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' REPLY BRIEF

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INTRODUCTION

In their briefs, Respondents fail in any meaningful way to engage the real issues in this case. In this Reply Brief, Appellants try to refocus on those issues. At every point, Respondents argue as though every person required to register under SORA is a heinous convicted serial child molester inevitably destined to high recidivism. Appellants wish there to be no mistake about their argument. SORA is completely constitutional with respect to such criminals. Appellants raise, however, and Respondents avoid discussing, the constitutional infirmities in SORA that arise from SORA's over-inclusiveness.

In addition to heinous serial child molesters who need to be subjected to SORA, Missouri has also subjected – as most of Missouri's sister states have not – a large class of persons who are not "sex offenders" to the onerous burdens and requirements of SORA. Where Missouri draws the line between serial sex offenders of children among whom recidivism is virtually certain and teenagers in love two decades ago for whom recidivism is virtually non-existent, is a legislative function. It is, however, a legislative function that must be exercised with a rational basis. Instead of attempting to find a rational basis with which to draw that line, Missouri has swept hundreds, if not thousands, of citizens into SORA's

net, citizens for whom there is no rational basis for their inclusion. Not surprisingly, the respondents make no attempt to justify their inclusion, referring instead to them all as "sex offenders", a term that is not even used in SORA to describe all registrants.

1. RESPONDENTS' USE OF THE TERM "SEX OFFENDERS"

The term "sex offender" is not generally used in SORA. It is used only in MO. REV. STAT. § 589.414.5(1) and then only to refer to certain and narrowly defined persistent offenders. Nonetheless, Respondent Stottlemyre, in particular, repeatedly uses the term "sex offenders" to refer to anyone required to register under SORA. *See, e.g.*, STOTTLEMYRE BR. at 28-29, 31, 39-41, 47.

This broad use of the term is inappropriate since the Act does not use the term in that manner. It is also misleading. The Act applies to a far larger and more innocuous class of persons than would be considered "sex offenders" as the term is commonly understood. Calling all persons required to register under SORA "sex offenders" permits Respondents to ignore, and thus fail to respond to, Appellants' arguments. Reading Respondents' briefs is entirely to read about the high recidivism rates of sex offenders. Reading Appellants' Brief is to read about persons who are nowhere in Missouri law referred to as sex offenders. In fact, many of the appellants turn out to be citizens almost no one would think to include

if asked to list the offenses that makes one a sex offender. So, Respondents' use of the term is incorrect and misleading – in fact, distracting, when the constitutional issues in this matter are considered.

By referring only to sex offenders, Respondents fail to explain the logic or rational basis for applying SORA to Appellants Jane Doe I[1], John Doe I[2], or John Doe VII[3]. Lumping them in with serial child molesters and rapists, Respondents

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[1]Jane Doe I, at age twenty (20), had consensual sex with a male, whom she thought was eighteen (18), but was only fifteen (15). She pled guilty, received a suspended imposition of sentence, served no time, was released from probation in 1997, and has no criminal conviction. She is now the mother of five. *See* APPTS'. BR. at 31.

[2]John Doe I, received a suspended execution of sentence for having inappropriately touched his girlfriend when he was seventeen (17) and she was fifteen (15). *See* APPTS'. BR. at 32.

[3]During a bitterly contested dissolution proceeding, John Doe VII was charged with abuse of a child for allegedly injuring his son two years earlier by spanking him with a belt, leaving a bruise. He pled guilty on the advice of his lawyer that doing so would result in a suspended imposition of sentence, probation, and no criminal history of conviction. *See* APPTS'. BR. at 35.

ignore the constitutional frailty of applying the Draconian requirements of SORA registration to adults who, as teenagers, had sex or petted with under-age boyfriends or girlfriends.

Appellants are not all sex offenders. Respondents adopt the over inclusiveness of the statute to form the basis of their argument justifying it, labeling all individuals to whom the statute applies as "sex offenders" even though many of them are not sex offenders either in the common sense understanding of the term or as the term is used in SORA. Rather, they are persons required to register under SORA. In fact, only by straining unreasonably the meaning of the term can Respondents refer to some of the appellants as "sex offenders".

Nevertheless, having lumped together all individuals subject to the statute's registration requirements and labeled them "sex offenders", Respondents point to the high recidivism rates of sex offenders to assert a rational basis for those requirements. But the recidivism on which the Respondents so heavily rely refers to the recidivism of child molesters and rapists.[4] Stottlemyre's expert, Dr. Roy LaCoursiere, M.D., related his recidivism opinions to those instances in which there were contact offenses and acts for which one gets incarcerated, recognizing that there were often offenses that may be legally defined as sex offenses but

[4] *See* STOTTLEMYRE BR. at 39-41.

which did not come within the sweep of his definition of a sex offense. He acknowledged that among all the offenses, a conviction for which would result in one being required to register, the rates of recidivism would vary by categories. L.F. 316 (LACOURSIERE EVIDENTIARY DEPOSITION at 18:16-20:13).

