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SC99656

IN THE SUPREME COURT OF MISSOURI

LIANA M. MACCOLL,

Appellant,

v.

MISSOURI STATE HIGHWAY PATROL, ET AL.,

Respondents.

Appeal from the Circuit Court of Boone County
The Honorable Jeff Harris, Judge

Substitute Brief of Missouri State Highway Patrol

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Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Table of Contents

Table of Contents 2
Table of Authorities 3
Argument 10
I. MacColl was required to register under SORNA absent a judicial order to the contrary. – Responds to MacColl's Point III 12
II. The interplay between SORA and SORNA continues to impose a lifetime registration requirement on MacColl because the 2018 SORA amendments did not alter the relevant language in Section 589.400.1(7). – Responds to MacColl's Point V 17
A. The General Assembly declined to modify the relevant language in Section 589.400.1(7) and thereby endorsed the lifetime registration requirement. 18
B. The text of Section 589.400.1(7) creates a lifetime registration requirement for those sex offenders who "have been" "required to register" under federal law because they must re-register at the end of the terms. 23
C. Declining to adopt MacColl's requested interpretation does not render the 2018 amendments meaningless. 27
III. MacColl is a Tier III offender under SORA. – Responds to MacColl's Point II 34
IV. The rule of lenity does not apply to SORA cases. – Responds to MacColl's Points II, III & IV 38
A. SORA is civil, not criminal, so the rule of lenity does not apply. 38
B. The General Assembly enacted SORA to protect children and Missourians, and SORA is not ambiguous, so the rule of lenity should not apply in any event. 42
V. MacColl's other challenges are wrong or irrelevant. – Responds to the Remainder of MacColl's Brief 43
Conclusion 45
Certificate of Compliance 46

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Table of Authorities

Cases

Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO, Council 61 v. State,
653 S.W.3d 111 (Mo. 2022).. 11, 27, 36

Asbury v. Lombardi,
846 S.W.2d 196 .... 26, 36

Boland v. Saint Luke's Health Sys. Inc.,
471 S.W.3d 703 (Mo. 2015)... 11

Brizendine v. Conrad,
71 S.W.3d 587 (Mo. 2002)... 12

Burnet v. Coronado Oil & Gas Co.,
285 U.S. 393 (1932) 24

Citizens Bank & Tr. Co. v. Dir. of Revenue,
639 S.W.2d 833 (Mo. 1982).. 19, 21

City of Aurora v. Spectra Commc'ns Grp., LLC,
592 S.W.3d 764 (Mo. 2019).. 15, 16

City of Kansas City v. Tyson,
169 S.W.3d 927 (Mo. App. 2005).. 40, 42

D.E.G. v. Juvenile Officer of Jackson Cnty.,
601 S.W.3d 212 (Mo. 2020)... 23

Dixon v. Mo. State Hwy. Patrol,
583 S.W.3d 521 (Mo. App. 2019)... 42

Doe v. Frisz,
643 S.W.3d 358 (Mo. 2022)... 28

Doe v. Keathley,
290 S.W.3d 719 (Mo. 2009)...passim

Doe v. Neer,
409 S.W.3d 451 (Mo. App. E.D. 2013) 21

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

Doe v. Toelke,
389 S.W.3d 165 (Mo. 2012)..passim

Ellis v. Whitlock,
10 Mo. 781 (1847) 39

Hixson v. Missouri State Highway Patrol,
611 S.W.3d 923 (Mo. App. E.D. 2020) 35

Holtcamp v. State,
259 S.W.3d 537 (Mo.2008).. 40, 41

Holtcamp v. State,
WD66661, 2007 WL 2700551 n.6 (Mo. App. Sept. 18, 2007) 40

Horton v. State,
462 S.W.3d 770 (Mo. App. 2015)... 16, 17

In re: McClain,
741 S.E.2d 893 (N.C. App. 2013) 45

J.B. v. Vescovo,
632 S.W.3d 861 (Mo. App. W.D. 2021) 27, 38

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

James v. Missouri State Hwy. Patrol,
505 S.W.3d 378 (Mo. App. E.D. 2016) 21

Khatri v. Trotter,
554 S.W.3d 482 (Mo. App. S.D. 2018)... 21

Kirk v. State,
520 S.W.3d 443 (Mo. 2017).. 12, 13, 41

MacColl v. Mo. State Hwy. Patrol,
WD 84739, 2022 WL 1309988 n.4 (Mo. App. May 3, 2022)......................... 12

