* TR. at 21:19-22 (Ms. S.); at 36:11-12, 36:9-16 (Mr. B.)) and they are not among "sex offenders" likely to re-offend. But these non-sex offenders are required to register and bear for life all the burdens of sex offender registrants.

4. Less Burdensome Alternatives

It was not necessary for Missouri to fulfill its federal obligation to enact a Megan's Law by enacting the SORA it did. Among Missouri's bordering sister states, all enacted their own SORAs but in many respects their SORAs lack the harsh lifetime provisions of Missouri's SORA. While this Court may not direct the adoption of any particular provisions, what the sister states enacted illustrates how Missouri's SORA fails constitutional muster, *e.g.*, when it is analyzed against the due process requirement informed by the "principal office" of Missouri government to provide for the general welfare of "all persons", *i.e.*, by nuancing the burdens it seeks to exact.

a. Sunset provisions. No sister state bordering Missouri requires lifetime registration. The obligation to register in Arkansas expires after fifteen (15) years. ARK. CODE ANN. § 12-919(b)(1)(A)(i). In Kentucky, lifetime registration is required only where the victim is under eighteen, for subsequent offenses, first degree rape, first degree sodomy, and for sexually violent predators. KY. REV. STAT. ANN. § 17.520(2)(a). All other offenders are required to register for only ten (10) years. KY. REV. STAT. ANN. § 17.520(3).

In all the other bordering states, registration sunsets after ten (10) years. 730 ILL. COMP. STAT. ANN. 150/7 (Illinois); IOWA CODE ANN. § 692A.2(1) (Iowa); KAN. STAT. ANN. § 22-4906(b) (Kansas)[11]; NEB. REV. STAT. § 29-4005(1) (Nebraska); OKLA. STAT. ANN. tit. 57 § 583(C) (Oklahoma); TENN. CODE. ANN. § 40-39-207(a) (Tennessee).

b. Requirement of adjudication of guilt. Among the states bordering Missouri, only Oklahoma joins Missouri in requiring registration of individuals who receive a suspended sentence. Oklahoma's registration law applies to any person who has been convicted, whether upon a verdict or plea of guilty or *nolo contendere,* or who "received a suspended sentence or any probationary term or is currently serving a sentence or any form of probation or parole for a crime or attempt to commit a crime . . .." 57 OKLA. STAT. ANN. § 582(A). None of Missouri's other neighbors specifically require persons who receive a suspended imposition or execution of sentence to comply with their respective registration statutes.[12]

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[11]However, if a diversionary agreement or probation order or juvenile sentence is entered which requires registration, the term of registration is controlled by that agreement, order, or juvenile sentence. KAN. STAT. ANN. § 22-4904(a)(7).

[12]*See* ARK. CODE ANN. §§ 12-12-903(1), 12-12-905(a) (registration requirements apply to a person who is adjudicated guilty on or after August 1, 1997,

of a sex offense; adjudication of guilt means a plea of guilty or *nolo contendere*, a negotiated plea, or a finding of guilt by a judge or jury); 730 ILL. COMP. STAT. ANN. 150/2(A) (sex offender means any person who is charged and convicted of specified sex offenses, found not guilty by reason of insanity, or is the subject of a finding not resulting in an acquittal at a fitness for trial hearing); IOWA CODE ANN. § 692A.2 (requiring registration of a person who has been convicted or is required to register in another state under the state's sex offender registry); KAN. STAT. ANN. § 22-4902(a) (defining offenders who must register as those convicted or adjudicated as a juvenile or found to be a sexually violent predator); KY. REV. STAT. ANN. § 17.500 (4) (registrant means any person who has committed a sex crime or a criminal offense against a victim who is a minor or who is required to register due to conviction or registration requirement in another state or the United States or by court martial or any sexually violent predator); NEB. STAT. ANN. § 29-4003(1)(a) (applies to one who pleads or is found guilty); TENN. CODE ANN. § 40-39-202 (requiring registration of convicted offenders and defining conviction as meaning a judgment entered by a Tennessee court upon a plea of guilty, *nolo contendere*, or a finding of guilt by judge or jury or conviction by a federal court or military tribunal).

c. Termination of registration. Offenders in Arkansas may make application for an order terminating the obligation to register. ARK. CODE ANN. § 12-919(b)(1)(A)(ii). In Nebraska, an offender may file a petition with the district court for an order to expunge the information. NEB. STAT. ANN. § 29-4010(1). And, in Tennessee, a registrant may file a request for termination of registration requirements with the Tennessee Bureau of Investigation headquarters.[13] TENN. CODE ANN. 40-39-207(a).

d. Limitations on the use of registration lists. Some of the states bordering Missouri impose limitations on the use of the registration list or data. In Illinois, information is to be used only for administration of purposes of the article and the Department of State Police may require that a person who seeks access to sex offender information submit biographical information about him/herself before being allowed access to that information. 730 ILL. COMP. STAT. ANN. 150/12; 730 ILL. COMP. STAT. ANN. 152/115. In Iowa, information about an offender under age twenty (20) cannot be disclosed on the internet

[13]Upon the receipt of notice of the death of a registrant, data pertaining to him or her is removed from the register. TENN. CODE ANN. § 40-39-210.

web page. IOWA CODE ANN. § 692A.13(1)(b). In addition, requests for information about a specific offender must be in writing and shall include the name of the offender and one identifier (*e.g.*, date of birth, social security number, or address). IOWA CODE ANN. § 692A.13(1)(b)(3). Kentucky requires that its internet website display language notifying website visitors that use of information obtained from the website to harass a person identified thereon is a criminal offense. KY. REV. STAT. ANN. § 17.580(1)(b)(3). In Nebraska, the information is deemed confidential and there is no requirement to set up a list accessible by the public although the Nebraska State Patrol may release relevant information necessary to protect the public. NEB. STAT. ANN. § 29-4009. In Tennessee, the information for all sexual offenses prior to July 1, 1997 is confidential. TENN. CODE ANN. § 40-39-207(f) .

e. Safety valves. Some of Missouri's neighbors have provided various safety valves to allow for exemptions from the registration requirement in various circumstances. For example, in Iowa, the juvenile court can find that the juvenile offender should not be required to register. IOWA CODE ANN. § 692A.2(4). In Kentucky, conduct which is criminal only because of the age of the victim is not considered a criminal offense requiring registration if the perpetrator was under eighteen (18). KY. REV. STAT. ANN. § 17.500(2)(b). In Nebraska, the state patrol is legislatively charged with developing rules for the

administration of the sex offender registration act and the statutes require that such rules shall identify and incorporate factors relevant to the sex offender's risk of recidivism. NEB. STAT. ANN. § 29-4013(2)(b). And, as mentioned, *supra* at 25 n. 11, Kansas provides that certain diversionary agreements, probation orders, and juvenile sentences can control the term of any registration requirement. KAN. STAT. ANN. § 22-4904(a)(7).

f. Registration method. Two of Missouri's neighboring states have lessened the registration burden by providing for alternative registration methods. In Iowa, an offender can return a verification form by mail. IOWA CODE ANN. § 692A.4(1)(a). And, in Kansas, an offender can register by mail. KAN. STAT. ANN. § 22-4904(c)(2).

g. Constitutional issues. In Arkansas, risk assessment is linked to sex offender registration. To the extent that an offender is required to submit to an assessment, he or she may refuse to cooperate with that assessment on the basis of the right to avoid self-incrimination.

5. The Parties

All of the Does are "convicted"[14] sex offenders, living in the State of Missouri,

[14]Some Does entered agreements with the State of Missouri prior to SORA's enactment in 1994 resulting in a suspended imposition of sentence, and, thus, have no final judgment and no conviction by operation of Missouri law. *See infra* at 67 n. 20,

and required by SORA to register in their counties of residence; some must register every ninety days. L.F. 52-53, STIP. ¶ 21. They are all currently registered. L.F. 50-51, STIP. ¶ 7. None of the Does has been found to be a dangerous offender by any court or governmental agency, other than by the fact of their convictions or pleas of guilt. L.F. 52, STIP. ¶ 19. There is no provision in SORA for them to establish, individually or as a class, in court or elsewhere, that they are not dangerous or that they should not be required to register. L.F. 52-53, STIP. ¶ 21. Nor does SORA provide a means by which the Does and other SORA registrants can avoid or end registration by altering the course of their activities or by making any showing as to the likelihood of re-offense, the gravity of their offense, or the degree of danger they present to society. L.F. 53, STIP. ¶ 25.

