IN THE

Supreme Court of Missouri

Supreme Court 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
Sixteenth Judicial Circuit, Division 18

RESPONDENTS' BRIEF

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JURISDICTIONAL STATEMENT

This action is an appeal from the Memorandum and Order denying injunctive and declaratory relief (Judgment) of the Honorable Jon R. Gray, Circuit Court of Jackson County, Missouri, Division 18, entered on January 6, 2005, denying Plaintiffs' Request for Declaratory Judgment and Injunctive Relief regarding whether Plaintiffs had a duty to register under the Sex Offender Registration Statutes, Mo. Rev. Stat. §§ 589.400 *et seq.* (hereinafter referred to as "SORA"). (L.F. 198). The effect of the Court's ruling is that Mo. Rev. Stat. §589.400 through §589.425 are constitutional and applicable to Plaintiffs. Consequently, Plaintiffs are required to register as sex offenders with the chief law enforcement officer of the county or face prosecution for the Class A misdemeanor for Failure to Register, pursuant to Mo. Rev. Stat. §589.425.

Plaintiffs challenge the constitutionality of the Sex Offender Registration Statutes, and Plaintiffs claim the Trial Court's application of these statutes to them constitutes an impermissible *ex post facto* law. Additionally, Plaintiffs claim that they should not have to register as sex offenders because the Sex Offender Registration Statutes violate their substantive due process rights. The Plaintiffs further claim that they should not have to register under SORA because it violates their equal protection rights under the Missouri Constitution. Plaintiffs claim that application of SORA to them violates the prohibition against bills of attainder

under Article I, Section 30 of the Missouri Constitution and is improper because SORA is an unconstitutional special law under Article III, Section 40(30) of the Missouri Constitution.

Thus, the appeal herein involves the validity of a statute and provisions of the Constitution of this state. According to Article V, Section 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction in cases of this nature.

STATEMENT OF FACTS

All of the Plaintiffs in this action have pled guilty to or been convicted of a sex offense which requires them to register in their counties of residence under SORA.[1] All of the Plaintiffs have registered as sex offenders as required by §589.400 *et seq*. (L.F. 50-51). Plaintiff Jane Doe I pled guilty to sexual assault in St. Louis County, Missouri in 1992. She received a suspended imposition of sentence ("SIS") which did not result in a criminal conviction. She was released from probation for that offense in 1997. (L.F. 53).

Plaintiff Jane Doe II pled guilty to sexual assault in 1991 in Jackson County, Missouri. She also received a suspended imposition of sentence ("SIS") which did not result in a criminal conviction. She was released from probation in 1996. (L.F. 54).

Jane Doe III pled guilty to injury to a child in Atascosa County, Texas in 1998. She received a suspended imposition of sentence and was placed on parole for ten years. (L.F. 56).

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[1] The parties will be referred to by their Trial Court denominations or their names. References to the Legal File will be as follows: (L.F. _____). References to the Appellants' Brief will be as follows: (Appellants' Brief, _____). References to the Stipulation will be as follows: (STIP. ¶_____).

John Doe I pled guilty to sexual assault in Lawrence County, Missouri in 1988. Upon his plea of guilty, he received a suspended execution of sentence ("SES"). Such a probation results in a criminal conviction. His probation expired in 1992. (L.F. 54).

John Doe II pled guilty to enticement of a minor in Wyandotte County, Kansas in 1986. He received two years probation for the offense. He currently resides in Newton County, Missouri. (L.F. 54-55).

John Doe III pled guilty in 1993 to sodomy and sexual abuse in Jackson County, Missouri. He served nine years prison time and is currently on parole. (L.F. 55).

John Doe IV entered an *Alford* plea and was convicted of sexual abuse in St. Louis County, Missouri resulting in a sentence of probation. He was released from probation in either 1992 or 1994. (L.F. 55).

John Doe V pled guilty to sodomy and sexual assault of a minor in 1992 which resulted in a conviction, and he served a small amount of prison time. He completed his parole in 1998. (L.F. 55-56).

John Doe VI pled guilty to sodomy in Platte County, Missouri in 1991 and was sentenced to probation. He was released from probation in 1996. (L.F. 56).

John Doe VII pled guilty to abuse of a child in Jackson County, Missouri in 1993. (L.F. 56-57).

John Doe VIII pled guilty to sodomy in 1993 in Jackson County, Missouri. He received a suspended imposition of sentence and probation. (L.F. 57).

Thus, all of the Plaintiffs in this action have pled guilty to or otherwise been convicted of a sex offense requiring them to register under SORA. All of them have, in fact, previously registered under SORA. (L.F. 51).

Plaintiffs filed a Petition for Declaratory Judgment and Injunctive Relief on July 10, 2003. (L.F. 2-14). Plaintiffs' Petition sought injunctive relief to prevent the Jackson County Sheriff, the Jackson County Prosecutor and the Superintendent of the Missouri State Highway Patrol from enforcing the registration requirement and criminal penalties set forth in SORA. Judge Jon Gray held an evidentiary hearing in the matter. Plaintiffs testified pursuant to Stipulation regarding their guilty pleas and convictions or suspended impositions of sentences. (L.F. 53-7). There is no factual dispute in this case that the conduct of pleading guilty to the enumerated sex offense is an event that triggers the registration requirement under the terms of the Sex Offender Registration Act (SORA).

After considering the stipulated testimony and arguments of counsel, Judge Jon Gray denied Plaintiffs' Request for Declaratory and Injunctive Relief. Judge Gray prepared a written Memorandum and Order Denying Injunctive and Declaratory Relief (Judgment) dated January 6, 2005. (L.F. 198). Thereafter, Plaintiffs filed a Notice of Appeal to the Supreme Court of Missouri basing

jurisdiction on their assertion that the validity of a Missouri statute is at issue in this case. (L.F. 205).

FACTUAL BACKGROUND OF THE MISSOURI SEX OFFENDER REGISTRATION STATUTES

The Missouri Sex Offender Registration Statutes, SORA, §§589.400, RSMo. *et seq.*, have two parts. The first part is an overall statement of applicability indicating those persons who must potentially be registered. The second part describes who must take action to register and when that duty ripens into a statutory requirement. The Missouri Legislature first enacted this statute in 1994 and has modified it since then. The initial version took effect in 1995. Basically, the statutes require a person who has done certain triggering acts, such as pleading guilty to or being found guilty of a sex offense, to register with the chief law enforcement officer in the county. The statute has been revised several times to add certain offenses which are triggering acts for registration and to change the time in which to report from fourteen (14) to ten (10) days.

Following this Court's ruling in *J.S. v. Beaird*, 28 S.W.3d 875 (Mo. banc 2000), the Sex Offender Registration Statute was modified to clarify to whom the statute applied. Under the modification, an individual who committed one of the triggering acts, and was not otherwise registered in the county of their residence, had ten (10) days in which to register with the chief law enforcement officer of the county. The final modification, thus far, occurred in 2003 when school law enforcement agencies were added to those who can benefit from the registration

list. Also new is the requirement that individuals who must register have to disclose their enrollment or employment in any institution of higher education. §589.407, RSMo. 2000 (Cum. Supp. 2003). While the statute itself contained no express declaration of its legislative intent, purpose or objective, Judge Wolff, writing on behalf of this Court in *J.S. v. Beaird* stated that the legislative intent for enacting §589.400 was to "protect children from violence at the hands of sex offenders." 28 S.W.3d at 876. (L.F. 51).

Registrants must complete a form which includes, but is not limited to a statement, signed by the registrant, giving his or her name, 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 §558.018 RSMo., 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. While much of the information collected is available only to courts, prosecutors and law enforcement agencies, any person may request a list of the names, addresses and crimes for which offenders are registered from a county's chief law enforcement official. §589.417, RSMo. 2000 (Cum. Supp. 2003).

Once registered, all registrants are required to annually report in person in the month of their birth to the county law enforcement agency to verify the information given in their registration statement. 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, attend school or train and register in that state. §589.414.7, RSMo. If an offender is registered as a predatory or persistent sexual offender, if the victim was less than eighteen (18) 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 (90) days to verify the information given in their registration statement. §589.414.5 (1) – (3) RSMo. Certain of the Plaintiffs in this case fall under that ninety (90) day requirement.[2] Additional reporting requirements can be triggered by various changes of circumstances specified in the subject statute. There is a lifetime registration requirement unless the convictions for the offenses requiring registration are reversed, vacated or set aside or unless the registrant is pardoned.

The Missouri Sex Offenders Registration statutes contain no specific language that exonerates a person from the obligation of registration who has

[2] Jane Doe III, John Doe II, and John Doe VII.

completed his or her probation, but who otherwise meets the registration criteria. Rather, the specific language of the statute requires any person to register who has been convicted of one of the enumerated offenses or committed one of the triggering actions during the applicable time interval. §589.400.1 (Cum. Supp. 2003). No exemptions or exceptions exist in the statutes for persons who receive suspended imposition of sentence or any other form of probation or parole. No exceptions or exemptions exist for those who are living peacefully and in a law-abiding manner. Those who meet the criteria set forth in the statute must register.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DENYING THE DECLARATORY RELIEF SOUGHT BY PLAINTIFFS IN COUNT I BECAUSE THE TRIAL COURT CORRECTLY DETERMINED THAT THE MISSOURI SEX OFFENDER REGISTRATION STATUTES, (SORA) MO. REV. STAT. §§589.400 – 589.425, AS APPLIED TO PLAINTIFFS, DO NOT VIOLATE SUBSTANTIVE DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT SORA DOES NOT INVOLVE A FUNDAMENTAL LIBERTY RIGHT AND SORA IS RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST OF PUBLIC SAFETY.