Nowden v. Div. of Alcohol & Tobacco,
Ctrl., 552 S.W.3d 114 (Mo. 2018).. 11

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Ocasio v. United States,
578 U.S. 282 (2016) 43

Parktown Imports Inc. v. Audi of Am. Inc.,
278 S.W.3d 670 (Mo. 2009)... 11

R.W. v. Sanders,
168 S.W.3d 65 (Mo. 2005)... 41

Roe v. Replogle,
408 S.W.3d 759 (Mo. 2013)... 41

Selig v. Russell,
604 S.W.3d 817 (Mo. App. 2020) 21, 32, 34

Shoppe Intern., Inc. v. Dir. of Rev.,
156 S.W.3d 333 (Mo. 2005)... 22

State ex rel. Dean v. Daues,
14 S.W.2d 990 (Mo. Div. 1 1929) 19

State ex rel. T.J. v. Cundiff,
632 S.W.3d 353 (Mo. 2021).. 11, 35

State ex rel. Valentine v. Orr,
366 S.W.3d 534 (Mo. 2012)... 38

State v. Alpert,
543 S.W.3d 589 (Mo. 2018)... 16

State v. Bazell,
497 S.W.3d 263 (Mo. 2016)... 38

State v. Jensen,
184 S.W.3d 586 (Mo. App. 2006) 29, 30

State v. Liberty,
370 S.W.3d 537 (Mo. 2012)... 43

State v. McCord,
621 S.W.3d 496 (Mo. 2021)... 43

State v. Wade,
421 S.W.3d 429 (Mo. 2013)... 41

Templemire v. W & M Welding, Inc.,
433 S.W.3d 371 (Mo. 2014).. 12, 23, 24

United Pharmacal Co. of Mo. v. Mo. Bd. of Pharmacy,
208 S.W.3d 907 (Mo. 2006).. 40

United States v. Elk Shoulder,
738 F.3d 948 (9th Cir. 2013) 45

United States v. Templin,
354 F.Supp.3d 1181 (D. Mont. Jan. 29, 2019).. 16

United States v. Wiltberger,
18 U.S. 76 (1820) 39

Wilkerson v. State,
533 S.W.3d 755 (Mo. App. W.D. 2017) 21, 23, 34

Statutes

§ 1.120.. 20

§ 566.068 (2000) 29

§ 566.069.. 30, 31

§ 566.069 (2017) 30

§ 566.083.. 30, 36

§ 566.086... 31

§ 566.090 (RSMo. 1979 36

§ 566.093.. 29, 36

§ 589.400...passim

§ 589.400 (1997) 22

§ 589.400 (2006) 22

§ 589.400 (2008) 22

§ 589.400 (2018) 19

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

§ 589.401 26

§ 589.414 .... passim

§ 589.414 (2008) 31

§ 589.417 37

§ 632.525 22

34 U.S.C. § 20911(5)(B) 30

34 U.S.C. § 20911(5)(C) 28, 29, 31

34 U.S.C. § 20913(a) 14

34 U.S.C. § 20915(a)(1) 14, 17

34 U.S.C. § 20915(b)(1) 13, 15

34 U.S.C. §20911(5)(A) 25, 28

34 U.S.C. §20927(a) 33

42 U.S.C. § 14071(b)(6)(A) 45

U.S.C. § 20915(a)(1) 17

Regulations

28 C.F.R. § 72.5(b)(2) 14, 17

73 Fed. Reg. 38,030 (July 2, 2008) 14

72 Fed. Reg. 8894 (Feb. 28, 2007) 14

Other Authorities

4B Mo. Prac., Probate & Surrogate Laws Manual Ch. 632(2) Intro (2d ed.) . 20

A. Sullivan, Statutory Construction in Missouri,
59 J. Mo. B. 120 (2003) 11

J.S. v. Beaird, SC82274, 2000 WL 34546773, Resp.'s Br. (Mo. 2000) 40

J.S. v. Beaird, SC82274, 2000 WL 34546776, App.'s Br. (Mo. 2000) 40

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Supplemental Statement of Facts