Jane Doe I

Appellant Jane Doe I was convicted by her plea of guilty to sexual assault in St. Louis County, Missouri, in 1992, of having consensual sex when she was age twenty (20) with a boy age fifteen (15), whom she thought was age eighteen (18). She received a suspended imposition of sentence, served no time, was released from probation in 1997 and so has no criminal conviction. She now has five children, all of whom are in her custody. Jane Doe I is required by SORA to register in person at the office of the county sheriff four times a year for the rest of her life. L.F. 53, STIP. ¶

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and 68 n. 21.

26a.

Jane Doe II

Appellant Jane Doe II was convicted by her guilty plea to sexual assault in 1991, in Jackson County, Missouri, where she presently resides. She received an SIS and was released from probation in 1996 and so has no criminal conviction. She was a municipal employee at the Kansas City, Missouri Department of Health as a Public Health Specialist II until terminated in Spring, 2003. She was terminated for having declined to answer on her job application whether or not she had pled guilty to or been convicted of a felony. Jane Doe II had been the subject of an anonymous letter sent to her supervisor. The letter writer stated that she found out about Plaintiff's SORA registration from a friend who noticed Jane Doe II's name on the sex offender registration list, and because the letter writer's fiancé had previously been fired by the City, she thought it only fair that the City fire Jane Doe II. L.F. 54, STIP. ¶ 26b.

John Doe I

By his plea of guilt to sexual assault in Lawrence County, Missouri, in 1988, John Doe I was convicted, of having inappropriately touched, at age 17, his 15-year-old girlfriend. He initially pleaded not guilty, but changed his plea and received a suspended execution of sentence ("SES"). His probation expired in 1992. L.F. 54, STIP. ¶ 26c.

John Doe II

John Doe II was convicted, by his plea of guilty, in Wyandotte County, Kansas, in 1986, of one count of enticement of a minor. He was placed on probation for two (2) years, which he successfully completed. He obtained mental health counseling for two (2) years, which he successfully completed. He obtained mental health counseling for seven years and has had no other convictions. He now resides in Newton County, Missouri. L.F. 54-55, ¶ 26d.

John Doe III

John Doe III was convicted by his guilty plea, in 1993, in Jackson County, Missouri, of sodomy and sexual abuse. He fondled his two granddaughters. He served nine years in correctional facilities and has successfully completed the Missouri sex offenders program. He is now required by the terms of his parole to attend group counseling sessions. L.F. 55, STIP. ¶ 26e.

John Doe IV

John Doe IV was convicted of sexual abuse in the first degree in St. Louis County, Missouri. He was accused by his stepdaughter of molesting her. Even though Doe IV knew the charges were false, on advice of his attorney, he entered an *Alford* plea to save the family from having to go through a painful trial. He served no time, received three-to-five years probation, and was released in 1992 or 1994. He continues to reside in St. Louis County, Missouri. L.F. 55, STIP. ¶ 26f.

John Doe V

John Doe V is a resident of St. Louis County, Missouri, and was convicted of sodomy and sexual assault of a minor in 1992. On his own volition, he sought in-patient psychological treatment that same year and, in December, 1992, he voluntarily underwent an orchiectomy (a form of castration). It was after this treatment that he was identified to authorities and prosecuted, pled guilty, and served four months in prison. He successfully completed his period of parole in 1998. L.F. 55-56, STIP. ¶ 26g.

John Doe VI

John Doe VI is a resident of Jackson County, Missouri, was convicted by his plea of guilty to sodomy in Platte County, Missouri in 1991, and sentenced to probation. He was released from probation in 1996. Upon learning of his earlier conviction through his registration on the offender list, members of the church that John Doe VI and his wife had attended for ten years confronted him and demanded that he sign a "contract" regarding his behavior even though he has no involvement with youth activities. Because of this incident, John Doe VI and his wife have chosen to seek another church in which to worship. L.F. 56, STIP. ¶ 26h.

Jane Doe III

Jane Doe III is a Jackson County, Missouri, resident who was convicted by her plea of guilty to injury to a child in Atascosa County, Texas, in 1998. She was given a suspended imposition of sentence and placed on parole for ten years. She was

advised by her attorney in Texas that she was required to register in Texas for the ten years she was on parole, but not thereafter. When she moved to Missouri, she discovered that under Missouri's SORA, she was required to register for the rest of her life. She is required to register in Jackson County, Missouri. L.F. 56, STIP. ¶ 26i.

John Doe VII

John Doe VII is a resident of Jackson County, Missouri, and was convicted by his plea of guilty to abuse of a child. The charges arose during a bitterly contested dissolution proceeding in 1993 concerning an alleged 1991 incident in which it was charged that Doe VII had injured his son by spanking him with a belt, leaving a bruise. On the advice of his lawyer that a plea of guilty would result in a suspended imposition of sentence, probation, and no criminal history record of a conviction, he entered a plea of guilty and received a suspended imposition of sentence and probation. Thereafter, he successfully completed probation. When SORA became effective as to him on August 28, 2002, he learned he had to register and he did so. Had he known that he would have to register under SORA, he would not have entered his plea in 1993. L.F. 56-57, STIP. ¶ 26j.

John Doe VIII

John Doe VIII is a Jackson County, Missouri, resident who was convicted of sodomy by his plea of guilty in Missouri in December, 1993, for inappropriate touching of his then eight-year-old stepdaughter. He maintained his innocence, but

was told that it would cost him $35,000 in fees to defend the charges and impose a hardship on his stepdaughter. On the advice of his lawyer that a plea of guilty would result in a suspended imposition of sentence, probation, and no criminal history record of conviction, he entered a guilty plea and received a suspended imposition of sentence and probation. Thereafter, he successfully completed probation. When SORA became effective as to him, he learned he had to register and he complied. If he had known that he would have to register under SORA, he would not have entered his plea in December, 1993. L.F. 57, STIP. ¶ 26k.

Thomas Phillips

Thomas Phillips is the present Sheriff of Jackson County, Missouri and is its chief law enforcement officer. L.F. 51, STIP. ¶ 8. As is the case for all other chief law enforcement officers of all 115 Missouri counties, Phillips must register individuals subject to SORA's requirements. § 589.400.2. Within three days of receipt of a registration form, he must forward it to the Missouri State Highway Patrol. § 589.410. He is to forward a copy of each registration form to local law enforcement authorities if so requested. § 589.400.2. He must receive written and in person changes in residence to registration information and shall inform the Missouri State Highway Patrol of those changes. § 589.414. He is to be informed of changes in enrollment or employment status and of registrants' name changes. *Id.* He is to receive in person reports every ninety days of persons who are registered as predatory

or persistent sexual offenders, of persons who committed a crime where the victim was less than eighteen years of age, and of persons who pled guilty or were found guilty of failing to register or submitting false information. *Id.* He must receive the annual, in person reports of registrants, verifying the information in their § 589.407 statements. *Id.* He is charged with maintaining, for all offenders registered in Jackson County, a complete list of the names, addresses and crimes for which offenders are registered and provide it to any person who requests it. § 589.417.2. *See also* L.F. 50, STIP. ¶ 4.

Michael Sanders

Michael Sanders is the prosecutor for Jackson County, Missouri. He is charged by law with the responsibility of enforcing SORA in Jackson County. MO. REV. STAT. § 56.060 (except where such duties are performed by a county counselor, "[e]ach prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county"); § 56.450 ("The circuit attorney of the city of St. Louis shall manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction [and] shall appear for the state in all misdemeanor cases appealed from the circuit court of the city of St. Louis to the court of appeals."); L.F. 51, STIP. ¶ 9

Colonel Roger D. Stottlemyre

Colonel Roger D. Stottlemyre is the Superintendent of the Missouri State Highway Patrol ("MSHP"). L.F. 51, STIP. ¶ 10. The MSHP is a state agency created and operating under Chapter 43 of the Missouri Revised Statutes. § 43.020. The MSHP Superintendent has command of the patrol and is to perform all duties imposed on the superintendent. § 43.030. The MSHP Superintendent is required to collect, compile and keep available for the use of peace officers of the state the information deemed necessary for the detection of crime and identification of criminals. § 43.120.4. Pursuant to SORA, the MSHP is to develop the offender registration form which offenders subject to SORA must complete and which the chief law enforcement officers of Missouri counties must send to MSHP within three days of registration. § 589.407. SORA requires that upon receipt of a completed registration form, MSHP must enter the information into the Missouri Uniform Law Enforcement System ("MULES") where it is available to members of the criminal justice system and other entities upon inquiry. § 589.410. Whenever a registrant changes residence, the MSHP is provided with that information, § 589.414.2, and, presumably, given the dictate of § 589.410, updates that registrant's information in MULES. When a registrant moves from Missouri to a new state, the MSHP must inform the responsible official in the new state of residence of the registrant's move. § 589.414.2.