SOURCES:

MO. CONST. art. I, §10.

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

Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).

R.W. v. Sanders, No. SC85652, 2005 Mo. LEXIS 4 (Mo. Jan 11, 2005).

II. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFFS IN THEIR PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF SORA TO PLAINTIFFS DOES NOT CONSTITUTE AN IMPERMISSIBLE *EX POST FACTO* AND/OR RETROSPECTIVE LAW IN VIOLATION OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 13, IN THAT SORA IS A CIVIL REGULATORY SCHEME NOT A PUNITIVE STATUTE.

SOURCES:

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

R.W. v. Sanders, No. SC85652, 2005 Mo. LEXIS 4 (Mo. Jan. 11, 2005).

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

Corvera Abatement Technologies v. Air Conservation Comm'n, 973 S.W.2d 851 (Mo. banc 1998).

III. THE TRIAL COURT DID NOT ERR IN DENYING DECLARATORY RELIEF BECAUSE THE TRIAL COURT CORRECTLY DETERMINED THAT SORA DOES NOT VIOLATE PLAINTIFFS' EQUAL PROTECTION RIGHTS UNDER ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT ALL OF THE MEMBERS OF THE APPLICABLE CLASSIFICATION THAT ARE SIMILARLY SITUATED AS REGISTRANTS UNDER SORA ARE TREATED THE SAME.

SOURCES:

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

R.W. v. Sanders, No. SC85652, 2005 Mo. LEXIS 4 (Mo. Jan. 11, 2005).

City of Cleburn v. Cleburn Living Center, 473 U.S. 432 (1985).

Inman v. Mo. Dep't of Corr, 139 S.W.3d 180 (Mo. Ct. App. 2004).

IV. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFFS IN THEIR PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF SORA TO PLAINTIFFS DOES NOT VIOLATE THE PROHIBITION AGAINST BILLS OF ATTAINDER UNDER ARTICLE I, SECTION 30 OF THE MISSOURI CONSTITUION, IN THAT SORA IS A CIVIL REGULATORY SCHEME NOT A PUNITIVE STATUTE, AND AS SUCH, SORA CANNOT IMPOSE PUNISHMENT ON ANYONE.

SOURCES:

State ex rel. Bunker Resource Recycling & Reclamation, Inc.,
782 S.W.2d 381 (Mo. banc 1990).

R.W. v. Sanders, No. SC85652, 2005 Mo. LEXIS 4 (Mo. Jan. 11, 2005).

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

V. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFFS IN THEIR PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF SORA TO PLAINTIFFS DOES NOT CONSTITUTE A SPECIAL LAW UNDER ARTICLE III, SECTION 40(30) OF THE MISSOURI CONSTITUTION IN THAT IT REQUIRES REGISTRATION BY THE ENTIRE CLASS OF PERSONS WHO PLED GUILTY TO OR WERE CONVICTED OF AN ENUMERATED SEX OFFENSE.

SOURCES:

Savannah R-III School Dist. v. Pub. School Retirement Sys. of Mo., 950 S.W.2d 854 (Mo. banc 1997).

R.W. v. Sanders, No. SC85652, 2005 Mo. LEXIS 4 (Mo. Jan. 11, 2005).

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

ARGUMENT

A. INTRODUCTION

The plain wording of the Missouri Sex Offender Registration statutes provides for registration of individuals who have either pled guilty to or been convicted of an enumerated sex offense. Mo. Rev. Stat. §§589.400-589.425. According to their testimony, Plaintiffs pled guilty to or were convicted of an enumerated offense under SORA. (L.F. 53-7). Plaintiffs sought equitable relief from the Trial Court from registration or criminal prosecution by the county prosecutor for failure to register with the county sheriff, stating that the application of SORA to them constituted a violation of their constitutional rights. The Trial Court properly denied their request for equitable relief since they either pled guilty to or were convicted of a sex offense, and they are therefore subject to the requirement to register under the plain language of the sex offender registration statute. The Trial Court correctly recognized that the plain meaning of this statute made it applicable to Plaintiffs.

B. STANDARD OF REVIEW

The appellate review of suits which are equitable in nature is governed by the standard established in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). On review of a case tried by the court without a jury, the appellate court only overturns the judgment of the trial court if there is no substantial evidence to

support the judgment, the judgment is against the weight of the evidence or the trial court's judgment erroneously declared or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Similarly, the denial of a petition for declaratory judgment and injunctive relief may be reversed if there is no substantial evidence to support the court's determination, if the judgment is against the weight of the evidence, or if the judgment erroneously declares or applies the law. *Opponents of Prison Site, Inc. v. Carnahan*, 994 S.W.2d 573 (Mo. Ct. App. 1999); *State ex rel. State Highway Comm'n v. Finch*, 664 S.W.2d 53 (Mo. Ct. App. 1984).

Statutes are presumed to be constitutional and will be found unconstitutional only if they clearly violate a constitutional provision. *State v. Brown*, 660 S.W.2d 694, 699 (Mo. banc 1983); *State v. Mahurin*, 799 S.W.2d 840, 842 (Mo. banc 1990). "A statute must be interpreted to be consistent with the Constitution of the United States if at all possible." *Herndon v. Tuhey*, 857 S.W.2d 203, 207 (Mo. banc 1993). This rule of construction is also applicable to the Missouri Constitution. *State Highway Comm'n v. Spainhower*, 504 S.W.2d 121, 125 (Mo. banc 1973).

Any doubts concerning the constitutionality of the statute will be resolved in favor of validity. *State v. Young*, 695 S.W.2d 882, 883 (Mo. banc 1985). Additionally, the burden of persuasion on the issue of the statute's validity falls

squarely on the party challenging the statute. *State ex rel. Mathewson v. Election Comm'rs*, 841 S.W.2d 633 (Mo. banc 1992).

I. THE TRIAL COURT DID NOT ERR IN DENYING THE DECLARATORY RELIEF SOUGHT BY PLAINTIFFS IN COUNT I BECAUSE THE TRIAL COURT CORRECTLY DETERMINED THAT THE MISSOURI SEX OFFENDER REGISTRATION STATUTES, (SORA) MO. REV. STAT. §§589.400 – 589.425, AS APPLIED TO PLAINTIFFS, DO NOT VIOLATE SUBSTANTIVE DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT SORA DOES NOT INVOLVE A FUNDAMENTAL LIBERTY RIGHT AND SORA IS RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST OF PUBLIC SAFETY.

The Trial Court evaluated Plaintiffs' substantive due process claims correctly to determine that the obligations of SORA do not amount to an interference with fundamental rights that will trigger substantive due process protections. (L.F. 209-10). The Trial Court's approach first examined whether the government action interferes with fundamental rights or burdens a suspect class. *Casualty Reciprocal Exch. v. Mo. Employers Mut. Ins. Co.,* 956 S.W.2d 249

(Mo. 1997). If a law interferes with a fundamental right or burdens a suspect class, then it must be narrowly tailored to serve a compelling state interest. *Deaton v. State*, 705 S.W.2d 70 (Mo. Ct. App. 1985). Under the theory set forth in their Petition, Plaintiffs did not assert any burden on a suspect class, but alleged only an interference with their fundamental rights. (L.F. 9).

Fundamental rights derive only from the United States Constitution. *Batek v. Curators of the Univ. of Mo.*, 920 S.W.2d 895 (Mo. 1996). Fundamental rights traditionally include, for example, the rights to free speech, to vote, to freedom of interstate travel, as well as other basic liberties. Plaintiffs claim that SORA, as applied to them, infringes upon "the fundamental and constitutional liberty right to exercise personal choice and freedom as guaranteed by the Missouri Constitution, Article I, Section 10." (Appellants' Brief, 46-7). Plaintiffs also claim that SORA infringes upon their "fundamental and constitutional right to privacy and freedom from unwanted publicity and their right to travel." (Appellants' Brief, 48).

The Trial Court questioned whether Plaintiffs' so-called right to personal freedom is sufficiently specific so as to constitute a fundamental right protected by substantive due process. (L.F. 199). The Trial Court assumed *arguendo* that it was and determined that SORA does not interfere with the personal freedom of those who are subject to its registration requirements. (L.F. 199).

Reporting requirements under SORA do not restrict a registrant's right to travel. The Missouri registration statutes require registrants to provide fingerprints, a photograph and written information concerning the offender and the underlying offense. While those registrants whose criminal conduct involved a minor victim must report in person more frequently, "the registrant is otherwise free to travel and go about his or her daily activities with no additional intrusion from governmental officials." *R.W. v. Sanders,* No. SC85652, 2005 Mo. LEXIS 4, at *10 (Mo. Jan. 11, 2005). Any restrictions on housing and employment are collateral consequences of the underlying sex offense, not the registration requirement. *Id*. at *10.

The registration requirements do not impose substantial physical or legal impediments upon a registrant's ability to conduct his or her daily affairs. *Id.* at *11. SORA does not restrain activities that sex offenders may pursue but leaves them free to change jobs or residences. The same was found to be true of Alaska's sex offender registration statute, which was approved by the United States Supreme Court as containing no restraint on travel in *Smith v. Doe*, 538 U.S. 84 (2003).