Liana MacColl pleaded guilty on August 21, 1995, to sexual misconduct, a class A misdemeanor. D3, p. 1. According to the information, MacColl "had deviate sexual intercourse with an unnamed juvenile female, to whom defendant was not married and who was then under the age of seventeen years." D3, p. 5. While under investigation, MacColl provided a written statement that she repeatedly physically and sexually abused one of her daughters that was between 2 months and 4 months old. D16, p. 4; D17, p. 4. The abuse included MacColl bringing her newborn daughter to bed and molesting her until the daughter's death on March 30, 1990. D17, p. 4. MacColl also admitted to sexual relations with another daughter on August 13, 1994, and this is the conduct MacColl was charged with. D16, p. 6. Ultimately, the court sentenced MacColl to one year of imprisonment in the county jail, suspended execution of that sentence, and then placed MacColl on two years of probation with special conditions, including the completion of a sex offender program. D3, p. 1. MacColl began registering as a sex offender on August 24, 2000. D14, p. 4.

Twenty years later, MacColl filed a petition requesting her name be removed from the sex offender registry. D2. After discovery, the trial court granted summary judgment in favor of the State and against MacColl, finding that MacColl had an obligation to register under federal law because her

offense was against a minor. D32, p. 2. The trial court further found that MacColl's federal obligation to register persisted under the 2006 enactment of the Federal Sex Offender Registration and Notification Act ("SORNA"). *Id*. The trial court concluded that because both the Missouri Sex Offender Registry Act ("SORA") and federal law required Appellant to register with the Missouri Sex Offender Registry ("Registry"), she was not entitled to removal from the Registry. D32, p. 3.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Argument

Standard of Review

The trial court granted summary judgment to Respondents. "The standard of review on appeal of summary judgment is de novo, and summary judgment will be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law." *Nowden v. Div. of Alcohol & Tobacco Ctrl.*, 552 S.W.3d 114, 116 (Mo. 2018).

This Court reviews questions of statutory interpretation de novo. *Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO, Council 61 v. State*, 653 S.W.3d 111, 120 (Mo. 2022). This Court interprets statutes by giving effect "to the legislative intent as reflected in the plain language of the statute . . . ." *Id.* (quoting *Parktown Imports Inc. v. Audi of Am. Inc.,* 278 S.W.3d 670, 672 (Mo. 2009)). "In construing a statute, the Court must presume the legislature was aware of the state of the law at the time of its enactment." *Id.* (quoting *State ex rel. T.J. v. Cundiff*, 632 S.W.3d 353, 357 (Mo. 2021)); *see also* Craig A. Sullivan, *Statutory Construction in Missouri*, 59 J. Mo. B. 120, 123 (2003) ("If a court has construed a statute and the legislature reenacts it, the legislature is presumed to have incorporated the judicial construction into the statute."). When the Court reexamines a statutory provision it has interpreted, *stare decisis* is implicated. *Boland v. Saint Luke's Health Sys. Inc.*, 471 S.W.3d 703,

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

711 (Mo. 2015); *see also Templemire v. W & M Welding, Inc.,* 433 S.W.3d 371, 386–87 (Mo. 2014) (Fisher, J., dissenting).

Statement on Preservation

MacColl's statement of facts appears to be identical to the statement of facts she presented to the Missouri Court of Appeals, which the Missouri Court of Appeals found to be argumentative in violation of Rule 84.04(c). *MacColl v. Mo. State Hwy. Patrol*, WD 84739, 2022 WL 1309988, at *2 n.4 (Mo. App. May 3, 2022). Though this Court is not bound by the Court of Appeal's determination, and may review the brief *ex gratia*.

Additionally, MacColl's point II is multifarious and so preserves nothing for review, in that it contains multiple claims of error within a single point relied on. *See, e.g., Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. 2017).

Further, MacColl's points III and IV are not properly preserved for appellate review. Both points contain claims of error—that SORNA's so-called "clean record" provision applies automatically—in the argument section that is not presented in the point relied on. MacColl's Br. 29 (Point III); 38 (point IV). That is a violation of Rule 84.04(e), and such a violation constitutes abandonment of the claim. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. 2002). MacColl had notice of this provision because she presented the same point relied on to the Court of Appeals, and that court also found that the point violated Rule 84.04(e). *MacColl*, WD 84739, 2022 WL 1309988, at *5 n.13.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Finally, MacColl's point V is not properly preserved for appellate review because its point relied on does not comply with Rule 84.04. Non-compliance with the rule preserves nothing for review. *See, e.g., Kirk*, 520 S.W.3d at 450 n.3.