POINTS RELIED UPON

I. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF UNDER COUNT I BECAUSE SORA VIOLATES SUBSTANTIVE DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT IT INFRINGES ON FUNDAMENTAL LIBERTY RIGHTS, HAS NO EXPRESS PURPOSE, AND EVEN IF IT SERVES A COMPELLING INTEREST, IS NOT NARROWLY TAILORED

MO. CONST. art I, § 10

In re Marriage of Woodson, 92 S.W.3d 780 (Mo. 2003)

State ex rel. Cavallaro v. Groose, 908 S.W.2d 133 (Mo. banc 1995)

State ex rel. Oliver v. Hunt, 247 S.W.2d 969 (Mo. banc 1952)

II. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF UNDER COUNT II BECAUSE SORA VIOLATES THE PROHIBITION AGAINST *EX POST FACTO* AND/OR RETROSPECTIVE LAWS UNDER ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION IN THAT IT EITHER IMPOSES AN ADDITIONAL PUNISHMENT AND THEREBY ALTERS THE CONSEQUENCES ATTACHED TO A CRIME FOR WHICH THE DOES HAVE ALREADY BEEN SENTENCED OR IT IMPOSES A NEW OBLIGATION OR DUTY WITH RESPECT TO A PAST TRANSACTION AND/OR TAKES AWAY OR IMPAIRS A SUBSTANTIAL RIGHT

MO. CONST. art. I, § 13

State v. Larson, 79 S.W.3d 891 (Mo. banc 2002).

Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n,

973 S.W.2d 851 (Mo. banc 1998)

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

III. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF UNDER COUNT IV BECAUSE SORA VIOLATES THE GUARANTEE OF EQUAL PROTECTION UNDER ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT IT IMPINGES ON FUNDAMENTAL RIGHTS IN THE ABSENCE OF A COMPELLING STATE INTEREST, AND EVEN ASSUMING A COMPELLING INTEREST, IS NOT NARROWLY TAILORED TO ACCOMPLISH, NOR IS IT RATIONALLY RELATED TO, THAT INTEREST

MO. CONST. art. I, § 2

Yale v. City of Independence, 846 S.W.2d 193 (Mo. banc 1993)

Missourians for Tax Justice Education Project, 959 S.W.2d 100 (Mo. 1998)

State ex rel. Coker-Garcia v. Blunt, 849 S.W.2d 81 (Mo.App. W.D. 1993)

IV. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF ON COUNT V BECAUSE SORA VIOLATES THE PROHIBITION AGAINST BILLS OF ATTAINDER UNDER ARTICLE I, SECTION 30 OF THE MISSOURI CONSTITUTION IN THAT IT SINGLES OUT A SPECIFICALLY DESIGNATED GROUP AND IMPOSES PUNISHMENT ON THEM

MO. CONST. art. I, § 30

State ex rel. Bunker Resource Recycling & Reclamation, Inc.,

782 S.W.2d 381 (Mo. banc. 1990)

V. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF UNDER COUNT VI BECAUSE SORA IS AN UNCONSTITUTIONAL SPECIAL LAW UNDER ARTICLE III, SECTION 40(30) OF THE MISSOURI CONSTITUTION IN THAT IT EXCLUDES MANY VIOLENT OFFENDERS AT EQUAL RISK OF RE-OFFENDING TO THE DOES, CREATES CLOSED-ENDED CLASSIFICATIONS WITHOUT ANY REASONABLE BASIS, AND TO THE EXTENT IT HAS LEGITIMATE PURPOSES, THEY COULD BE ACCOMPLISHED BY OTHER GENERAL LAWS

MO. CONST. art III, § 40(30)

Treadway v. State of Missouri, 998 S.W.2d 508 (Mo. banc 1999)

Harris v. Missouri Gaming Commission,

869 S.W.2d 585 (Mo. banc 1994)

ARGUMENT

INTRODUCTION

The Jane and John Does who seek relief in this Court do not ask the Court to re-write Missouri's SORA. They acknowledge the exclusive statute-drafting responsibility of the legislature. That responsibility, however, is not *carte blanche*. In arguing that there are less harsh alternatives to SORA, that other states have taken different paths to fulfill the federal government's insistence that each state have a Megan's Law, or that statutory lines drawn differently would fulfill the same legislative intent but with fewer side effects, Appellants do not suggest that any particular legislative scheme is required by the Missouri Constitution. Appellants maintain, however, that the Constitution sets outer limits to the discretion the legislature enjoys; that those outer limits, *e.g.*, due process and equal protection, must be mapped against the general constraint that the "principal office" of Missouri government is to provide for the general welfare of "all persons." This requirement for a nuanced balancing of the burdens government seeks to exact permits the Court to declare broad brush, un-nuanced, and unreasoned burden-exacting legislation as having failed the test of the Missouri Constitution.

STANDARD OF REVIEW

The standard of review in a declaratory judgment case is the same as in any other court-tried case. "This Court will affirm the decision of the trial court 'unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 442 (Mo.App. W.D. 2004) (quoting *Kerperien v. Lumberman's Mut. Cas. Co.*, 100 S.W.3d 778, 780 (Mo. banc 2003) (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976))). The constitutionality of a statute is generally a question of law. *See, e.g.*, *State v. James*, 109 P.3d 1171, 1174 (Kan. 2005); *State v. Gales*, 694 N.W.2d 124, 149 (Nebr. 2005); *see also, City of Cape Girardeau v. Fred A. Groves Motor Co.*, 346 Mo. 762, 772, 142 S.W.2d 1040, 1045 (Mo. 1940) (the constitutionality of an ordinance is generally a question of law involving an interpretation of its terms, objects, purposes and practical operation rather than a question of fact). Further, interpretation of a statute is a question of law. *Smith v. Shaw*, 159 S.W.3d 830, 833 (Mo. banc 2005). "Questions of law are matters reserved for de novo review by the appellate court, and we therefore give no deference to the trial court's judgment in such matters." *Commerce Bank, N.A.*, 141 S.W.3d at 442 (quoting *H & B Masonry Co., Inc. v. Davis*, 32 S.W.3d 120, 124 (Mo.App. E.D. 2000)). However, the Court gives "due regard to the opportunity of the trial court to have judged the credibility of witnesses,"

Rule 84.13(d)(2), and is bound to "exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." *Murphy*, 536 S.W.2d at 32.

I. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF UNDER COUNT I BECAUSE SORA VIOLATES SUBSTANTIVE DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT IT INFRINGES ON FUNDAMENTAL LIBERTY RIGHTS, HAS NO EXPRESS PURPOSE, AND EVEN IF IT SERVES A COMPELLING INTEREST, IS NOT NARROWLY TAILORED

The trial court determined that SORA did not impinge on a fundamental right, and so needed to be only rationally related to a legitimate state interest. L.F. 200; App. A3. The trial court further decided that SORA's "clear intent" is to provide information to law enforcement officers that will assist in investigation of future crimes and to provide information to members of the public so they can take steps to protect themselves and their children. *Id.* The trial court concluded that these were legitimate state interests and that SORA's requirements were rationally related to those interests. L.F. 200. In these three respects, the trial court erred because SORA unconstitutionally infringes on a fundamental liberty right, has no express purpose and, even if it served a compelling interest, is not narrowly tailored to do so and, thus, denies the Does of substantive due process.

The Missouri Constitution provides that "no person shall be deprived of life,

liberty, or property without due process of law." MO. CONST. art. I, § 10. The Missouri due process clause provides heightened protection against government interference with certain fundamental rights and interests. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. 2003) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995)). While due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Rochin v. California*, 342 U.S. 165 (1952)). Thus, the standard depends on whether the government action is executive or legislative. *Woodson*, 92 S.W.3d at 783 (citing *County of Sacramento*, 523 U.S. at 846). When, as here, the action is legislative, due process protects fundamental rights and liberties that are "deeply rooted in this Nation's history and traditions," and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720-21. The asserted interests must be carefully described. *Woodson*, 92 S.W.3d at 783 (citing *Glucksberg*, 521 U.S. at 721).