Plaintiffs complain that SORA infringes upon their right to unwanted publicity and their right to privacy. These arguments have been raised and rejected previously. The Trial Court held that SORA does not violate any privacy rights of

Plaintiffs since it discloses information that is already in the public domain. There is also no violation of the right to privacy due to the compilation of information under SORA that would not otherwise be collected in one place for public dissemination. The Trial Court held that no right to be free from unwanted publicity has ever been recognized under the Missouri Constitution. (L.F. 200); (Appellants' Brief, A3). More importantly, the Trial Court held that Plaintiffs did not meet their burden to demonstrate such a right to be fundamental. (L.F. 200); (Appellants' Brief, A3).

The right to privacy encompasses only personal information and not information readily available to the public or in the public domain, so to speak. In *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court examined Connecticut's sex offender registration statute, which included a provision that the registry be posted on an Internet Website to make the registry available to the public. Plaintiff Doe in that case complained that injury to his reputation occurred from being included on the Website when he was not dangerous; he also complained that failure to have a hearing to determine whether he was dangerous violated his constitutional liberty rights. The court concluded he was not entitled to a hearing to establish that he was not a dangerous sex offender since that registration statute is organized by the category of those persons with convictions and not by any grouping made by a determination of dangerousness.

Conn. Dep't of Pub. Safety v. Doe, ***7.** Also, the court reiterated its previous ruling that mere injury to one's reputation, even if defamatory, does not constitute the deprivation of a liberty interest. *Paul v. Davis,* 424 U.S. 693 (1976).

Smith v. Doe also examined the publicity issue since Alaska's sex offender registry information is also posted on the Internet. "Although the public availability of information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Smith,* 538 U.S. at 1151. The purpose and the principal effect of notification is to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of such a scheme, and the attendant humiliation is but a collateral consequence of a valid regulation. *Id.* at 1150.

The Trial Court correctly determined no violation or infringement upon the privacy rights of Plaintiffs exists. Information for the registry is already in the public domain due to the fact that Plaintiffs previously entered pleas or received convictions to enumerated sex offenses. The fact that each of the Plaintiffs previously registered under SORA serves to underscore this point. (L.F. 51). Courts in other states have upheld sex offender registration laws against right of privacy challenges. M*artinez v. Commonwealth*, 72 S.W. 3d 581 (Ky. 2002);

People v. Malchow, 739 N.E. 2d 433 (Ill. 2000). In *R.W. v. Sanders*, Judge Teitelman noted the case of *People v. Snead*, 66 P. 3d 117 (Colo. Ct. App. 2003), in which the posting of information from the sex offender registry on the Internet did not constitute additional punishment. *R.W. v. Sanders*, 2005 Mo. LEXIS 4, *at *12*.

II. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFFS IN THEIR PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF SORA TO PLAINTIFFS DOES NOT CONSTITUTE AN IMPERMISSIBLE *EX POST FACTO* AND/OR RETROSPECTIVE LAW IN VIOLATION OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 13, IN THAT SORA IS A CIVIL REGULATORY SCHEME NOT A PUNITIVE STATUTE.

Both the United States Constitution and the Missouri Constitution prohibit *ex post facto* laws. Therefore, it is appropriate to look to federal as well as state law for guidance in this analysis. The Missouri Constitution's provision against *ex post facto* laws is more limited than the more general provision of the United States Constitution. *State ex rel. Nixon v. Taylor*, 25 S.W.3d 566 (Mo. Ct. App. 2000).

A. *EX POST FACTO* ANALYSIS

Plaintiffs contend that the registration requirement, as applied to them, is an invalid *ex post facto* law because it constitutes a new penalty or consequences for crimes committed before the registration requirements were enacted. (Appellants' Brief, 56). In order to prevail on this claim, Plaintiffs must overcome the presumption that the SORA statutes are constitutional. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). The registration statutes will be upheld unless they "clearly and undoubtedly" violate constitutional limitations. *In re Kohring*, 999 S.W.2d 228, 231 (Mo. banc 1999). As the party raising the challenge, Plaintiffs bear the burden of demonstrating that the statute is unconstitutional. *C.C. Dillon Co. v. City of Eureka*, 12 S.W. 3d 322, 327 (Mo. banc 2000). Due to the holding by this Court in the recent case of *R.W. v. Sanders*, No. SC85652, 2005 Mo. LEXIS 4 (Mo. Jan. 11, 2005), which finds that SORA is not an impermissible *ex post facto* law, the Plaintiffs cannot sustain this burden. *R.W. v. Sanders* controls this case.

A constitutionally prohibited *ex post facto* law is one that " provides for **punishment** for an act that was not punishable when it was committed or that imposes an additional **punishment** to that in effect at the time the act was committed." *Cooper v. Mo. Bd. of Prob. & Parole*, 866 S.W.2d 135, 137-38 (Mo. banc 1993) (emphasis added). The SORA registration scheme operates

retrospectively; therefore, persons who committed predicate acts in the past, such as sex offenses, now have to register. Obviously, the central issue to this analysis is whether the registration obligation functions as punishment. This analysis determines whether SORA is an invalid *ex post facto* law and whether it is an impermissible retrospective law. *R.W. v. Sanders* holds that SORA is neither. *R.W. v. Sanders*, 2005 Mo. LEXIS 4, at *6.

The methodology set forth by the United States Supreme Court to determine whether a retrospective statute constitutes an invalid *ex post facto* punishment or a valid, non-punitive civil regulation follows a two-step analysis. If the registration statutes are intended to be punishment, the analysis ends because an improper *ex post facto* law exists that does not pass constitutional muster. On the other hand, if the registration statutes are designed to set up a non-punitive, civil regulatory system, then further inquiry must be done to determine if the registration statutes are sufficiently punitive in their effect as to negate the legislature's intent to create a non-punitive civil regulation of sex offenders.

This analysis was used in *Smith v. Doe,* which found that the Alaska Sex Offender Registration Statute is not an invalid *ex post facto* law because it is civil and non-punitive. Missouri's sex offender registration statute is similar to that of Alaska, which was examined by the high court. The Supreme Court's examination in *Smith v. Doe,* utilizing traditional *ex post facto* analysis, controls the case at bar.

This Court relied on the methodology set forth in *Smith v. Doe* to make its recent ruling in *R.W. v. Sanders,* which held that the Missouri Sex Offender Registration Statute is not an invalid *ex post facto* law. *R.W. v. Sanders, 2005 Mo. LEXIS 4 at* *6. Obviously, this Court should engage in a similar methodology in the case at bar; however, the yeoman's portion of the work is done.

Plaintiffs do not mention the controlling case of *R.W. v. Sanders* at all in their brief. Perhaps it is a worthwhile exercise to determine whether any of the Plaintiffs at bar present a factually distinguishable case from that of *R.W. v. Sanders.* R.W. was an individual who pled guilty to a sex offense involving a minor. His offense occurred prior to the enactment of SORA; his guilty plea occurred after its enactment. He received a suspended imposition of sentence. He registered under SORA as part of his probation. Once he was released from probation, he stopped registering and filed an action seeking declaratory and injunctive relief against registering and the criminal penalties associated with failure to register. The circuit court denied relief and none was forthcoming from this Court either. R.W. focused his constitutional challenges to SORA on due process and *ex post facto* grounds. He also raised an issue about the statutory construction of the Suspended Imposition of Sentence statute providing for closed records being in conflict with the registration aspect of SORA. His appeal was denied on all grounds.

Clearly, this Court must decide whether any of the Plaintiffs that both committed their offense and entered their plea prior to the time that SORA was enacted are in a legally different factual circumstance so as to make the holding in *R.W. v. Sanders* not control the outcome of their appeal. Although he committed his sex crime prior to SORA's enactment, the date R.W. entered his plea fell after the effective date of SORA, and in fact, R.W. was advised of his requirement to register at the time he entered his plea.

Thus, this Court must evaluate whether the fact that certain of the Plaintiffs entered their pleas or received convictions at a time when the requirement to register had not yet been enacted makes any difference to the outcome of the analysis.[3] Defendants Sanders and Phillips argue that this is a distinction without a difference since the SORA registration scheme is not a punishment, but merely a collateral civil consequence of having committed the predicate conduct, and as such, it can be legislatively determined to operate retrospectively.

With regard to Plaintiff Jane Doe III, who entered her plea in 1998 in Texas, the rule set forth in *R.W. v. Sanders* is clearly controlling since she entered her plea at a time after SORA had been enacted. (L.F. 56). If she does not like the civil consequences attendant to that circumstance here in Missouri, she can return to

[3] All of the Does except Jane Doe III are in this procedural posture.

Texas where she may be able to have the benefit of a sunset provision to her registration instead of the longer requirement set forth by the Missouri statute. There are different legislative rules established in each state that an individual can evaluate prior to moving into that jurisdiction. The fact that sex offender registration has a different impact upon Jane Doe III in Missouri than it may in Texas does not give her any additional or distinctive ground to relief any more so than does the fact that she now has to pay a state income tax in Missouri and was not subject to one in Texas.

Ultimately, since SORA is a civil regulatory scheme that is not punitive, and since it operates retrospectively, it makes no difference when the Plaintiffs entered their pleas or obtained their convictions. The fact that they were convicted before the enactment of SORA is a circumstance specifically contemplated by the retrospective provisions of SORA. On the two prior occasions that this Court has contemplated constitutional challenges to SORA, the fact that the statute was devised to operate retrospectively was found to be acceptable.[4] Thus, all the other Does are also subject to the rule set forth in *R. W. v. Sanders*, which finds SORA's application to them constitutional.

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[4] *J. S. v. Beaird*, 28 S.W.2d 875 (Mo. banc 2000) and *R. W. v. Sanders*, No. SC85652, 2005 Mo. LEXIS 4 (Mo. Jan. 11, 2005).