I. MacColl was required to register under SORNA absent a judicial order to the contrary. – Responds to MacColl's Point III

In her third point on appeal, MacColl contends that she has never been required to register under SORNA because she was convicted in 1995 of a Tier I offense with a fifteen-year registration requirement, and because she was automatically entitled to removal after ten years because of SORNA's "clean record" provision, which would mean her obligation to register expired *before* SORNA's enactment date. MacColl's Br. 25–36. MacColl's argument is fatally flawed because, as MacColl admits, she never sought an adjudication of her claim that she was entitled to removal after ten years instead of fifteen. MacColl's Br. 42. Nor could she; SORNA's "clean record" provision reduces the amount of time for which a sex offender must register before seeking removal. 34 U.S.C. § 20915(b)(1). In other words, MacColl still had an obligation to register under SORNA.

After MacColl was adjudicated for performing deviate sexual intercourse on a child under the age of seventeen, she was placed on probation on August

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

21, 1995. D8, p. 12–15. Thereafter, the General Assembly amended SORA to require registration of misdemeanor offenses found in Chapter 566. § 589.400.1(1). In 2006, Congress enacted SORNA, which, in relevant part, required that sex offenders register in the jurisdiction in which they live. 34 U.S.C. § 20913(a). MacColl met the definition of a sex offender because she committed "a criminal offense that has an element involving a sexual act or sexual contact with another" and because she committed a "criminal offense that is specified against a minor." *Id.* § 20911(5)(A)(i–ii). In 2008, SORNA's provisions were made retroactive through Department of Justice regulations. 72 Fed. Reg. 8894 (Feb. 28, 2007); 73 Fed. Reg. 38,030 (July 2, 2008). This Court has long held that "SORNA applies to individuals who committed a sex offense prior to July 20, 2006." *Doe v. Keathley*, 290 S.W.3d 719, 720 (Mo. 2009).

As a Tier I offender under SORNA, MacColl had a federal registration obligation that began after her 1995 adjudication and lasted until 2010. 34 U.S.C. § 20915(a)(1); 28 C.F.R. § 72.5(b)(2). Because MacColl's federal registration obligation extended past the effective date of SORNA, she is *presently* someone who "has been . . . required to register" under federal law. *Doe v. Toelke*, 389 S.W.3d 165, 167 (Mo. 2012).

MacColl acknowledges this, but asks the Court to find that she has never had a federal obligation to register because SORNA provides for a ten-year registration period instead of a fifteen-year registration period if the sex

offender meets certain criteria. MacColl's Br. 27–28. SORNA's "clean record provision" provides for a reduction if the offender has not been convicted of any additional offense with a possible sentence exceeding one year, and has not been convicted of an additional sex offense, and has successfully completed probation, and has successfully completed a sex offender treatment program certified by a jurisdiction or by the attorney general. 34 U.S.C. § 20915(b)(1).

MacColl's argument is flawed for four reasons. *First*, and simplest, the record on summary judgment does not establish that the sex offender treatment MacColl claims to have completed has been "certified by a jurisdiction or by the attorney general." *See, e.g.*, D22, p. 6 (alleging that MacColl completed a program but failing to allege that the program was certified by a jurisdiction or by the United States Attorney General). In her brief, MacColl asserts she has completed a program certified by a jurisdiction or by the attorney general, but she cites no facts to support the *certification* portion of the claim. MacColl's Br. 32–34. As the party seeking declaratory judgment, MacColl had the burden of proof to provide evidence proving her claim. *City of Aurora v. Spectra Commc'ns Grp., LLC*, 592 S.W.3d 764, 796 (Mo. 2019). She has failed to meet that burden.

Second, application of the "clean record" provision requires a judicial determination; it is not an automatic process. At first blush, MacColl's litigation of this point in this declaratory judgment action demonstrates that a

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

judicial process can—and must—resolve this question. Moreover, other offenders have litigated this question and received court orders granting the provision's registration reduction. *See, e.g., United States v. Templin*, 354 F.Supp.3d 1181, 1183 (D. Mont. Jan. 29, 2019).