The substantive component of the Due Process Clause protects "fundamental" rights, that is, those "implicit in the concept of ordered liberty." *Cavallaro*, 908 S.W.2d at 135 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Snyder v.*

Massachusetts, 291 U.S. 97, 105 (1934) (rights and liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental"). Fundamental rights are "created only by the constitution." *Id.*, (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring), and citing *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995)). The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Glucksberg*, 521 U.S. at 719 (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Substantive due process protects such rights against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Under substantive due process analysis, a law which impinges upon a "fundamental right" is subject to the "strict scrutiny" test, which requires that the law be narrowly tailored to serve some compelling state interest. *Deaton v. State*, 705 S.W.2d 70, 73 (Mo.App. E.D. 1985) (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

A. SORA Infringes on Fundamental and Constitutional Rights

SORA infringes upon the fundamental and constitutional liberty right to exercise personal choice and freedom as guaranteed by the Missouri Constitution, Article I, Section 10. The Does have a fundamental liberty interest, rooted in history and

tradition, in being free from restriction upon their personal freedom once their sentences have been served and/or they have successfully completed their probation or parole. *United States v. Solerno*, 481 U.S. 739, 746 (1987) (while the liberty interest to be free from detention is fundamental, it can be overcome by clear and convincing evidence of a compelling government interest, which interest is determined after a hearing consistent with the Due Process Clause); at 755 ("In our society, liberty is the norm . . .."); *see also State ex rel. Oliver v. Hunt*, 247 S.W.2d 969 (Mo. banc 1952) (recognizing that a person who is fully discharged from parole by the state is restored to all rights and privileges of citizenship); MO. REV. STAT. § 561.016[15]. As

[15]App. A20 (MO. REV. STAT. § 561.016).

Not all disqualifications or disabilities that historically have resulted from conviction of a criminal felony statute are encompassed by section 561.016. The statute expresses the General Assembly's intent to remove much of the legal stigma resulting from conviction for a felony in that the legislation provides that convicted felons will not suffer from "legal disqualification or disability" as a result of their convictions, except as provided by state constitution, code, or statute. *Presley v. United States*, 851 F.2d 1052, 1053 (8th Cir. 1988); § 561.016. The legislature's grant of social reinstatement of convicted felons is not comprehensive, however. *See, e.g.*, MO. REV. STAT. § 561.026(3) (jury service); § 57.010.1 (holding office of sheriff); § 43.060.1 (employment as highway patrol officer). Only legal

more fully explained, *infra* at 61, SORA also infringes upon the Does' fundamental and constitutional right to privacy and freedom from unwanted publicity and their right to travel.

SORA registrants, as a result of the newly enacted MO. REV. STAT. § 566.147, are now being required at each registration renewal to initial a box acknowledging their understanding that they may not live within one thousand feet of any public or private school or day care facility. Enacted in 2004, this statute adds to the substantial and growing formal burdens *all* registrants must bear. The nexus between formal statutory burdens and informal private burdens grows non-stop. This year, Six Flags Theme Parks, Inc., added to its season passes and ticket stubs language that provides, "Six

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disqualifications and disabilities are within the ambit of § 561.016. *Chandler v. Allen*, 108 S.W.3d 756, 761-62 (Mo.App. W.D. 2003). But this does not mean that statutory provisions specifically disqualifying or restricting a convicted felon's participation in civil life are immune from attack as being violative of substantive due process.

Flags reserves the right to deny admission . . . if the bearer is required to be registered as a sex offender (or words of similar import) in any jurisdiction." *See* <http://www.sixflags.com/parks/greatescape/ticket info/ seasonpass.html> (visited May 19, 2005). Thus, Jane Doe I may be prohibited from taking her five children and their friends to Six Flags.

Jane Doe II has lost her employment after having left blank on her employment application a question about a prior criminal conviction, apparently relying on the belief that she had no conviction, because her "conviction" resulted in an SIS, but she was reported as a registered sex offender and terminated. *See supra* at 31-32, *infra* at 67 n. 20, 68 n. 21. The list of these onerous burdens is lengthy and expanding. It may not be long before enterprising real estate speculators locate some registrants living in good housing and open a day care facility nearby to force registrants to sell

their homes at distressed prices in a new version of blockbusting.[16]

B. SORA Imposes a Severe Stigma for Life

SORA also imposes a severe stigma – for life – on those to whom it applies. Although the general public may only request a complete list of the names, addresses, and crimes for which the offenders are registered, this information is made even more readily available on the Internet. *See* Sex Offender Information Page,

[16]Indeed, since real estate professionals are obligated to disclose to potential buyers all material facts, the presence of a registered offender in the neighborhood begs the question. According to the website of the National Association of Realtors, "[t]he impact of Megan's Law is unknown for real estate practitioners who are required by professional licensing standards to disclose material facts." *See* <http://www.realtor.org/publicaffairsweb.nsf/pages/TPMegan'sLaw> (visited May 20, 2005).

<http://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CRID/SOR/SORPage.html> (visited June 28, 2005). Even without wide dissemination of all the registration information or Internet dissemination of only the publicly available information, the stigmatizing effect is severe. The mere listing of Jane Doe II's name, address, and crime for which she was registered, acquisition of the list, word-of-mouth transmission of the fact of Jane Doe II's listing to a disenchanted, anonymous letter-writer, and a threatening letter to her supervisor were enough to get her fired from employment. *See supra* at 31. Registration and dissemination of the name, address, and crime of John Doe VI and revelation of those facts to his church initially resulted in the church confronting him and demanding that he sign a "contract" regarding his behavior. It subsequently resulted in John Doe VI and his wife seeking a new church in which to worship. *See supra* at 34.

The stigmatizing effect is undeniable. The registration and reporting obligations imposed by SORA on sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole. *Smith v. Doe*, 538 U.S. 84, 111-12 (2003) (Stevens, J., dissenting in No. 01-729 and concurring in the judgment in No. 01-1231, *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003)); *id.* at 115-16 (Ginsburg, J., dissenting). They evoke the "shaming punishments that were used earlier in our history to disable offenders from living normally in the community", *id.* at109 (Souter, J., concurring in the judgment), and

"to mark an offender as someone to be shunned." *Id.* at 116 (Ginsburg, J., dissenting). They expose registrants "to profound humiliation and community-wide ostracism." *Id.* at 115; *see also id.* at 109 (Souter, J., concurring in the judgment). Even though the information is already public, SORA goes farther, sending "a message that probably would not otherwise be heard, by selecting some conviction information . . . and broadcasting it . . .. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm." *Id.* at 109 (Souter, J., concurring in the judgment).

C. Even If Legitimate Purposes Underpin SORA, Its Provisions Are Neither Narrowly Tailored Nor Rationally Related to Those Aims

Although he admits that the Missouri legislature does not maintain a record of legislative history that provides evidence as to the intent or purpose of a statute, Colonel Stottlemyre claims "apparent" compelling state interests in assisting the investigation of future crimes and providing information to further protection of the public and its children. TR. at 7 (citing L.F. 37, STOTTLEMYRE STIP. at ¶ 1); TR. at 8 (citing *id.* at ¶ 3); L.F. 51, STIP. at ¶ 11). Indeed, this Court has observed that the legislative intent for enacting § 589.400 was to "protect children from violence at the hands of sex offenders." *J.S. v. Beaird*, 28 S.W.3d at 876; L.F. 51, STIP. at ¶ 12.

Because, as explained, SORA covers all offenders from the time of their release

until their death without relation to whether or not they are likely to repeat their offense, the gravity of their offense, or the danger presented to society, even if these are compelling state interests, it is not narrowly tailored to serve such a compelling interest. This is so even though the State knows that not all offenders are likely to re-offend and it knows that there are evaluations which can be performed to distinguish those sex offenders who are likely to re-offend from those who are not. L.F. 297 (LACOURSIERE DISCOVERY DEPOSITION, September 5, 2002, at 21:22-22:15).

In fact, the wholesale over-inclusion of registrants may impede law enforcement efforts to protect the public. It seems self-evident that some screening to eliminate those who engaged in teenage petting years ago, the elderly and homebound, and the alleged child spankers of decades past, would lighten the burden of law enforcement when a sex crime is committed. If that is so, the vast over-inclusion, hampering law enforcement, is some evidence of a legislative intent to inflict post-judicial punishment on a wide class of persons. *See infra* at 56. Even if it was deemed desirable to require all current registrants to remain registered, a system of classifications, with degrees of public disclosure from none to complete and with administrative mechanisms to contest improper classifications, would serve both the legislative interests and the constitutional imperatives.