In considering whether a law constitutes retrospective punishment forbidden by the *ex post facto* clause, a court must ascertain whether the legislature meant the statute to establish civil proceedings. If the legislative intention was to enact a regulatory scheme that is civil and non-punitive, the court must further examine whether it is so punitive either in purpose or effect as to negate the legislature's intention to deem it civil. *Smith v. Doe*, 538 U.S. at 90. Using this approach, the United States Supreme Court found the Alaska Sex Offender Registration laws to be civil and regulatory in nature; as such, they are not *ex post facto* laws. Using the same approach, this Court held in *R.W. v. Sanders* that the Missouri Sex Offender Registration statutes are a civil regulatory scheme that is non-punitive. *R.W. v. Sanders, 2005 Mo. LEXIS 4*, at *8. Because there was no clear legislative intent specified in SORA, this Court engaged in the *Smith v. Doe* analysis in *R.W. v. Sanders* to determine whether SORA is sufficiently punitive in effect so as to constitute a retrospective punishment. *Id.*

In *J.S. v. Beaird*, this Court held that the "obvious 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 875, 877 (Mo. banc 2000). With regard to sex offender registration statutes, the legislative purpose of public safety has historically been regarded as a legitimate non-punitive governmental objective. *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997). Nothing on the face of the statute

suggests that the legislature sought to create anything other than a civil scheme designed to protect the public from harm.

This Court's use of the *Smith v. Doe* approach resulted in the same conclusion for the Missouri Sex Offender Registration Act since the salient characteristics of the Alaska and Missouri statutes are comparable. *R.W. v. Sanders, 2005 Mo. LEXIS 4 at* *8. *R.W. v. Sanders* is the controlling precedent for the case at bar. The whole analysis suggested in *Smith v. Doe* was conducted therein. The vast majority of federal and state courts confronted with the issue of the validity of sex offender registration statutes have also found the registration laws constitutional.

Examples of federal decisions upholding the constitutionality of sex offender registration laws are as follows: *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999)(holding that the Tennessee Sex Offender Registration and Monitoring Act did not violate double jeopardy, *ex post facto*, bill of attainder, due process or equal protection clauses); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997)(holding that no violation of *ex post facto* clause existed because the statute showed a regulatory not punitive effect); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997) (holding that neither registration nor notification provisions under New York act inflicted punishment under *ex post facto* clause); *E.B. v. Verniero,* 119 F.3d 1077 (3d Cir. 1997)(holding that notification under New Jersey Registration and

Community Notification Laws did not constitute punishment for purposes of *ex post facto* and double jeopardy clauses); *Artway v. Attorney General,* 81 F.3d 1235 (3d Cir. 1996)(holding the challenge to notification aspects of New Jersey was not ripe, but registration requirements do not violate *ex post facto*, double jeopardy, bill of attainder, equal protection or due process clauses); *Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998)(holding that registration requirements of Massachusetts law are not violative of *ex post facto* clause, although unlimited public access provisions are too broad to be constitutional); *Lanni v. Engler*, 994 F. Supp. 849 (D. Mich. 1998)(holding that the purpose of the law is to protect the public and not to punish offenders so it is not an *ex post facto* law); *W.P. v. Poritz*, 931 F. Supp. 1190 (D.N.J. 1996)(holding that the effect of the law does not to constitute punishment so it is not *ex post facto*).

State law cases upholding such sex offender registration and notification laws constitutional against *ex post facto* challenges are as follows: *Robinson v. State*, 730 So.2d 252 (Ala. Crim. App. 1998)(holding that registration and notification requirements are not punishment); *Patterson v. State*, 985 P.2d 1007 (Alaska Ct. App. 1999)(stating the legislative intent is regulatory); *People v. Castellanos*, 982 P.2d 211 (Cal. 1999)(holding there is no legislative intent to punish, and any punitive effect is not so strong as to outweigh remedial intent); *Jamison v. People*, 988 P.2d 177(Colo. Ct. App. 1999)(holding the intent of the

statute remedial, not punitive); *Ray v. State*, 982 P.2d 931 (Idaho 1999)(holding that the registration act is a collateral consequence of the guilty plea); *State v. Torres*, 574 N.W.2d 153 (Neb. 1998)(holding that the sex offender statute is a collateral consequence of guilty plea); *State v. Costello*, 643 A.2d 531 (N.H. 1994)(holding that any punitive effect of registration statute is *de minimis*); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995)(holding that the intent was clearly remedial in purpose, so it is not punitive); *Commonwealth v. Gaffney*, 733 A.2d 616 (Pa. 1999)(holding that the registration law serves non-punitive goals of public safety, and its effect is not so harsh as to render it punishment); *White v. State*, 988 S.W.2d 277 (Tex. App. 1999)(holding that the statute is not punitive and therefore not an *ex post facto* law); *Kitze v. Commonwealth*, 475 S.E.2d 830 (Va. Ct. App. 1996)(holding that the registration requirement is not penal); *Snyder v. State*, 912 P.2d 1127 (Wyo. 1996)(holding that law's intent not to inflict greater punishment, but to facilitate law enforcement and protect children).

In *Smith v. Doe*, the United States Supreme Court utilized a multi-factor test previously set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to consider the issue of whether a statute is punitive or regulatory. *Smith v. Doe*, 538 U.S. 84 (2000). *Smith v. Doe* states that certain factors noted in *Kennedy v. Mendoza-Martinez* are useful to consider in this context. *Id.* They are as follows: whether the regulatory scheme has been regarded in our history and traditions as a

punishment; whether it imposes an affirmative disability or restraint; whether it promotes the traditional aims of punishment; whether it has a rational connection to a non-punitive purpose; or whether it is excessive with respect to this purpose. *Id.*

Obviously, this Court should continue to evaluate the constitutional challenges to Missouri's sex offender registration statutes within this framework. This Court previously announced in *J.S. v. Beaird* that the "obvious legislative intent for enacting § 589.400 was to protect children from violence at the hands of sex offenders." 28 S.W.3d at 877. Therefore, its legislative purpose should be viewed as protection of children and preservation of public safety.

1. Traditional Notions of Punishment

Using the framework from *Smith v. Doe*, this Court should inquire whether registration such as is required by § 589.400 has historically been regarded as punishment. Plaintiffs argue that the application of SORA to them is punishment in that it violates their privacy by placing stigmatizing information into the public domain that would not otherwise be there, and it restricts their freedom or right to travel by requiring them to reappear in person to register frequently. (Appellants' Brief, 50-1). However, in *Smith v. Doe*, the Supreme Court explained how shaming or stigmatizing punishments are dissimilar from registration schemes. Historical shaming punishments such as stocks, pillories and branding were

designed to do more than provide information. Specifically, they were designed to punish and required the physical participation of the offender. *Smith v. Doe*, 538 U.S. at 98-9.

By contrast, registration or notification occurs after the sex offender has been punished. *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997). The dissemination of information regarding criminal conduct, without more, is not punishment when done to advance a legitimate government purpose or objective. *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997). For the most part, stigmatization occurs as a result of dissemination of accurate information about a criminal record, much of which is already public.

In contrast to the traditional forms of punishment, registration does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme. "The 'dissemination of truthful information in furtherance of a legitimate governmental objective' is generally not regarded as punishment." *R.W. v. Sanders*, 2005 Mo. LEXIS 4 at *9, quoting *Smith*, 538 U.S. at 98. The Missouri registration statutes were determined by this Court in *R.W. v. Sanders* to be distinguishable from traditional notions of punishment. *R.W. v. Sanders*, 2005 Mo. LEXIS 4 at *8.

2. Traditional Aims of Punishment

Consideration should be given to whether the Missouri Sex Offender Registration statutes serve the traditional deterrent and retributive aims of punishment. It is conceivable that some individuals may be deterred from committing new crimes by virtue of the fact that they are required to register. However, it is much more likely that any resultant deterrence stems from their original conviction and incarceration. Nevertheless, the existence of a deterrent effect, in and of itself, does not render the statute punitive in nature. *Smith,* 538 U.S. at 102; *R.W. v. Sanders, 2005 Mo. LEXIS 4* at *9; *State v. Burr*, 598 N.W. 2d 147, 154 (N.D. 1999); *State v. Ward*, 869 P.2d 1062 (Wash. 1994); *Kellar v. Fayetteville Police Dep't*, 5 S.W.3d 402, 408 (Ark. 1999).

This Court determined that the SORA registration requirements are not retributive despite the fact that all offenders are subject to lifetime registration. *R.W. v. Sanders, 2005 Mo. LEXIS 4* at *10. A retributive scheme would impose progressively longer registration periods based upon the severity of the underlying sex offense, which does not occur under SORA. Requiring registrants whose offenses were committed against a minor victim to register in person or more frequently "is reasonably related to the regulatory objective of reducing recidivism and more efficiently investigating crimes against minors." *R.W. v. Sanders*, at *10.

Several of the Does fall into the category of having committed crimes against a minor victim.[5]

3. Affirmative Disability or Restraint

No affirmative disability or restraint is imposed by Missouri's sex offender registration scheme. *R.W. v. Sanders,* 2005 Mo. LEXIS 4 at *10. Under the statute, registrants must provide fingerprints, a photograph and written identifying information concerning the offender and the details of the underlying sex offense. There are requirements to update information periodically, especially if the registrant moves. Those whose underlying crime involved a minor victim have to report more frequently. Still, these requirements are not burdensome. Most of the information required in registration is the same as is utilized during the court procedures for the underlying sex offense. "However, the registrant is otherwise free to travel and go about his or her daily activities with no additional intrusion from governmental officials." *R.W. v. Sanders,* 2005 Mo. LEXIS 4 at *10. Specific provisions exist to control circumstances wherein the registrant travels out of state. Thus, it is clearly contemplated by the scheme that registrants will travel out of state. No impediment is placed upon such travel.