Respondents thus construct a circular argument:

> All persons required to register are "sex offenders"; all sex offenders have high recidivism rates; high recidivism rates of sex offenders justifies making them all register.

This argument fails because: all registrants are not "sex offenders" in the common sense of the term[5]; all registrants do not have high recidivism rates; and, thus, the registration requirement for all registrants based on high recidivism is not

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[5]Nor are all registrants even the kinds of offenders that a rational basis would cause to be registered because the registration requirements affect both those who present little or no risk of reoffense and also those who present a great risk of reoffense. The list is too over inclusive to be rationally useful. Neither crime prevention nor the public's sense of its children's safety are furthered by the registration of persons such as Jane Doe I, John Doe I, or John Doe VII. To the contrary, publicly registering them as statutory rape convicts or child abuse convicts would just as likely fan public fears that "sex offenders" are everywhere.

justified. The "particular threat of sex offenders to reoffend and the severe impact of sex crimes and crimes against children"[6] support registration requirements for "sex offenders" who threaten to reoffend. They do not support the same registration burdens for those who do not threaten to reoffend. The State knows the line between the two can be drawn. APPTS' BR. at 52 (citing L.F. 297 (LACOURSIERE DISCOVERY DEPOSITION at 21:22-22:15). Other states either do not require such overly inclusive registration[7] or they classify registrants by threat level and provide safety valves.[8] To do nothing to effect the principal office of Missouri government to provide for the general welfare of *all* persons violates the Missouri Constitution.

2. SUSPENDED IMPOSITION OF SENTENCES BEFORE SORA

Respondent Stottlemyre claims that the "only difference between sex offenders who receive suspended sentences and those whose sentences are not suspended is the nature of the sentence". STOTTLEMYRE BR. at 42. This ignores the nature of the bargain that is at the heart of all SIS cases. The State of Missouri created, pre-SORA, a set of incentives for those *accused* of crimes and for the

[6]STOTTLEMYRE BR. at 41.

[7]APPTS' BR. at 25-27.

[8]APPTS' BR. at 29-30.

State to encourage both to avoid the time, expense, and risks of trial. The State benefitted from the incentives it created by reducing the number of trials and by increasing the number of instances in which it could threaten prosecution while not having to follow through and, thus, the State could create disincentives for the public to engage in proscribed conduct. For this incentive to work, and, thus, for the State to gain the benefits of its bargain, it had to provide benefits to those accused, and it did. It offered to suspend imposition of sentences, benefitting the accused who would not have to pay for the cost of defense or subject themselves to the risk of adverse outcomes at trial and sentencing. For this set of incentives to work, it had to be effective at the margin. That is where incentives play out. At the margin, those accused who were actually innocent had an incentive to control the risks of adverse outcomes at trial and accept the State's offer of a SIS, in return for which the accused was promised no adverse consequences normally associated with a criminal conviction: no conviction on the record of the accused and, thus, no consequences that were then foreseeable.

Post-SORA, the risks and benefits of an SIS bargain with the State changed dramatically for those accused of offenses enumerated in SORA. For persons, including R.W. in *R.W. v. Sanders*, No. SC85652, ___ S.W.3d ___, 2005 WL 44388 (Mo. January 11, 2005), who accepted the State's SIS bargain after the

effective date of SORA, the costs of the bargain, including SORA registration, were known and foreseeable and, thus, part of the bargain with the State. This was not the case for persons, including some of the appellants, who accepted that bargain before SORA became effective.

Accordingly, Stottlemyre's statement that a "plea of guilt is a quite reasonable basis" on which to require SORA registration[9] is true only for pleas entered after SORA was enacted. It is unreasonable to change the bargain after the fact.

This also applies to the argument that SORA is not retrospective because it allegedly only changes the legal effect of prior facts or transactions and is forward-looking only. STOTTLEMYRE BR. at 31. But this is not correct. In fact, SORA changes the legal effect of a bargain the State made. It retrospectively looks back and removes one of the central incentives that the State offered to the accused to encourage the accused to accept the SIS bargain. It changes the very nature of that bargain retrospectively, completely altering the balance of risks and benefits that an accused considered at the time of the SIS plea. At the margin, there are those actually innocent persons for whom the costs of defense were outweighed by the benefits of an SIS. Add in the future costs of SORA registration and that calculus

[9] STOTTLEMYRE BR. at 43.