For whatever reason, Missouri's registration system is hardly narrowly tailored to achieve even legitimate state interests and denies due process to those registrants

who could prove they were not going to re-offend with evidence sufficient to satisfy even the State's own expert. To satisfy due process, the statute should have levels of registration classification and a judicial safety-valve such as the Connecticut statutory scheme employs. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-251(a) (registration for ten years except any person with one or more prior convictions or those convicted of violations of § 53a-70(a)(2) shall maintain registration for life); § 54-251(b)-(d) (providing for court exemption under specified circumstances); § 54-255(c) (certain persons may petition to limit dissemination of information). In contrast, Missouri's one-size-fits-all registration requirement constitutes a severe deprivation of liberty. It is imposed in a totally arbitrary fashion on anyone who is convicted or who pleads guilty to a long list of specified offenses, and it is imposed only on those persons and no others. Appellees do not explain how SORA is narrowly tailored to serve any compelling interest. Nor can they. How narrowly tailored to investigation of future crimes and protection of the public and its children is a statute that will require Jane Doe I, when she is eighty-five, a mother of five, and by then, likely a great-grandmother to who knows how many, to report in person four times a year, even if she is bedridden in a nursing home with senile dementia? And yet, that is precisely the result SORA dictates.

In sum, SORA adversely infringes upon the Does' fundamental liberty interest in freedom from restriction after serving the sentence prescribed for their offense

and/or release from probation or parole. This is especially so for those who, before 1994 (or 2002), in a then-reasonable benefit-cost analysis, *by both the registrant and the prosecutor*, determined that an SIS served the needs of the State and the accused. Had the fact of SORA registration been known at the time of these plea contracts with Missouri, many different decisions would have been made, at the margin with the substantially greater burden SORA would impose, some unknown number of prosecutors would not even have filed charges and some unknown number of accused would have declined offers of an SIS.

Despite the fact that a constitutional fundamental liberty interest is being abridged by SORA, no compelling state interest is cited to justify the deprivation as to so many and SORA is not narrowly tailored to serve a compelling state interest as to those whose liberty may unquestionably be deprived. Accordingly, this Court should hold that SORA violates substantive due process and must be declared unconstitutional.

II. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF UNDER COUNT II BECAUSE SORA VIOLATES THE PROHIBITION AGAINST *EX POST FACTO* AND/OR RETROSPECTIVE LAWS UNDER ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION IN THAT IT EITHER IMPOSES AN ADDITIONAL PUNISHMENT AND THEREBY ALTERS THE CONSEQUENCES ATTACHED TO A CRIME FOR WHICH THE DOES HAVE ALREADY BEEN SENTENCED OR IT IMPOSES A NEW OBLIGATION OR

DUTY WITH RESPECT TO A PAST TRANSACTION AND/OR TAKES AWAY OR IMPAIRS A SUBSTANTIAL RIGHT

Like the United States Constitution, Missouri's Constitution forbids *ex post facto* laws. But Missouri's Constitution also forbids laws which are applied retrospectively. *Fults v. Missouri Board of Probation and Parole*, 857 S.W.2d 388, 390 (Mo.App. W.D. 1993). Article I, Section 13 provides "[t]hat no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." MO. CONST. art. I, § 13. While the "*ex post facto* clause is aimed at laws that are retroactive and that either alter the definition of crimes or increase the punishment for criminal acts already committed," *Cavallaro*, 908 S.W.2d at 136 (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506-07 (1995); *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)), unconstitutional retrospective laws are generally civil in nature. *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo.App. W.D. 1989). SORA, whether considered to be criminal or civil, violates the Missouri Constitution's prohibition on *ex post facto* and retrospective laws.

A. If Criminal, SORA Is an Unconstitutional *Ex Post Facto* Law

The trial court did not consider whether SORA was an unconstitutional *ex post facto* law, instead applying the retrospective analysis customarily applied to those laws considered to be civil in nature. L.F. 200-201; App. A3-A4. But the Does contend

that SORA is criminal in nature and, thus, is an *ex post facto* law in violation of Missouri's constitution because it is retroactive to the extent that it alters the consequences attached to a crime for which they have already been sentenced. Indeed, by its express terms, it applies to persons whose convictions or guilty pleas, commitments or findings of mental disease or defect date back to July 1, 1979. But to prevail, the Does must also demonstrate that SORA either alters the definition of crimes or increases the punishment for criminal acts already committed. *Cavallaro*, 908 S.W.2d at 136. SORA does not alter the definition of crimes, but it increases the punishment for criminal acts already committed. "Two elements are necessary for a law to be *ex post facto*: it must be retrospective and it must disadvantage the affected offender." *Cooper v. Missouri Board of Probation and Parole*, 866 S.W.2d 135, 138 (Mo. banc 1993) (citing *Miller v. Florida*, 482 U.S. 423, 430 (1987)); *Fults*, 857 S.W.2d at 390. "The *ex post facto* provision prohibits any law that . . . imposes an additional punishment to that in effect at the time the act was committed." *Cooper*, 866 S.W.2d at 137-38.

"The crucial question thus becomes, [are the Does] disadvantaged by the application of the law to [them]?" *State v. Lawhorn*, 762 S.W.2d 820, 824 (Mo. 1988). Here, not only has this Court recognized that registration is punitive[17], but the disadvantage is plain to see because SORA is overwhelmingly punitive in effect. Prior

[17]*State v. Larson*, 79 S.W.3d 891, 894 (Mo. banc 2002).

to the enactment of SORA, none of the Does would be limited in where they could live or would have been subjected to having to comply with the registration requirements it imposes on them for life. Prior to SORA's enactment, none of them would have had to report in person annually or every ninety days to verify the registration information for the rest of their lives. Prior to SORA's enactment, none of the Does would have had to comply with the reporting requirements resulting from a change in address, enrollment or employment status with any institution of higher education, or name. Nor, prior to SORA's enactment would any of the Does have suffered the public dissemination of their names, addresses, and crimes in the fashion facilitated by SORA and been subjected to adverse public responses in their employment or religious worship. SORA also disadvantages the Does because it does not relate the registration requirement to the risk of recidivism or provide for an individualized assessment of the risk of recidivism even though the States own expert acknowledges, and sister states have enacted, practical classification systems. As discussed, *supra* at I.B, the stigmatizing effect is substantial, real and, further, disadvantages individuals subject to SORA's requirements.

B. If Civil, SORA Is an Unconstitutional Retrospective law

Under Missouri law, an unconstitutional retrospective law is a law that imposes a new obligation, duty, or disability with respect to a past transaction or that takes away or impairs a vested or substantial right. *Corvera Abatement Technologies, Inc.*

v. Air Conservation Comm'n, 973 S.W.2d 851, 856 (Mo. banc 1998); *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338 (Mo. banc 1993). A retrospective law is one that relates back to a previous transaction and gives it a different effect from that which it had under the law when it occurred and changes the legal effect of those transactions. *Gonzalez v. Labor and Industrial Relations Comm'n*, 661 S.W.2d 54 (Mo.App. W.D. 1983). Unconstitutional retrospective laws are civil in nature. *Webster*, 779 S.W.2d at 289. The trial court erred in holding that SORA neither deprived the Does of any vested right nor imposed upon them any new obligation based on a past event to their substantial prejudice. L.F. 201, App. 4. The trial court was clearly in error in holding that SORA governed "only those actions that occurred after its enactment" because by the language of § 589.400, it applies to "those individuals who, since July 1, 1979," otherwise fall within the criteria specified in subsections § 589.400.1(1)-(6). *Id.*; § 589.400, App. A8-A9. The Missouri Constitutional prohibition against retrospective laws is applicable to this case.

First, SORA imposes a new obligation with respect to a past transaction. The statute creates a new obligation to register if an offender has previously been convicted of an enumerated sex offense. The registration requirement relates to a past transaction in that the statute applies to "any person who, since July 1, 1979, has been or is hereafter convicted of, been found guilty of, or pled guilty to," an enumerated sex offense, or who, "since July 1, 1979, has been committed as a criminal sexual

psychopath, or who, "since July 1, 1979, has been found not guilty as a result of mental disease or defect" of any of the enumerated offenses. § 589.400.1 (1)-(5). All of the Does were convicted[18] of or pled guilty to an enumerated sex offense prior to the enactment of SORA in 1994. In the cases of Jane Doe I, John Doe I, and John Doe II, the acts underlying the offenses, their convictions, service of the sentence or probation, and discharges from parole or probation all occurred prior to the enactment of SORA. Clearly, these convictions constitute past transactions for purposes of the retrospective analysis.