Registration poses no physical restraint. The Missouri scheme does not restrain the activities sex offenders may pursue and leaves employment options

[5] Jane Doe III, John Doe II, John Doe V, and John Doe VII.

unrestricted. To the extent that there exist restrictions upon available housing or jobs for sex offenders, it is a collateral consequence from the commission of the conduct, not from the registration. *R.W. v. Sanders,* 2005 Mo. LEXIS 4 at *10. The availability of information concerning the sentence given the sex offender is a matter of public record in many instances. All of the Plaintiffs have registered already. (L.F. 51). The fact of their previous registration negates any argument Plaintiffs now make that providing the same information that is already on the list again somehow violates their right to privacy.

4. Rational Connection to a Non-punitive Purpose

The most significant factor in the *ex post facto* analysis examined in *Smith v. Doe* was whether the statute has a rational connection to a non-punitive purpose. Here, as with all sex offender registration schemes, there is a legitimate non-punitive purpose of public safety and protecting the welfare of children from sex offenders, which is advanced by alerting the public to the risk of sex offenders in their community. It is important to note that the statute does not have to be a perfect fit or narrowly drawn to accomplish the non-punitive aims it seeks to advance. It can still be considered to have a rational connection to its non-punitive goals. *Smith* at 103. This Court pronounced the registration requirement under SORA to advance a legitimate, non-punitive purpose of public safety and

protection of children from sex offenders, citing *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). *R.W. v. Sanders*, 2005 Mo. LEXIS 4 at *11.

5. Excessiveness With Respect to the Purpose

This Court determined in *R.W. v. Sanders*, that the SORA registration statutes are not excessive in relation to the regulatory purposes. *R.W. v. Sanders*, 2005 Mo. LEXIS 4at *11. Specifically applied in their most restrictive case, to a person who committed an offense involving a minor, who consequently, has the most frequent reporting duty under the statute, the registration requirement is not excessive given the assistance it provides law enforcement agencies in investigating future offenses. Additionally, this Court decided that the registration requirements do not impose substantial physical or legal impediments upon a registrant's ability to conduct his or her daily affairs. *R.W. v. Sanders*, 2005 Mo. LEXIS 4 at *11.

It is not fatal to this determination that the Missouri scheme does not distinguish between sex offenders on the basis of their future dangerousness. The United States Supreme Court has upheld against an *ex post facto* challenge laws that impose regulatory burdens upon the class of sex offenders without any individual determination of future dangerousness. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003). The United States Supreme Court also has upheld regulations upon groups of persons whose membership in the class is determined

by conduct antecedent to the legislation. *DeVeau v. Braisted,* 363 U.S. 144 (1960); *Hawker v. New York,* 170 U.S. 189, 197 (1898). The relatively minor condition of registration does not require any individual determination of future dangerousness. Neither the duration of the reporting requirement or the potential for public dissemination of the information make the Missouri scheme excessive relative to its non-punitive purpose. In other words, registration is not so restrictive, either in purpose or effect, as to negate the legislature's intention to deem it civil and regulatory. The legislation does not have to prove to be the best method, only a reasonable one in light of the non-punitive objective. Missouri's legitimate need to protect public safety is of extreme importance, and the manner in which this goal is accomplished under the sex offender registration statutes is not excessive in relationship to its non-punitive purpose.

Ultimately, the focus of the *ex post facto* inquiry concerns whether the legislation alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *Ca. Dep't of Corr. v. Morales,* 514 U.S. 499 (1995); *Collins v. Youngblood*, 497 U.S. 37 (1990). Plaintiffs maintain that Missouri's Sex Offender Registration Act is *ex post facto* in that it "alters the consequences attached to a crime for which they have already been sentenced." (Appellants' Brief, 56).

The New Hampshire Court sitting *en banc* in *State v. Costello*, 643 A.2d 531 (N.H. 1994) rejected an *ex post facto* challenge to the constitutionality of that state's sex offender registration law. Relying on *Trop v. Dulles*, 356 U.S. 86 (1958), the court stated that "a statute is generally considered non-penal if it imposes a disability, not to punish but to accomplish some other legitimate governmental purpose. A statute that has both a penal and non-penal effect is nonetheless non-penal if that is the evident purpose of the legislature." *Costello*, 643 A.2d at 533.

In *Costello*, the defendant argued that he was being prosecuted for an act that was not illegal when the underlying crime was committed, as do the Plaintiffs at bar. However, the court found this contention to misconstrue the appropriate *ex post facto* analysis. The court stated that the defendant in *Costello* was in fact being prosecuted for an illegal act, to wit: the failure to register, contemporary conduct that was in itself an offense when defendant committed it, which in turn presented no problem of retrospective enforcement. *Id.* at 533. The same analysis fits here and is dispositive of these issues.

The Missouri sex offender registration statutes meet all the tests set forth in *Smith v. Doe* to establish the legislation as regulatory and not punitive. Therefore, as discussed above, no violation of the *ex post facto* clause exists. Accordingly, the statutes are constitutional in this respect. It was appropriate for the Trial Court

to deny injunctive and declaratory relief to Plaintiffs since the application of the statutes did not constitute an *ex post facto* law.

B. RETROSPECTIVE ANALYSIS

The Sex Offender Registration Act is not a prohibited retrospective law. The prohibition against retrospective laws applies when the law at issue impairs some vested right or affects past transactions to the substantial prejudice of a person. *La-Z-Boy Chair Co. v. Dir. of Econ. Dev.,* 983 S.W.2d 523 (Mo. 1999). A vested right is one guaranteed by a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. *Fisher v. Reorganized School Dist. No. R-V,* 567 S.W.2d 647 (Mo. 1978). A vested right is something more than a mere expectation based upon a supposed continuation of past law. Additionally, a statute is not retrospective or retroactive because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixed the status of an entity for the purpose of its operation. *Jerry-Russell Bliss, Inc., v. Hazardous Waste Mgmt. Comm'n*, 702 S.W. 2d 77 (Mo. 1985).

To the extent that this Court wishes to analyze Plaintiff's retrospective argument, it should be guided by *Corvera Abatement Technologies v. Air Conservation Comm'n*, 973 S.W.2d 851 (Mo. banc 1998). *Corvera* concerned

regulations governing asbestos abatement projects. The Air Conservation Commission promulgated certain regulations and then issued citations for infractions to Corvera, a company involved in the removal of asbestos. Corvera filed a petition for declaratory and injunctive relief against the Commission seeking to enjoin the Commission from enforcing the regulations against it, claiming the regulations were void as retrospective legislation.

This Court found that the regulations were not retrospective as to Corvera in that they applied only to acts that occurred after enactment of the regulation. The same result is true in this case. Plaintiffs' putative failure to register is conduct that, if it occurs, will happen after the date of the enactment of the Missouri Sex Offender Registration Law so it does not affect any of Plaintiffs' past transactions and operates prospectively upon Plaintiffs. The operative date in this analysis is the date of the failure to register, which will potentially occur in the future after the statutory enactment. Plaintiffs' conduct of failing to register would occur after the effective date of § 589.400.

This Court goes on to state that no one has a right to be free of enforcement of legislation for activities occurring after the legislation is enacted. *Corvera*, 973 S.W.2d at 856. Neither persons nor entities have a vested right to insist that a law remain unchanged. *Fisher*, 567 S.W.2d at 649. Plaintiffs are subject to the registration requirement continuing forward indefinitely.

Further, Plaintiffs cannot show that the application of the Missouri Sex Offender Registration Act is an impermissible retrospective law as to them since the conduct it regulates is the failure to register, which clearly occurs after enactment of the legislation and does not affect their past transactions.

The Sex Offender Registration Act applies to Plaintiffs because of their past convictions of or pleas of guilty to an enumerated sex offense. This application, however, neither deprives them of any vested right nor imposes upon them any new obligation based on a past event to their substantial prejudice. They are simply required to provide certain information to the Sheriff and then report periodically thereafter. They are not harmed in any way. They are not denied income or employment nor deprived of any benefit otherwise available to them. They are not prevented from moving about or changing residence or domicile. The Sex Offender Registration Act merely fixes the status of persons to whom it applies based on their past criminal conduct. A statute may use antecedent facts to establish the status of those to whom it applies. *Corvera*, 973 S.W.2d at 856.

The Sex Offender Registration Act is forward-looking. SORA applies if the offender has been convicted of or pled guilty to certain predicate offenses, which may have occurred in the past, prior to the enactment of the statute; yet, the conduct regulated is the registration, which occurs after the enactment of the statute. In this case, any failure to register by Plaintiffs will occur in the future so

it is after the enactment of the Sex Offender Registration Act. Offenders are required to register and can be convicted of the crime of failing to register. It is the registration that is the "transaction" controlled by the statute, not the underlying sex offense. This premise is the most important one in the analysis. The Sex Offender Registration Act penalizes only the actions of failure to register that occur after its enactment. Hence, it is not a retrospective law.

III. THE TRIAL COURT DID NOT ERR IN DENYING DECLARATORY RELIEF BECAUSE THE TRIAL COURT CORRECTLY DETERMINED THAT SORA DOES NOT VIOLATE PLAINTIFFS' EQUAL PROTECTION RIGHTS UNDER ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT ALL OF THE MEMBERS OF THE APPLICABLE CLASSIFICATION THAT ARE SIMILARLY SITUATED AS REGISTRANTS UNDER SORA ARE TREATED THE SAME.