Third, MacColl's statutory argument is unpersuasive. MacColl begins by contending that SORNA establishes a right to the "clean record" provision because the act uses the word "shall." MacColl's Br. 43–44. But that is merely support for an offender's entitlement to the reduction if the offender meets the statutory requirements. After all, the purpose of declaratory judgment is to determine the rights and responsibilities between the parties. *See, e.g., State v. Alpert*, 543 S.W.3d 589, 592 (Mo. 2018). Instead of establishing that the "clean record" provision applies automatically, MacColl poses a series of hypothetical questions. MacColl's Br. 43–44. But again, MacColl has the burden of proof. *City of Aurora*, 592 S.W.3d at 796. And again, she has failed to satisfy it.

Although not binding on this Court, the Court of Appeals has considered and rejected a similar claim. In *Horton v. State*, 462 S.W.3d 770, 773 (Mo. App. 2015), the Court of Appeals considered a claim that a sex offender did not have an obligation to register under SORNA, and therefore had no obligation to register under SORA. *Id.* The court observed that the sex offender was a Tier I offender under SORNA—like MacColl—and was therefore required to

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

register for fifteen years "unless . . . allowed a reduction" under the "clean record" provision. *Id.* (quoting 42 U.S.C. § 16915(a)(1))). The Court of Appeals noted that the sex offender had not proven that he had previously been "allowed" a reduction. *Id.*

MacColl, like the offender in *Horton*, has failed to prove she has previously been "allowed" a reduction. To be sure, MacColl contests *Horton*'s applicability based on the record deficiencies present in *Horton*. MacColl's Br. 41–42. But, as explained above, MacColl has also failed to prove she has previously requested or received an allowance.

Fourth and finally, MacColl's argument fails because, in order to receive a reduction from fifteen years to ten years, MacColl would have had an obligation to register in the first instance. The soonest MacColl could have sought the reduction under the "clean record" provision was 2005. U.S.C. § 20915(a)(1); 28 C.F.R. § 72.5(b)(2). But MacColl did not bring her claim until this litigation. That, in turn, means that MacColl was subject to SORNA's registration requirements from the effective date of SORNA through 2010. As a result, she is *presently* someone who "has been . . . required to register" under federal law. *Toelke*, 389 S.W.3d at 167.

Conclusion

MacColl's third point—where she argues that she was automatically removed from SORNA under the "clean record" provision—is meritless and

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does not entitle her to relief. MacColl was subject to SORNA until 2010. MacColl has failed to prove she was actually entitled to the "clean record" provision under SORNA because she failed to plead uncontroverted facts establishing that her program was "certified." MacColl also failed to show that the "clean record" provision applies automatically. Any one of these deficiencies is sufficient to prove that MacColl was required to register under SORNA.

II. The interplay between SORA and SORNA continues to impose a lifetime registration requirement on MacColl because the 2018 SORA amendments did not alter the relevant language in Section 589.400.1(7). – Responds to MacColl's Point V

Nearly ten years ago, this Court held that Section 589.400.1(7) imposes a lifetime registration requirement. *Toelke*, 389 S.W.3d at 165. This Court's holding in *Toelke* followed from its holding three years earlier that Section 589.400.1(7) imposed an "independent" obligation to register under Missouri law on those who have had or presently have any obligation to register as a sex offender under federal law. *Doe v. Keathley*, 290 S.W.3d 719, 720 (Mo. 2009). In 2018, the General Assembly modified many provisions of SORA, but did not disturb that portion of Section 589.400.1(7).

In her fifth point, MacColl contends that despite this history, this Court should abandon its interpretation of Section 589.400.1(7) and adopt the rationale of the Eastern District's decision in *Smith v. St. Louis County Police*

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Department, et al.,. MacColl's Br. 48–50. This Court should reject MacColl's request.

When the General Assembly reenacted Section 589.400.1(7), it left the "has been . . . required to register" language in place, which is the language that created the lifetime registration requirement. *Compare* § 589.400.1(7) (2009) *with* § 589.400.1(7) (2018). Likewise, by readopting the same language, the General Assembly incorporated the previous judicial interpretation into the statute. And maintaining this interpretation does not render the 2018 amendments a nullity.