In *Corvera Abatement Technologies*, the Air Conservation Commission promulgated certain regulations and later issued citations to Corvera, a company in the asbestos removal business. Corvera sought to enjoin the Commission from enforcing the regulations by asserting that the regulations constituted impermissible retrospective legislation. This Court found that the regulations were not retrospective because they applied only to acts that occurred after enactment of the regulation. Corvera challenged only the application of the statute to its transgressions of the rule that occurred after the amendments were enacted. The amendments did not affect any of

[18]Some "convictions" resulted in suspended imposition of sentence and, hence, no conviction. *See infra* at 67 n. 20, 68 n. 21 and accompanying text.

Corvera's past transactions, but operated only prospectively. *Corvera Abatement Technologies*, 973 S.W.2d at 856.

Here, however, it is the Does' original transgressions that trigger the obligation to register under SORA. These obligations, as described, *supra* at I.A, are significant and substantial. While in *Corvera Abatement Technologies*, only citations for transgressions that occurred after the enactment of the statute were at issue, here, the Does' transgressions occurred before the enactment of SORA. Therefore, the enforcement of the registration requirement on them and others whose convictions, pleas, or other qualifying events predate SORA's enactment is retrospective and violates the Missouri Constitution.

Second, SORA takes away or impairs a vested or substantial right. As explained, *supra* at I.A, Missouri law restores most of the rights and privileges of citizenship to those who have completed their sentences or have been discharged from probation or parole. Upon their discharges, the Does contend, they were again cloaked with the substantial rights guaranteed to all citizens by both the United States and Missouri Constitutions including the liberty interest discussed *supra* at I.A, their right to privacy and to be free from unwarranted publicity, *Beiderman's of Springfield, Inc., v. Wright*, 322 S.W.2d 892 (Mo. 1959), and the right to travel, *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969). SORA as applied to the Does impairs these substantial rights. Registrants are now required to acknowledge limits on

where they may live. In addition to the deprivation of liberty extensively discussed, *supra* at I.A, SORA affirmatively requires the Does to disclose their convictions to the public and suffer the dissemination of that information in a manner which impairs the right to privacy and to be free from unwarranted publicity. Additionally, requiring Jane Doe I, John Does I, II, III, IV, and V to register and update his or her registration every 90 days for the remainder of their lives significantly impairs their right to travel. The Does have more than a mere expectation that their rights to liberty, privacy and travel will not again be invaded by the state as long as they continue to remain law-abiding citizens. The enforcement of the registration requirement on them is retrospective because it impairs substantial rights and therefore, violates Article I, section 13 of the Missouri Constitution.

As noted, a law may not impair a vested or substantial right. *Corvera Abatement Technologies*, 973 S.W.2d at 856. Application of SORA to the Does who have been released from parole or probation also impairs a vested right. A vested right has been defined as "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 District No. R-V of Grundy County*, 567 S.W.2d 647 (Mo. banc 1978). A vested right must be more than a mere expectation of the anticipated continuance of the existing law. *Id.* Moreover, the word "vested" means fixed, accrued, settled or absolute. *Robbins v. Robbins*, 463

S.W.2d 876, 879 (Mo. 1971). After offenders complete their sentences, they are released from further obligation by the Board of Probation and Parole. These releases are unconditional and absolute. Some of the Does have already fulfilled their duties to the State. Their probation/parole discharge documents contain words to the effect that "the above-named individual has completed the obligations imposed in accordance with the terms of the aforementioned criminal judgment . . .." Furthermore, MO. REV. STAT. § 217.730 authorizes the Board of Probation and Parole to issue a final order of discharge to an offender when he or she has performed the obligations set forth by the state upon the Board's finding that such final release is compatible with the best interests of society. To be clear, the Does are not claiming that they possess a vested right to insist that the law not change. However, they do contend that they have a vested right to insist that the State of Missouri abide by the previously issued discharges.

By application of SORA to those Does who were granted a discharge from further obligation to the State, the State now seeks essentially to revoke the discharge by imposing a new and continuing registration requirement upon them. By virtue of the discharge given to these individuals, the State of Missouri has already, years ago, released them from any further obligations with respect to the aforementioned criminal judgment. The grant of discharge from parole is a gift that, once accepted, cannot be recalled. *In re Eddinger*, 211 N.W. 54 (Mich. 1969). Ignoring the discharge of the

Board of Probation and Parole renders meaningless the discharge previously granted by the Missouri Board of Probation and Parole.

SORA is an impermissible retrospective law as to those Does who were granted a discharge from further obligation to the State since the conduct triggering the new registration requirement is based on criminal convictions that occurred before the enactment of the registration requirement. As to them, the statute is impermissibly retrospective and is, therefore, in violation of Article I, section 13 of the Missouri Constitution. Cumulatively, these factors weigh heavily in favor of a conclusion that the law impairs a vested or substantive right and, hence, a finding that SORA violates the retrospective clause of the Missouri Constitution.

III. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF UNDER COUNT IV BECAUSE SORA VIOLATES THE GUARANTEE OF EQUAL PROTECTION UNDER ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT IT IMPINGES ON FUNDAMENTAL RIGHTS IN THE ABSENCE OF A COMPELLING STATE INTEREST, AND EVEN ASSUMING A COMPELLING INTEREST, IS NOT NARROWLY TAILORED TO ACCOMPLISH, NOR IS IT RATIONALLY RELATED TO, THAT INTEREST

The trial court held that SORA is rationally related to legitimate state interests and, concluding that it was reasonable for the state to impose SORA obligations on all sex offenders without conducting individual risk determinations, held that SORA does not deny equal protection to those subject to it. L.F. 202, App. 5. But the trial court

erred. SORA violates the Missouri Constitution's guarantee of equal protection. Missouri's Constitution specifies:

> [t]hat all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government . . ..

MO. CONST. art. I, § 2.

Analysis of an equal protection claim involves a two-step process. The first step is to determine whether the classification burdens a "suspect class" or impinges upon a "fundamental right"; in either event, strict judicial scrutiny is required. Either determination triggers strict judicial scrutiny of whether the statute is necessary to accomplish a compelling state interest. If no such right or category is present, then the statute will be upheld and a classification sustained if the classification is rationally related to a legitimate state interest. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991).

Here, the Does maintain that SORA impinges upon their fundamental rights. A fundamental right, under equal protection analysis, is a right "explicitly or implicitly guaranteed by the Constitution." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1996) (quoting *San Antonio School Dist. v. Rodriguez*,

411 U.S. 1, 33-34 (1972)). They include the rights to free speech, to vote, freedom of interstate travel, the right to personal privacy and other basic liberties. *Id.*; *see also Blaske*, 821 S.W.2d at 829 (fundamental rights "include such things as . . . freedom of the press, freedom of religion, . . . and the right to procreate). And, as the Does have already established, *supra* at I.A and I.B, they have a fundamental liberty right to be free from restriction on their personal freedom once their sentences have been served and/or they have successfully completed their probation or parole as well as fundamental and constitutional rights to privacy and freedom from unwanted publicity and to travel. In addition to the ways the Does have already shown that SORA impinges on their fundamental rights, SORA also impinges upon those fundamental rights in ways that offend the equal protection guarantee of the Missouri Constitution. So-called "sex offenders"[19] are required to register under SORA with no regard for the nature of the offense, a given offender's propensity for recidivism, or for the danger the offender presents to the public or society. Other persons convicted of violent crimes such as murdering an adult or battery upon an adult, no matter how they are found guilty of the offense, their recidivism, and no matter what current risk they may present to society are not treated similarly to sex offenders in that they are not required to register. All persons similarly situated – that is, those presenting an

[19]Many offenders are required to register for offenses not at all, or only remotely, related to sex offenses. *See supra* at 19-20.

equal risk to society – are not treated similarly. Thus, SORA is impermissibly biased against one poorly delineated subclass of offenders.