The Trial Court correctly ruled that SORA is rationally related to legitimate state interests and does not deny equal protection to persons required by its terms to register. (L.F. 202); (Appellants' Brief, A5). Plaintiffs took issue with SORA because its obligations are imposed upon all sex offenders without individual regard to the level of risk, recidivism or dangerousness of registrants. Additionally, Plaintiffs complained about SORA's application to sex offenders but not to other criminal offenders such as murderers who are or may be potentially as dangerous or more so. (Appellants' Brief, 66-7).

As the first point of consideration, this Court should determine whether Plaintiffs have properly preserved their appeal with regard to the equal protection claim concerning the issue of an individual assessment of dangerousness under SORA. Defendants Phillips and Sanders respectfully suggest that there is no evidence in the record upon which Plaintiffs can base their equal protection claim involving a determination of dangerousness.

Plaintiffs failed to present evidence that they are in either the category of "dangerous" or that of "not dangerous" so as to demonstrate they are not being treated the same as others similarly situated. Assuming *arguendo* that two such categories exist as Plaintiffs contend, they have not presented evidence as to which category within which they claim to fall. The conflict Plaintiffs write about with some SORA registrants being "dangerous" and others "not dangerous" is purely a theoretical dichotomy.

Presumably, Plaintiffs wish to be considered to be part of the theoretical "not dangerous" category in contrast to others who must register under SORA that may be considered in the theoretical "dangerous" category. Unfortunately, the record only reflects the fact that the statute makes no distinction between dangerous and not dangerous. (L.F. 53, STIP¶23). The record states that none of the Plaintiffs have been found by a court or governmental agency to be dangerous, **other than by the fact of their convictions or pleas of guilty.** (emphasis added). (L.F. 52,

STIP ¶19). Plaintiffs have not affirmatively demonstrated in the record if they are in one category or another. Mere putative existence of two theoretical categories does not give Plaintiffs standing to complain about disparate treatment. Under the language of the SORA legislation, this Court could choose to construe all those who must register to be persons who are considered "dangerous" by virtue of the fact of their prior conviction to a sex offense, and thereby decide the case on a procedural basis without reaching the substantive issues surrounding an equal protection claim.

Standing to sue exists when a party has an interest in the subject matter of the suit that gives the party a right to recovery, if validated. *Lake Arrowhead Prop. Owners Ass'n v. Bagwell,* 100 S.W.3d 840, 842 (Mo. Ct. App. 2003). In order to have standing to sue in a declaratory judgment action, the plaintiff must have a legally protectable interest at stake. *Blue Cross & Blue Shield of Mo. v. Nixon*, 81 S.W.3d 546, 551 (Mo. Ct. App. 2002). "A legally protectable interest means 'a pecuniary or personal interest directly in issue or jeopardy, which is subject to some consequential relief, either immediate or prospective.'" *Id.* at 552 (quoting *Gen. Motors Acceptance Corp*. v. *Windsor Group, Inc.,* 2 S.W.3d 836, 839).

Standing is a threshold requirement because without it, the court has no power to grant the relief requested. *Inman v. Mo. Dep't of Corr.,* 139 S.W.3d 180, 184 (Mo. Ct. App. 2004). Lack of standing cannot be waived, and an appellate

court may consider it *sua sponte*, with the appellate review to be *de novo*. The appellate court determines standing as a matter of law on the basis of the petition for declaratory review and any other non-contested facts accepted as true by the parties at the time of the ruling, which in this case includes the trial stipulations. *Kinder v. Holden*, 92 S.W.3d 793, 803 (Mo. Ct. App. 2003). Plaintiffs have not provided evidence that they are "not dangerous" so they have no standing to complain that the putative category of "not dangerous" sex offenders is treated differently under SORA than the theoretical group of "dangerous" sex offenders.

Equal protection arguments examine persons who are similarly situated to determine whether they are treated in the same fashion. Whether those individuals who are similarly situated receive equal treatment may depend on how one defines or classifies the groups of persons compared. In this case, Plaintiffs erroneously define the group of persons who are similarly situated as those who present a risk to society. (Appellants' Brief, 67). Plaintiffs would include in their definition murderers and various other persons who are convicted of violent crimes since these persons allegedly pose some risk to society. (Appellants' Brief, 66). Those individuals are not currently in the statutory scheme for registration of sex offenders under SORA.

The Trial Court appropriately determined that the group of persons to be evaluated consists of all sex offenders required to register under SORA. (L.F.

211); (Appellants' Brief, A5). Thus, the inquiry becomes whether all persons who must register under SORA are treated the same under the statutory scheme. The answer to that question is yes.

All persons who either pled guilty to or were convicted of an enumerated offense are subject to the same collateral consequence of their conviction: they must abide by the registration obligations. It does not matter how the registrant becomes eligible for registration, whether through a trial resulting in a conviction or through a guilty plea. Further, it does not matter whether the registrant receives Suspended Imposition of Sentence ("SIS") or Suspended Execution of Sentence ("SES") types of probation.

Plaintiffs argue that it is "egregious" to subject a person who pled guilty to an enumerated sex offense and received an SIS to register since the plea does not produce a final judgment of conviction. (Appellants' Brief, 67-8). Plaintiffs state that persons who received an SIS should not have to register since SORA conflicts with the aspect of a SIS sentence which provides for the records to be "closed" under Section 610.105, R.S.Mo. 1986 upon completion of the probation. (Appellants' Brief, 67). Unfortunately for Plaintiffs, this very argument was completely disposed of by the Missouri Supreme Court in January 2005 in *R.W. v. Sanders,* which held that persons who had an SIS type of probation were subject to SORA. *R.W. v. Sanders,* 2005 Mo. LEXIS 4 at *8.

The Trial Court determined that no fundamental liberty interests were involved in SORA; thus, the test for evaluation of an equal protection challenge is whether the statutory scheme is rationally related to a legitimate governmental interest. (L.F. 199). Equal protection rights do not command that all persons be treated alike, but rather direct that all persons **similarly situated** be treated alike. *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432, 439 (1985)(emphasis added).

The level of scrutiny applied to ensure that classifications comply with this guarantee differs depending on the nature of the classification. Classifications involving a suspect class or those involving fundamental rights are subject to heightened scrutiny. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W. 2d 822, 829 (Mo. banc 1991). The classification of sex offenders required to register under SORA is not a suspect class. Therefore, in order for there to be compulsory strict scrutiny review of this statutory scheme, Plaintiffs must establish they have a fundamental right at issue. As addressed in response to Point I of this argument, Plaintiffs cannot do so. See *supra* at 19-24.

In *Mahfouz v. Lockhart*, 826 F.2d 791 (8th Cir. 1987), the Eighth Circuit used the rational basis test to determine that a portion of the Arkansas statute excluding sex offenders from participation in the work release program for inmates did not violate the equal protection clause. In that case, Arkansas' decision to

create a category comprised of sex offenders as a group was found to be rationally related to the legitimate government purpose of preventing sex crimes, and thus did not violate equal protection guarantees. *Id.* at 794. In that instance, all sex offenders were treated alike in not being permitted to participate in the work release program. It was not a proper category to compare all inmates, but rather all sex offenders. Since all sex offenders in that case were treated the same by not being allowed work release, all those similarly situated were treated alike.

The legitimate state interest of public safety is rationally related to regulation of all sex offenders required to register under SORA. The Trial Court determined that the state does not need to make individual risk assessments of registrants in order to comply with equal protection requirements. (L.F. 202).

A case recently decided by the Eighth Circuit in April 2005 concerning sex offenders in Iowa may prove instructive to examine. In *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), the court examined a law which was designed to protect children in Iowa from the risk that convicted sex offenders may reoffend in locations close to their residence by prohibiting those convicted sex offenders whose victims were minors from living within 2000 feet of a school or child care facility. *Doe v. Miller*, 405 F.3d 700, 704 (8th Cir. 2005). The statute is contained in IOWA CODE Ann. §692A.2A, which took effect on July 1, 2002. The statute

provides no procedure for individual determinations of the dangerousness of registrants.

The Eighth Circuit's examination contained an analysis of constitutional challenges based upon *ex post facto*, equal protection, and substantive due process regarding privacy and travel. The Plaintiffs in the Iowa case were sex offenders with convictions that predated the law's effective date. *Id.* at 705. Since the category of people affected by the Iowa legislation is comprised of sex offenders whose crimes involved minors, and the purpose of the Iowa statute was to protect children from sex offenders who committed certain offenses (those involving minors), the comparison to the case at bar is obvious. The Eighth Circuit's analysis of the various similar constitutional challenges should provide a guide to this Court in resolving the instant case.

The Eighth Circuit evaluated the Iowa statute to decide whether it involved fundamental rights, which was part of the court's substantive due process analysis, but also bears upon the equal protection determination. *Id.* at 709. The *Miller* Plaintiffs based their constitutional challenge upon decisions of the United States Supreme Court holding that certain liberty interests are so fundamental that a state may not interfere with them even with adequate procedural due process, unless the infringement is "narrowly tailored to serve a compelling state interest". *Id* at 709, quoting *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). The *Miller* Plaintiffs

referenced the fundamental rights of travel and privacy, calling them liberty interests that constitute fundamental rights requiring strict scrutiny be applied to the legislative classifications. *Miller,* 405 F.3d at 709. The *Miller* Plaintiffs asserted that "the right to personal choice regarding the family" was a fundamental right. This assertion is similar to the Plaintiffs at bar who claim that the right to personal privacy and the right to be free from restrictions on personal freedom are fundamental liberty rights. (Appellants' Brief, 65-6).