changes dramatically. Actually innocent SIS recipients, such as John Doe VII, would, at the margin, decline the SIS and accept the risks of trial, knowing they are innocent.[10]

3. SORA NOT TAILORED; THUS, LACKS RATIONAL BASIS

In their arguments concerning the rational relationship of SORA to the purposes it purports to serve, Respondents resort again to the same circular reasoning, pointing to the "high recidivism rates of sex offenders" in an attempt to justify the absence of any tailoring of Missouri's registration system to achieve legitimate state interests by such means as a classification system with degrees of public disclosure and administrative mechanisms to contest improper classifications, a judicial safety valve, sunset provisions, termination provisions,

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[10]For purposes of the imposition of SORA's burdens, Respondents also fail to differentiate between those who were "convicted" by a plea but whose "convictions" were later deemed not to exist by operation of law because imposition of their sentences was suspended, from those who were convicted of grave offenses and served time pursuant to executed sentences, or persistent sexual offenders. Instead, Respondents categorize all registrants as persons "convicted" of offenses when some were not "convicted" as of the time SORA became effective. For example, STOTTLEMYRE BR. at 27.

and alternative registration methods. STOTTLEMYRE BR. at 28. This position relies on the same device of categorizing and labeling all those subject to SORA's requirements as "sex offenders" as before.

Here, the criticism of SORA is all the more salient because the reason for having these tailoring features is to deal with different recidivism rates for different offenses, *see supra* at 7-8, lumped together in Missouri's SORA. Missouri must either narrowly define "sex offenses" for which SORA's substantial burdens apply, in which case all of Respondents' arguments would be correct, or, if it chooses to leave the broad and sweeping list of offenses now covered by SORA and justified by high recidivism rates, it must include classification and safety valves tailored for those offenses or offenders for which high recidivism rates are not contended or not proved or are not rationally applicable to individual offenders.

4. THE MISSOURI CONSTITUTION IS NOT LIMITED BY PARALLEL FEDERAL CASE LAW

Respondent Stottlemyre relies primarily on federal law, especially *Smith v. Doe*, 538 U.S. 84 (2003), and fails to deal with the contention that Missouri law may be, and should be, more exacting. *State ex rel J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. 1978) (where U.S. Supreme Court decision in one case approved a standard which seemed to the Missouri Supreme Court to represent a diminution of

the protection afforded by due process and equal protection clauses as interpreted in prior case, Missouri Supreme Court refused to "dilute these important rights" and held that the Missouri Constitution required a higher minimum standard than the U.S. Supreme Court said was required by the United States Constitution). Admittedly, the Supreme Court's decisions are instructive, but this Court is the arbiter of what passes muster under the Missouri Constitution.

CONCLUSION

The principal office of the government of the State of Missouri is to protect the general welfare of all persons. MO. CONST. art. I, § 2. To fulfill that principal office, the Missouri Constitution limns the outer boundaries of the state's power to act. Those boundaries are set by *inter alia* the due process and equal protection clauses and the prohibition of retrospective laws. Taken together, these limits define what it means to be a citizen of the State of Missouri. In protecting the general welfare of *all* persons, the legislature must have a rational basis for distinguishing among those persons it chooses to burden. In enacting SORA in its various iterations, Missouri has failed to nuance those burdens in accordance with the limits on its authority to act. It is now for this Court to conserve what it means to be a Missouri citizen whose general welfare is protected while the state pursues its justifiable purpose to burden those for whom there is a rational basis to burden.

Specifically, Appellants ask this Court to discharge Missouri's principal office and to conserve and protect the general welfare of *all* persons by declaring that:

- SORA as it applies to "sex offenders" as defined by MO. REV. STAT. §§ 589.414.5(1) and 558.018 offends no provision of the constitution;

- SORA is inapplicable to any person who would otherwise have to register because of a suspended imposition of sentence imposed before the enactment of SORA;
- SORA is unconstitutionally overly inclusive but could be saved either by more narrowly defining the offenses for which registration is imposed or by adding classification and safety valve provisions.

Missouri's sister states have met their federal obligation to enact a Megan's Law and advance the same public interests that SORA was intended to promote. They have done it, for the most part, while protecting and balancing the interests of all their citizens. That they have done so does not mandate that Missouri must as well. The Missouri Constitution, however, does not permit the State to act capriciously to lessen what it means in Missouri to be a person, a citizen, entitled to enjoy the general welfare of life. That is why Missouri has its Constitution. And that is why it has its Supreme Court, to conserve the general welfare for all persons.

Respectfully submitted,

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September 6, 2005

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	)	
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	)	
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 2,793 words – less than twenty-five percent of the limit prescribed by Rule 84.06(b)). 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.

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CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of Appellant's Reply 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 Reply 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 3rd day of September, 2005, on:

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