SORA also requires that dissimilar groups be treated similarly. This is so because individuals are required to register regardless of whether they were found guilty by a jury or pled guilty. SORA also requires persons given SIS or SES to register even though an SIS[20] does not result in a final judgment of conviction from

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[20]Notably, in requiring registration by those who receive a suspended imposition of sentence and permitting the public dissemination of that information, SORA conflicts with the

> obvious legislative purpose of the sentencing alternative of suspended imposition of sentence to allow a defendant *to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow*. That legislative purpose is further evidenced in statutes concerning closed records; under § 610.105, R.S.Mo. 1986, if imposition of sentence is suspended, the official records are closed following successful completion of probation and termination of the case. Closed records are made available only in limited circumstances and are largely inaccessible to the general public. § 619.121 R.S.Mo., Supp. 1991.

Yale v. City of Independence, 846 S.W.2d 193, 195 (Mo. banc 1993).

which an appeal will lie. This is particularly egregious in the case of an individual who does not believe that the charges against him or her are valid, but the State does, and so, agrees to plead guilty to a suspended imposition of sentence believing that at the end of the probationary period, he or she would not have a conviction on his or her record.[21] Thus, there certainly exist some individuals who are actually innocent of

[21]For example, an individual who receives a suspended imposition of sentence is not "convicted" for the purposes of MO. REV. STAT. § 491.050, which confers an absolute right to impeach the credibility of any witness with his or her prior criminal convictions. *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. 1995) (*Alford* plea to Class B sodomy charge); *Yale*, 846 S.W.2d at 195-96 (word "conviction" alone as used in city personnel manual authorizing discharge of employee for "conviction" of

charges, who would have been found not guilty at a trial, but who pled guilty either to avoid the embarrassment of a trial or because he or she thought the suspended imposition of sentence would result in avoiding the consequences of a guilty plea or conviction, but who are nonetheless required to register under SORA.

Thus, since SORA impinges on fundamental rights, the Court should apply strict scrutiny review to determine whether the infringement is necessary to accomplish a compelling state interest and whether the State used the least restrictive means to accomplish that compelling state interest. *Missourians for Tax Justice Education Project*, 959 S.W.2d 100, 103 (Mo. 1998); *State ex rel. Coker-Garcia v. Blunt*, 849 S.W.2d 81, 85 (Mo.App. W.D. 1993). As observed, SORA expresses no purpose whatsoever and no defendant has advanced any state interest – let alone a compelling state interest – for its infringement on the Does' rights. Nor, as yet, have the appellees proffered any explanation of how SORA is narrowly tailored or uses the least restrictive means to accomplish that result. The burden is on them to do so.

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felony, or as used in statutes as predicate for punitive action in collateral proceeding, did not include disposition of "suspended imposition of sentence," despite existence of statutory exceptions in specific limited instances.

Coker-Garcia, 849 S.W.2d at 85 (state must put forward compelling reasons, but in case at bar, Secretary of State has presented no plausible argument) (quoting *McCarthy v. Kirkpatrick*, 420 F.Supp. 366, 374-75 (W.D.Mo. 1976) ("defendant Secretary of State 'has failed to demonstrate a state interest sufficiently compelling to warrant an infringement by statute'"); and citing *Labor's Educ. and Political Club-Indep. v. Danforth*, 561 S.W.2d 339, 348 (Mo. banc 1977) (where state was held to a strict scrutiny standard, the state could not show a compelling interest for restrictions); *Witte v. Director of Revenue*, 829 S.W.2d 436, 439 (Mo. 1992) ("Cases involving 'suspect classifications' or 'fundamental interests' force the courts to peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, thus subjecting the classification to strict scrutiny. The effect is to shift the burden of proof to justify the classification from the individual attacking such classification to the State or its agencies.") (quoting *Gumbhir v. Kansas State Board of Pharmacy*, 646 P.2d 1078, 1089 (1982), *cert. denied*, 459 U.S. 1103 (1983)).

Neither the requirement to register nor the dissemination of information is based on any present danger to society or on the degree of risk the offender presents to the public. SORA sweeps into its coverage those who present no danger along with those who do present such a danger, yet it fails to require registration and dissemination of information from other persons convicted of violent crimes who certainly present a

risk to society. Its requirements are applied to registrants for the remainder of their lives, but others who are violent and dangerous, but who are not required to register suffer neither these restrictions nor the stigma and other consequences registration and dissemination borne by the Does. There is no opportunity to escape the dictates of SORA's in-person reporting requirements regardless of the registrant's health or other restrictions on ability to comply. Thus, even assuming a compelling state interest, there can be no showing that SORA employs the least restrictive means or is carefully tailored to minimize the infringement on the Does' fundamental liberties and rights. Accordingly, SORA violates the Does right to equal protection as guaranteed by the Missouri Constitution and this Court should so declare.

IV. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF ON COUNT V BECAUSE SORA VIOLATES THE PROHIBITION AGAINST BILLS OF ATTAINDER UNDER ARTICLE I, SECTION 30 OF THE MISSOURI CONSTITUTION IN THAT IT SINGLES OUT A SPECIFICALLY DESIGNATED GROUP AND IMPOSES PUNISHMENT ON THEM

SORA is an unconstitutional bill of attainder prohibited by Article I, Section 30 of the Missouri Constitution providing that "no person can be attainted of treason or felony by the general assembly." The prohibition against bills of attainder "was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard

against legislative exercise of the judicial function, or more simply – trial by legislature." *State ex rel. Bunker Resource Recycling & Reclamation, Inc.*, 782 S.W.2d 381, 386 (Mo. banc. 1990) (citing *United States v. Brown*, 381 U.S. 437, 442 (1965)). Bills of attainder are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *Id.* at 385 (quoting *United States v. Lovett*, 328 U.S. 303, 315 (1965)).

Two elements identify a legislative act as a bill of attainder. The first is that the statute singles out a "specifically designated person or group," and the second element is that the act inflicts punishment on that person or group. *Id.* at 386 (citing *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846 (1984)). SORA meets both of these elements.

A. SORA Singles Out a Specifically Designated Group

The specificity element is met by a statute which singles out an individual or group, whether the individual or group is called by name or described in terms of past conduct which, because it is past conduct, operates only as a designation of particular persons. *Id.* at 387. SORA meets the specificity requirement in that it singles out a group which is described in terms of past conduct that operates as a designation of particular persons, that is, persons convicted of or who have pled guilty to specified sex offenses. The group is described in terms of the past conduct of those who

comprise the group. Legislation is not held to be directed at specific persons if the class is such that the affected persons can escape regulation merely by altering the course of present activities or bringing themselves into compliance with the law. *Id.* But with SORA, the opposite is true. No affected person can escape SORA's requirements merely by altering the course of his or her present activities. Nor can anyone required by SORA to register and suffer public dissemination of registration data escape the law's requirements by bringing themselves into compliance with the law.

B. SORA Inflicts Punishment on a Specifically Designated Group

As to the second element – that punishment be inflicted on a group – "the deprivation of any rights, civil or political, previously enjoyed, may be punishment" and "legislation which inflicts a deprivation on named or described persons or groups constitutes a bill of attainder whether its aim is retributive, punishing past acts or preventive . . . discouraging future conduct." *Crain v. City of Mountain Home, Arkansas*, 611 F.2d 726, 728 (8th Cir. 1978) (citing *Brown*, 381 U.S. at 448, 458). Here, SORA deprives sex offenders, including those never given a judgment of conviction, of a previously enjoyed right to be free of registration and identification once their sentence, parole, or probation is completed. The question is whether there is constitutionally forbidden punishment, a determination informed by the answers to three inquiries: (1) whether the challenged statute falls within the historical meaning of

legislative punishment; (2) whether the statute, viewed in a light of the severity of burdens it imposes, can reasonably be said to advance a nonpunitive legislative purpose, and (3) whether the legislative record discloses an intent to punish. *Bunker Resource Recycling*, 782 S.W.2d at 387. The trial court held that SORA did not inflict punishment and that the burdens it imposes "are not excessive in light of the purpose of the statute." L.F. 202, App. A5. Accordingly, in the trial court's view, SORA did not constitute a bill of attainder. An analysis of the answers to the three relevant inquiries yields an opposite conclusion and demonstrates the trial court's error.