Thus, the Eighth Circuit was called upon to determine whether the legislative classification in the Iowa statute involved any fundamental rights that required strict scrutiny or if the lesser standard of the rational basis test was applicable. The Eighth Circuit held that there was not a fundamental right that would trigger strict scrutiny of the statute. *Miller,* 405 F.3d at 710. The court reiterated the view expressed by the United States Supreme Court that they should exercise judicial restraint in recognizing new fundamental rights. *Flores*, 507 U.S. at 302 (quoting *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992)). The court found that the legislative classification of sex offenders did not sufficiently involve decisions on family matters or force choices about family matters so as to require heightened scrutiny. *Miller,* 405 F.3d at 711.

Next, the Eighth Circuit examined the allegation of the *Miller* Plaintiffs that the Iowa statute impermissibly impinged upon their right to travel, which is an

argument made by the Plaintiffs in the instant case. (Appellants' Brief, 47). To the extent that the right to travel is a fundamental right, it must have three components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

The Eighth Circuit did not agree that the Iowa statute violated the *Miller* Plaintiffs' constitutional right to travel. Rather, it ruled that the Iowa Statute does not violate principles of equality by treating nonresidents who visit Iowa any differently than current residents, or by discriminating against citizens of other States who wish to establish residence in Iowa. *Miller*, 405 F.3d at 712. The Eighth Circuit held that to recognize a fundamental right to travel in this situation would extend the doctrine beyond the limits of the Supreme Court's pronouncements in this area. *Id.* The Eighth Circuit also noted the case of *Doe v. City of Lafayette*, 377 F.3d 757, 770-71 (7th Cir. 2004) in which a city's ban of sex offenders from all public parks did not implicate a fundamental right to travel. While much of its discussion in *Miller* is oriented around substantive due process concepts, the Eighth Circuit determined that the Iowa statute was not the kind that required strict scrutiny, which bears upon equal protection analysis.

With regard to the equal protection challenge, the Iowa statute provides no process for individual determinations of dangerousness. *Id.* at 709. The absence of a particularized risk assessment is examined in *Doe v. Miller* from several points of view including equal protection, *ex post facto* and due process. "The absence of a particularized risk assessment, however, does not necessarily convert a regulatory law into a punitive measure, for the *Ex Post Facto Clause* does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Miller*, 405 F.3d at 721 (quoting *Smith v. Doe,* 538 U.S. at 103). The Supreme Court over the years has held that restrictions on classes of offenders are nonpunitive, despite the absence of particularized determinations, including laws prohibiting the practice of medicine by convicted felons, *Hawker v. New York*, 170 U.S. 189, 197 (1898), laws prohibiting convicted felons from serving as officers or agents of a union, *De Veau v. Braisted*, 363 U.S. 144, 160 (1960)(plurality opinion) and laws requiring the registration of sex offenders, *Smith v. Doe*, 538 U.S. at 106. *Miller*, 405 F.3d at 721-2.

Since the SORA legislation does not involve any fundamental liberty rights, classification does not have to pass any strict scrutiny test. The inquiry does not revolve around whether the legislature has made the best choice possible to address the problem it seeks to remedy, "but rather an inquiry into whether the regulatory

means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. Since the SORA registration requirement treats everyone within its classification of sex offenders equally by imposing registration requirements upon all of them, and since it is rationally related to the legitimate governmental purpose of protecting children from sex offenders, it does not violate the equal protection rights of Plaintiffs.

In *People v. Malchow*, 739 N.E.2d 433 (Ill. 2000), the Illinois Supreme Court reviewed the conviction of a sex offender for his failure to register under Illinois' sex offender registration statute. The state contended that Carl Malchow was obligated to register due to his 1988 conviction of aggravated sexual abuse. Malchow raised several constitutional arguments including due process, equal protection, *ex post facto* and violation of the right to privacy. In those regards, it is an illustrative case for review since the Illinois sex offender registration statute is comparable to that of Missouri.

Malchow asserted that his right to privacy stemmed from the constitutions of Illinois and the United States. However, the Illinois Supreme Court found that the privacy rights that have thus far been recognized under the United States Constitution have been interpreted to apply only to personal decisions involving marriage, procreation, contraception, family relationships, child rearing and education. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684 (1977).

The Illinois Supreme Court found that the registration information Malchow contended should not be disclosed was not within any of these recognized privacy right areas. Further, although the Illinois Supreme Court recognized that the provisions of the Illinois constitution provided broader rights than did the United States Constitution, the guarantee affords protection only against unreasonable invasions of privacy. Malchow failed to meet his burden of establishing that the disclosure of information attendant to the required sex offender registration was an unreasonable invasion of privacy. *Malchow,* 739 N.E.2d at 425.

The continued disclosure of information already on the Missouri sex offender's registry due to the previous registration of all of the Plaintiffs does not constitute an unreasonable invasion of privacy. The disclosure of data related to the underlying criminal conviction should be deemed a collateral consequence of the crime, not viewed as any unreasonable invasion of privacy. Since publication of the Plaintiffs' SORA registry data does not involve the kind of privacy right recognized as a fundamental liberty interest under the constitution, no strict scrutiny need occur in the equal protection evaluation of Plaintiffs' claims. The SORA statute meets the applicable lesser standard of review because registration of convicted sex offenders is rationally related to protecting public safety. As such, SORA is constitutional, and the Trial Court was correct to so hold.

IV. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFFS IN THEIR PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF SORA TO PLAINTIFFS DOES NOT VIOLATE THE PROHIBITION AGAINST BILLS OF ATTAINDER UNDER ARTICLE I, SECTION 30 OF THE MISSOURI CONSTITUION, IN THAT SORA IS A CIVIL REGULATORY SCHEME NOT A PUNITIVE STATUTE, AND AS SUCH, SORA CANNOT IMPOSE PUNISHMENT ON ANYONE.

The Trial Court was correct to deny relief under Plaintiffs' Petition because SORA is not an unconstitutional bill of attainder prohibited by Article I, Section 30 of the Missouri Constitution. By definition, SORA cannot be considered an unconstitutional bill of attainder because it does not impose punishment. Under Missouri law, impermissible bills of attainder include "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." *State ex rel Bunker Resource Recycling & Reclamation, Inc.*, 782

S.W.2d 381, 385 (Mo. banc 1990) (quoting *United States v. Lovett,* 328 U.S. 303, 315 (1965))(emphasis added).

"A statute is invalid as a 'special law' if members of a stated class are omitted from the statute's coverage whose relationship to the subject matter cannot by reason be distinguished from that of those included." *Id.* at 385 (quoting *State ex rel. Pub. Defender Comm'n v. County Ct. of Greene County*, 667 S.W.2d 409, 412 (Mo. banc 1984). Worded differently, "[a] law may not include less than all who are similarly situated." *Id.* at 385 (quoting *Wilson v. City of Waynesville,* 615 S.W.2d 640, 644 (Mo. Ct. App. 1981).

SORA is not an impermissible bill of attainder since it does not contain the requisite elements under Missouri law. In order to be considered a bill of attainder, a legislative act must single out a specifically designated person or group, and it must inflict punishment on that person or group. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841 (1984). Under the second prong, SORA fails the test for a bill of attainder. Since SORA is a non-punitive civil sex offender registration program, it does not impose punishment, and therefore, does not meet the legal definition for a bill of attainder. *R.W. v. Sanders,* 2005 Mo. LEXIS 4 at *11.

This Court ruled in *R.W. v. Sanders,* that "[w] hile the registration statutes have both punitive and regulatory attributes, a weighing of the factors above leads

to the conclusion that the thrust of the registration and notification requirements are civil and regulatory in nature." *R.W. v. Sanders,* 2005 Mo. LEXIS 4 at *11. This ruling determines that SORA does not impose punishment; thus, it does not meet the definition of an impermissible bill of attainder.

Without exception, those courts that have examined their various sex offender registration statutes have made a similar determination that the statute is civil and not punitive. In *Smith v. Doe*, the United States Supreme Court evaluated the Alaska statute and found it to be a civil regulatory scheme. *Smith*, 538 U.S. 84 (2003). In *Conn. Dep't of Pub. Safety v. Doe*, the United States Supreme Court found the Connecticut sex offender registration statute to be a non-punitive civil regulatory scheme. *Conn. Dep't of Pub. Safety v. Doe,* 538 U.S. 1 (2003). Numerous other examples of state and federal courts examining their various state sex offender registration statutes are discussed in Point II. See *supra* at 32-35. In *R.W. v. Sanders*, Judge Teitelman referenced the plethora of states upholding constitutional challenges to their sex offender registration statutes because the legislation is not punishment. *R.W. v. Sanders*, 2005 Mo. LEXIS 4, at *12. The Trial Court was correct to find SORA to be a civil regulatory scheme and not an impermissible bill of attainder. This Court should uphold the ruling of the Trial Court.

V. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFFS IN THEIR PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF SORA TO PLAINTIFFS DOES NOT CONSTITUTE A SPECIAL LAW UNDER ARTICLE III, SECTION 40(30) OF THE MISSOURI CONSTITUTION IN THAT IT REQUIRES REGISTRATION BY THE ENTIRE CLASS OF PERSONS WHO PLED GUILTY TO OR WERE CONVICTED OF AN ENUMERATED SEX OFFENSE.