A. The General Assembly declined to modify the relevant language in Section 589.400.1(7) and thereby endorsed the lifetime registration requirement.

MacColl does not address that the General Assembly declined to modify the relevant portion of Section 589.400.1(7) when repealing and reenacting Section 589.400 *et seq*. MacColl's Br. 48–50. Instead, MacColl merely copies selected portions the Eastern District's decision in *Smith v. St. Louis County Police Department, et al.,* which is not binding on this Court. MacColl's Br. 48–50. However, when the legislature reenacts a previously interpreted provision, this Court will presume that the General Assembly was aware of judicial interpretations of the statute *and* that the General Assembly chose to endorse those decisions. *Citizens Bank & Tr. Co. v. Dir. of Revenue*, 639 S.W.2d 833, 835 (Mo. 1982) (citing *State ex rel. Dean v. Daues*, 14 S.W.2d 990, 1002 (Mo.

Div. 1 1929)). This presumption is strengthened by the General Assembly's long-standing endorsement of that position. § 1.120 ("The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment.").

SORA was enacted in 1994 and became known as "Megan's Law" in 1997. *J.S. v. Beaird*, 28 S.W.3d 875, 875 (Mo. 2000).[1] In 2006, SORA included a provision that required sex offenders to register under SORA if the offender "has been or is required to register in another state or under federal or military law." § 589.400.1(5). In 2009, this Court held for the first time that this language imposed an independent registration obligation on sex offenders. *Keathley*, 290 S.W.3d at 720. Eventually, that language was moved to Section 589.400.1(7), and in 2012, this Court held that section imposed an independent, lifetime registration requirement. *Toelke*, 389 S.W.3d at 165 (SORA "provides that the lifetime registration requirements "of '[s]ections 589.400 to 589.424 shall apply to' . . ." those with an obligation to register under Section 589.400.1(7)). The holding that Section 589.400.1(7) imposed an

[1] The registration requirement became known as Megan's Law after an eight-year-old girl was lured to a sex offender's home before being raped and murdered. Sexually Violent Predators, Civil Commitment, 4B Mo. Prac., Probate & Surrogate Laws Manual Ch. 632(2) Intro (2d ed.). The short title seems to have been removed when the 2006 statutes were moved to electronic resources. Resp. App. A1.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

independent, lifetime registration requirement was largely followed by the Court of Appeals. *See, e.g., Selig v. Russell*, 604 S.W.3d 817, 821 (Mo. App. W.D. 2020); *Wilkerson v. State*, 533 S.W.3d 755, 761 (Mo. App. W.D. 2017), *James v. Missouri State Hwy. Patro*l, 505 S.W.3d 378, 383 (Mo. App. E.D. 2016); *but see, e.g., Khatri v. Trotter*, 554 S.W.3d 482, 483 (Mo. App. S.D. 2018) (citing both § 589.400.3 and § 589.400.7); *Doe v. Neer*, 409 S.W.3d 451, 459 n.6 (Mo. App. E.D. 2013) (citing § 589.400.3).

So while some opinions cited only Section 589.400.1(7) and others cited both Section 589.400.1(7) and Section 589.400.3, this Court's cases were binding on the Court of Appeals, and this Court's decisions—which cited to *only* Section 589.400.1(7)—made plain that the statute imposed an independent, lifetime-registration requirement. *Keathley*, 290 S.W.3d at 720; *Toelke*, 389 S.W.3d at 165. Under those circumstances, the Court should credit the presumption that the General Assembly was aware of its cases when it did not alter Section 589.400.1(7) during the 2018 amendments. *Citizens Bank & Trust Co.*, 639 S.W.2d at 835.

The General Assembly's history of amending SORA and its history of amending the Sexually Violent Predator Act (SVPA) further supports this presumption. Beginning in 1997, defendants who committed a non-sexual

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

kidnapping were required to register under SORA. § 589.400.1(2) (1997)[2]; *Doe v. Phillips*, 194 S.W.3d 833, 840 (Mo. 2006) (recognizing that "Missouri's law went beyond federal registration requirements" by requiring registration of non-sexual kidnapping offenders). But the General Assembly amended SORA only two legislative sessions after *Phillips* and removed non-sexual parental kidnapping from the list of Missouri offenses that would trigger SORA registration requirements.[3] *Compare* § 589.400 (2006) *with* § 589.400.6 (2008) (providing that non-sexual parental kidnapping is not a registrable offense). More recently, the General Assembly passed legislation to amend the SVPA to abrogate two statutory interpretation decisions from the Missouri Court of Appeals, with which it disagreed. § 632.525.