1. Because sex offender registration and dissemination of registration information were only first enacted beginning in the 1940's, that fact suggests that registration and public notification of registration data may not fall within the historical meaning of legislative punishment. However, as observed, *supra* at I.A., registration and notification resembles the "shaming punishments" of the colonial era and earlier days which were intended to inflict public disgrace, and which label, humiliate, and lead to ostracization of a registrant as someone to be shunned. As was often the case in our history, the labeling of SORA is permanent, and as with those historical punishments, the aim is to make all registrants suffer permanent stigmas since its requirements are lifelong, and to disable them from living normally in the community. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880,

1913 (1991).

2. Whether the statute, viewed in light of the severity of the burdens it imposes, reasonably advances a nonpunitive legislative purpose is a functional approach in which the Court must determine if a nonpunitive legislative purpose is advanced by the law. *Bunker Resource Recycling*, 782 S.W.2d at 387. Generally, legislation intended to prevent future danger, rather than to punish past action, is not an unconstitutional bill of attainder. However, if the function of the statute does not advance the intended purpose and the statute operates only as a punishment of specific persons or a class, the act is a bill of attainder. *Id.* Here, there is no express legislative purpose, but even a nonpunitive purpose does not establish the legitimacy of a law creating a class subject to a legislatively imposed punishment. *Bunker Resource Recycling*, 782 S.W.2d at 386.

3. Finally, as to whether the legislative history discloses an intent to punish, there is no legislative history. *See supra* at 18. However, in *Bunker Resource Recycling* there was also no legislative history and the court concluded that both the specificity and punishment elements necessary to establish the statute as a bill of attainder had nonetheless been satisfied. *Bunker Resource Recycling*, 782 S.W.2d at 388. Here, too, even in the absence of legislative history disclosing an intent to punish, this Court should conclude that both the specificity and punishment elements necessary to establish that SORA is a bill of attainder have been satisfied. That being

so, the Court should also conclude that SORA is an unconstitutional bill of attainder and so declare.

V. THE TRIAL COURT ERRED IN DENYING DECLARATORY RELIEF UNDER COUNT VI BECAUSE SORA IS AN UNCONSTITUTIONAL SPECIAL LAW UNDER ARTICLE III, SECTION 40(30) OF THE MISSOURI CONSTITUTION IN THAT IT EXCLUDES MANY VIOLENT OFFENDERS AT EQUAL RISK OF RE-OFFENDING TO THE DOES, CREATES CLOSED-ENDED CLASSIFICATIONS WITHOUT ANY REASONABLE BASIS, AND TO THE EXTENT IT HAS LEGITIMATE PURPOSES, THEY COULD BE ACCOMPLISHED BY OTHER GENERAL LAWS

SORA is an unconstitutional special law. Section 40(30) of Article III of the Missouri Constitution provides that

> The general assembly shall not pass any local or special law:
>
> (30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

MO. CONST. art. III, § 40(30).

When the challenge is that the law is an unconstitutional special law two inquiries are appropriate. First, is whether the law is a special or local law. Second, if the law is a special or local law, is whether the vice that is sought to be corrected is so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result. *Treadway v. State of Missouri*, 998 S.W.2d 508, 511 (Mo. banc 1999) (quoting *School Dist. of Riverview Gardens, et al.*

v. St. Louis County, 816 S.W.2d 219, 221 (Mo. banc 1991)).

A special law is one that includes less than all who are similarly situated. *Savannah R-II School Dist. v. Public School Retirement System of Missouri*, 950 S.W.2d 854, 858 (Mo. banc 1997); *Batek v. Curators of the Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996). SORA is a special law that includes less than all who are similarly situated because it excludes or omits many violent offenders who are at equal risk of re-offending or who present an equal danger to society to those included within its registration requirement. However, a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis. *Id.* "The party defending the facially special statute must demonstrate a 'substantial justification for the special treatment." *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 65 (Mo. banc 1994) (citing *City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993)). But, the trial court's erroneous conclusion to the contrary notwithstanding[22], the classification here is not made on any reasonable basis. Violent offenders who present a high risk of re-offense or who present a danger to society are excluded from requirement of registration. "The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes." *Batek*, 920 S.W.2d

[22]L.F. 203, App. 6.

at 899.

Furthermore, the issue of whether a statute is, on its face, a special law depends on whether the classification is open-ended. *Treadway*, 988 S.W.2d at 510 (citing *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997)). Classifications are open-ended if it is possible that the status of members of the class could change. *Harris*, 869 S.W.2d at 65. Here, the designation in SORA of the class required to register is closed-ended in that it is not possible that the status of the members could change. The registration requirement and dissemination of registration data is lifelong. The classification of those who must register is arbitrary and without a rational relationship to a legislative purpose in that it does not apply to all persons similarly situated. Even if a law purports to be general, if the classification is unreasonable, unnatural, or arbitrary so that it does not apply to all persons or things similarly situated, it is then, in fact, special despite its apparent purpose. *Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens*, 517 S.W.2d 49, 53 (Mo. 1974). "If in fact the act is by its terms or 'in its practical operation, it can only apply to particular persons or things of a class, then it will be a special or local law, however carefully its character may be concealed by form of words.'" *Id.* (quoting *Dunne v. Kansas City Cable Co.*, 32 S.W. 641, 642, 131 Mo. 1, 5 (1895)).

Individuals are released from prison, parole, or probation who were convicted

of violent crimes and who continue to be dangerous and present a risk to society, but they are not required to register as are sex offenders, who must register even if they are not dangerous or present no risk to society. These violent non-sex offenders who are dangerous and present a risk to society are similarly situated to violent sex offenders but are excluded from the requirements of SORA.

Furthermore, as a special law, SORA is unconstitutional because there are many other general laws that could be used to serve purposes that SORA may be argued to serve, including, for example, but not limited to § 43.504 *et seq.*, Reportable crimes; § 558.016 et seq., Extended terms for recidivism; § 559.010 *et seq*., Sexual Assault Prevention Act; and § 589.303 *et seq.*, Records required – public–access–court ordered access.

The Does have demonstrated that SORA is an unconstitutional special law imposing registration requirements and dissemination of a registrant's name, address, and crime on less than all similarly situated violent and dangerous offenders; that, although there is no demonstrated purpose or substantial justification for the special treatment, there is no rational basis for this SORA's classification; and, that there are many other general laws that could be used to serve the purposes advanced to justify SORA. Accordingly, this Court should declare SORA an unconstitutional special law.

CONCLUSION

In the current climate of public discourse, when the highest courts of states

resolve important state constitutional disputes they may be subjected to attack for their supposed "activism." Whether it is the termination of life support for persons in a persistent vegetative state or enforcement of state constitutional guarantees of adequate financial support for public education, state supreme courts face heightened demands to explain, in ways the general public can embrace, their decisions that enforce and implement constitutional guarantees of liberty. That such tasks are difficult does not warrant their avoidance. It summons the teacher or coach to guide the public to construct its own understanding of the different but equally important roles of the refereeing courts, the players of the legislature, and the rule-setting constitution.

Missouri's SORA is a heavy-handed, misguided, and ill-conceived attempt to address important public issues. None of those criticisms, however, justify its invalidation. Missouri's SORA is overly broad, deprives due process, denies equal protection, and is *ex post facto* or retroactive. Those characteristics violate the people's rules – their constitution. It is this Court's role to say so and explain why. The Doe Appellants, and the thousands of Missourians like them, urge this Court to fulfill its constitutionally mandated role and declare SORA unconstitutional.

Respectfully submitted,

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June 29, 2005

IN THE MISSOURI SUPREME COURT

JANE DOE I, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	Case No. SC86573
	)	
THOMAS PHILLIPS, et al.,	)	
	)	
Respondents.	)	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of MO. SUP. CT. R. 84.06(b). It contains no more than 31,000 words of text (specifically, containing 17,153 words). It was prepared using Word Perfect 6/7/8/9/10/11/12 for Windows. The enclosed floppy disc also complies with MO. SUP. CT. R. 84.06(g) in that it has been scanned and is virus free. The files on the floppy disk contain the brief in both Word Perfect 6/7/8/9/10/11/12 for Windows and "saved as" MSWord 97/2000 formats.

By_____
Attorney for Appellants

IN THE SUPREME COURT OF MISSOURI

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	)	
Appellants,	)	
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	)	
THOMAS PHILLIPS, et al.,	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of Appellant's Brief as well as a floppy disc of same were sent by Federal Express to the Clerk of the Court for filing, and two copies of Appellant's Brief and a floppy disc containing the word processing file of same in Word Perfect 6/7/8/9/10/11/12 and "saved as" Word 97/2000 formats were served by U.S. mail this 28th day of June, 2005, on:

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