The Trial Court was correct to deny relief under Plaintiffs' Petition because SORA is not an unconstitutional special law prohibited by Article III, Section 40(30) of the Missouri Constitution. In order to be a "special law", the legislation must be written so that it does not include the entire class of persons who are similarly situated. *Savannah R-III School Dist. v. Pub. School Retirement Sys. of Mo.*, 950 S.W.2d 854, 858 (Mo. banc 1997). However, SORA does not exclude any members of the class who are similarly situated. The class chosen for inclusion by the legislature when enacting SORA was the group of persons who pled guilty to or were convicted of an enumerated sex offense during the relevant

antecedent time period. The fact that some of the sex offenders required to register under SORA may be dangerous and other criminals may not be dangerous is of no concern to the analysis since all persons who are convicted of or pled guilty to an enumerated sex offense are treated equally by SORA.

A law is not a special law if it applies to all of a given class alike and the classification is made on a reasonable basis. 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 v. Curators of the Univ. of Mo.,* 920 S.W. 2d 895, 899 (Mo. banc 1996)(quoting *ABC Liquidators, Inc. v. Kansas City,* 322 S.W. 2d 876, 885 (Mo. banc 1959)).

SORA does not exclude any similarly situated classification from its registration requirements. Thus, it does not qualify as a special law. All persons who are convicted of or pled guilty to an enumerated sex offense are included in the classification and must register. While it is arguable that violent persons who have been convicted of non-sex-related crimes should be tracked also, they are not part of the class of persons who either pled guilty to or were convicted of enumerated sex offenses. The legislature may subsequently choose to create a registration system for all violent offenders, but SORA is not established to accomplish that purpose. SORA is designed to facilitate the registration of all of those persons who fall into the classification of having been convicted of or pled

guilty to a sex offence; no determination of dangerousness is included in the scheme. Persons who are "dangerous" may fall in a separate classification system not included in the registration requirement under SORA.

"In essence, the test for 'special legislation' under Article III, sec. 40, of the Missouri Constitution, involves the same principles and considerations that are involved in determining whether the statute violates equal protection in a situation where neither fundamental right nor suspect class is involved, *i.e.* where the rational basis test applies." *Savannah R-III School Dist.,* 950 S.W.2d at 859 (quoting *Blaske v. Smith & Entzeroth, Inc.,* 821 S.W.2d 822, 831 (Mo. banc 1991)). The Supreme Court holding in *Savannah R-III School Dist. v. Pub. School Retirement Sys. of Mo.* approved an analysis whereby the Court examined the rational relationship of the classification to legitimate government objectives.

In the *Savannah* case, the law at issue was examined to determine whether it imposed disparate treatment. This Court identified a rational basis for the enactment of the law and that determination ended the analysis. *Id. a*t 860. No special law was found to exist. *Id.* at 860.

The same result should occur upon analysis of SORA by this Court. Previously, with regard to SORA, this Court has stated that the "obvious legislative intent for enacting §589.400 was to protect children from violence at the hands of sex offenders." *J.S.,* 28 S.W.3d at 876. Thus, the SORA statute is created as an

exercise of the state's power to protect the health and safety of its citizens, which is clearly a traditional rational basis for enactment of the statute. *R.W. v. Sanders*, 2005 Mo. LEXIS 4 at *7. Protecting the public from sex offenders is a legitimate government interest and has long been so regarded.

Furthermore, public knowledge of certain aspects attendant to our criminal justice system has been our tradition. While the publicity of our system may have negative consequences for the convicted criminal defendant ranging from embarrassment to social ostracism, public awareness is essential to the legitimate governmental interest of maintaining public respect for the criminal justice system. *Smith*, 538 U.S. at 1145. The fact that the statute is not as narrowly drawn as it could be is not fatal either. "The question here is not whether the legislature has made the best choice possible to address the problem it seeks to remedy, but whether the regulatory means chosen are reasonable in light of the non-punitive objective." *Id*. at 1153.

Neither has it been problematic that the statute examined did not distinguish categories based upon dangerousness. For example, in *Smith v. Doe*, the United States Supreme Court found no problem with the fact that the Alaska sex offender registration scheme did not distinguish dangerous registrants from non-dangerous ones. *Smith v. Doe, supra* at 1153.

This Court should uphold the ruling of the Trial Court who correctly determined that SORA is not a special law meaning no relief was due to Plaintiffs under their Petition. The group that is required to register under SORA includes all those individuals who have pled guilty to or been convicted of enumerated sex offenses. All those individuals who are similarly situated are treated alike in that all those who are convicted of an enumerated offense must register. The category of convicted sex offenders created under the statutory scheme is rationally related to the legitimate governmental purpose of public safety and welfare. As such, SORA is not an unconstitutional special law.

CONCLUSION

This Court should sustain the decisions of the Trial Court and find §589.400 *et seq.*, constitutional under the Missouri Constitution. SORA passes all the tests set forth by the United States Supreme Court for the constitutional registration of convicted sex offenders. Two recent cases at the United States Supreme Court, *Smith* v. *Doe*, 538 U.S. 84 (2003) and *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), prescribe the methodology for analysis of the Missouri sex offender registration statutes. By following the procedure set forth in those cases, this Court should confirm the constitutionality of SORA. This Court recently did the yeoman's portion of that analysis in the case of *R.W. v. Sanders*, in which the sex offender statute was confirmed as constitutional under an *ex post facto* challenge. *R.W. v. Sanders*, No. SC85652, 2005 Mo. LEXIS 4 (Mo. Jan. 11, 2005). *R.W. v. Sanders* is controlling in this situation. Surprisingly, it is a case that is not even mentioned once in Appellant's brief.

SORA does not violate the substantive due process rights of Plaintiffs because it does not involve a fundamental right as those have been defined previously. Plaintiffs, as a group, do not constitute a suspect class. Therefore, the standard of review appropriate to evaluate SORA is the "rational basis" test. The State has a legitimate governmental interest in the protection of the public from harm by convicted sex offenders, which goal is furthered by the registration

scheme set forth in SORA. SORA meets the "rational basis" test in that it provides a mechanism by which the State can track the whereabouts of convicted sex offenders who reside within Missouri and provide the public with certain data so they may take whatever protective action they deem appropriate.

This Court should find that SORA does not violate the prohibition against impermissible *ex post facto* laws and retrospective laws established by the Missouri Constitution. In order to be an *ex post facto* law violative of the Missouri Constitution, the legislation must impose punishment. Since SORA has been determined by this Court in *R.W. v. Sanders* to be a civil regulatory scheme that is non-punitive, it does not impose punishment. Therefore, it is not an impermissible *ex post facto* law. Furthermore, SORA is not an impermissible retrospective law because it imposes its consequences in the future. Under SORA, the consequences result from one's failure to register, conduct which necessarily occurs in the future after enactment of the statute, not in the past as Plaintiffs postulate.

This Court should uphold the decision of the Trial Court that SORA did not violate the equal protection rights of Plaintiffs. Equal protection concepts require that persons who are similarly situated be treated alike. The appropriate classification under SORA is comprised solely of those persons required to register under SORA. All persons who must register have the same requirement: the

obligation to register under the provisions of the statute or face criminal penalties for failure to register. There is no duty to register everyone who is "dangerous" since SORA meets the "rational basis" test of protecting the public from harm by convicted sex offenders. It is not of constitutional significance that SORA does not differentiate the relative level of risk of individual registrants. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

SORA is not an unconstitutional bill of attainder under the Missouri Constitution, and this Court should confirm the Trial Court's ruling to that effect. SORA has been determined not to be "punishment", but rather a civil regulatory scheme. *R.W. v. Sanders*, 2005 Mo. LEXIS 4 at *11. Thus, it cannot inflict "punishment" on anyone. Any stigma affiliated with registration is a collateral consequence of the criminal conviction, not a punishment without a judicial trial.

Finally, SORA is not an unconstitutional "special law" under the Missouri Constitution, as the Trial Court correctly held. An impermissible special law includes less than all of those who are similarly situated. SORA includes all those who have pled guilty to or been convicted of one of the enumerated sex offenses in the scheme. The fact that other putative "dangerous" criminals are not included in the registration mandate is a matter for the legislature to determine. It is not the dangerous criminals registration scheme, but rather that of the convicted sex offenders. The Trial Court correctly determined SORA not to be an

unconstitutional special law on those grounds. This Court should confirm that ruling.

The Trial Court correctly determined that SORA's registration requirements are applicable and constitutional as applied to Plaintiffs. The Trial Court correctly found that Plaintiffs failed to meet their burden of proof to establish SORA as unconstitutional in any manner. This Court should uphold the Judgment of the Trial Court denying the declaratory and injunctive relief sought by Plaintiffs and confirm the constitutionality of SORA as applied to Plaintiffs and all convicted sex offenders.

CERTIFICATION

COMES NOW, Lisa Noel Gentleman, Deputy County Counselor, attorney of record for Respondents, Thomas Phillips, et al., and pursuant to Missouri Supreme Court Rule 84.06, states the following required information:

1. The Respondents' Brief complies with the provisions of Missouri Supreme Court Rule 55.03;
2. The Respondents' Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b);
3. The name of the word processing software used to prepare Respondents' Brief is Microsoft Word 2000;
4. The diskette accompanying Respondents' Brief has been scanned and is virus free;
5. The number of words in Respondent's Brief is 15956.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of Respondents' Brief and a diskette of same were sent via Federal Express addressed to the Clerk of the Missouri Supreme Court for filing, and two copies of Respondents' Brief with the diskette were sent by U.S. mail on this _____day of August, 2005, to:

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