Although legislative inaction gives rise to a weaker presumption than legislative action does, *Med. Shoppe Intern., Inc. v. Dir. of Rev.*, 156 S.W.3d 333, 334 (Mo. 2005), there is ample evidence of legislative action with respect to SORA because the General Assembly undertook a large-scale amendment process in 2018, which did not alter the relevant portion of Section 589.400.1(7). And as the legislative history shows, the General Assembly has

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[2] The addition of kidnapping corresponded to the events causing Missouri's registration scheme to be named "Megan's law."

[3] *Phillips* was handed down on June 30, 2006. *Phillips*, 194 S.W.3d at 833. The 2006 legislative session ended in May 2006, under the Missouri Constitution.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

often passed amendments to SORA. Resp. App. A1. (amendments in 1997, 1998, 2000, 2002, 2003, 2004, 2005).[4] This Court handed down *Keathley* on June 16, 2009, and the General Assembly readopted Section 589.400.1(7) in both 2017 and 2018. *Keathley*, 290 S.W.3d at 719. And before the 2018 amendment, the Court of Appeals issued *Wilkerson v. State*, where it questioned the General Assembly's policy decision. 533 S.W.3d at 761. But the General Assembly still did not change the relevant language when reenacting Section 589.400.1(7) during the 2018 amendments.

One final factor justifies declining to re-interpret Section 589.400.1(7): *stare decisis*. Several members of this Court have expressed that *stare decisis* counsels strongly against altering the statutory interpretation of a statutory provision that has not been altered itself. *See, e.g., D.E.G. v. Juvenile Officer of Jackson Cnty.*, 601 S.W.3d 212, 221–22 (Mo. 2020) (Powell, J., dissenting); *Templemire v. W & M Welding, Inc.,* 433 S.W.3d 371, 387–388 (Mo. 2014) ("Adherence to precedent is especially vital in my view with respect to prior cases interpreting statutes.") (Fisher, J., dissenting). Statutory interpretation sits at the intersection of the judicial and legislative branches, and respect between the branches is fostered when this Court follows the presumption that the General Assembly knows this Court's decisions and ratifies them when

[4] Although not in the appendix, the General Assembly also amended SORA in 2006, 2008, 2009, 2017, and 2018.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

reenacting without altering language previously interpreted by this Court. Justice Brandeis put it best: "in most matters it is more important that the applicable rule of law be settled than that it be settled right" especially when "correction can be had by legislation." *Templemire,* 433 S.W.3d at 387 (Fisher, J., dissenting) (quoting *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406–10 (1932)).

B. The text of Section 589.400.1(7) creates a lifetime registration requirement for those sex offenders who "have been" "required to register" under federal law because they must re-register at the end of the terms.

Even if this Court were to decide that *Keathley* and later cases were wrongly decided and that Section 589.400.1(7) does not impose an independent, lifetime-registration requirement, this Court should still affirm because MacColl will still have to register as someone who "has been" required to register under SORNA.

In *Toelke*, this Court rejected a retrospectivity challenge from an offender who was required to register because of SORA's requirement that anyone who "has been or is required to register . . . under tribal, federal, or military law . . . ." *Toelke*, 389 S.W.3d at 167 (quoting § 589.400.1(7)). In rejecting the challenge, this Court observed that even if an offender's obligation to register under SORNA has lapsed, that person is still obligated to register under SORA because of that person's *present* status as someone who "has been"

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

"required to register" "under tribal, federal, or military law . . . ." *Id. Toelke*'s holding is integral to the modern operation of Missouri's Registry.

After MacColl was adjudicated for having sexual relations with her daughter, she was placed on probation on August 21, 1995. As explained in point I, *supra*, SORNA's 2006 enactment and 2008 retroactive application to MacColl imposed a federal and state obligation to register as a sex offender. MacColl's state obligation under Section 589.400.1(7) applied because MacColl's offense triggered SORNA's registration requirements. 34 U.S.C. §20911(5)(A).

And under the current version of SORA's Tier provisions, MacColl would be eligible for removal after ten or fifteen years—if MacColl is correct that she is a Tier I offender under Missouri law.[5] § 589.400.4(1). Even as a Tier I offender, that would, in turn, return MacColl to her status post-adjudication. But, under that scenario, MacColl would still *presently be* someone who "has been" "required to register" "under tribal, federal, or military law . . . ." § 589.400.1(7). And that would again trigger the registration requirements.

This result does not invalidate the 2018 amendments to SORA for the reasons stated in point II.C, *infra*. But more importantly, SORA's plain text

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[5] MacColl is actually a tier III offender under Missouri law because her offense is not contained within tier I or tier II. § 589.414.7(5); *see also* point III, *infra*.

expressly allows for a class of offenders to be permanently removed from the registry. SORA provides that "[a]ny person currently on the sexual offender registry . . . for being adjudicated for the offense of felonious restraint of a nonsexual nature when the victim was a child and he or she was the parent or guardian of the child . . . shall be removed from the registry." § 589.400.8. There is no corresponding provision that applies to removal under the Tier system.

Instead, the General Assembly has provided that the registration requirements of SORA—including Section 589.400.1(7)—must apply unless, for example, the offender did not need not register and her name "shall be removed from the registry" or a court has ordered removal under Section 589.401. § 589.400.3(2)–(3). MacColl, as an offender who "has been" required to register under SORNA cannot satisfy subsection 2. Nor can MacColl satisfy subsection 3, because it, in turn, requires the Court to deny the petition unless the offender has satisfied every provision of SORA, including Section 589.400.1(7). § 589.401.18.

One of the key canons of statutory construction is to avoid reading words or clauses into the statute that one party may wish were present. *Asbury v. Lombardi*, 846 S.W.2d 196, 202 n. 9 (Mo. 1993). Put another way, the General Assembly has shown how it wishes to implement final and permanent removal: by using the words "Any person currently on the sexual offender registry . . .

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

[condition to be met] . . . shall be removed from the registry." § 589.400.8. But the General Assembly did not use that language here.

The result of the language the General Assembly elected to use is that when an offender completes the time proscribed by the Tier system, the offender remains someone who "has been" required to register under SORNA. That, in turn, triggers the registration requirements under Section 589.400.1(7).

When interpreting a statute, the Court is to look to the *statute*'s purpose, not the amendment's purpose. *Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO, Council 61*, 653 S.W.3d at 120. And SORA's purpose is to protect children and Missourians from sex offenders, not to enable easier removal from the Registry. *Phillips*, 194 S.W.3d at 839. SORA accomplishes its goal by recognizing and responding to the known danger of recidivism among sex offenders. *Id.* SORA has never been a redemptive statute, and the 2018 amendments did not transform its purpose from protecting Missourians into helping sex offenders. *See J.B. v. Vescovo,* 632 S.W.3d 861, 866 (Mo. App. W.D. 2021) (rejecting an argument that SORA is a remedial or redemptive statute).

As a result of SORA's purpose and plain text, Section 589.400.1(7)'s "has been or is required to register . . . under tribal, federal, or military law . . ." imposes a continuous requirement to register even after the expiration of the current registration term.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

C. Declining to adopt MacColl's requested interpretation does not render the 2018 amendments meaningless.

Rejecting MacColl's requested interpretation does not render SORA's 2018 amendments meaningless. There is not complete overlap between all registrable offenses under Missouri and federal law. For instance, if a person commits an offense that does not involve a minor, a sexual act, or sexual contact, then there is no obligation to register under SORNA. 34 U.S.C. § 20911(5)(A). Federal law also excludes consensual sex acts where the child victim is at least 13 and the perpetrator was no more than four years older. 34 U.S.C. § 20911(5)(C). Some Missouri offenses prohibit sex acts that might otherwise be consensual. Because Missouri uses the non-categorical approach, courts look to the convicted individual's actual conduct when deciding whether a person must register. *Doe v. Frisz*, 643 S.W.3d 358, 362 (Mo. 2022). Beyond these differences, the Tier system also alters the frequency of registration requirements. Taken together, the 2018 amendments are not meaningless because they still work to safeguard Missourians and preserve access to federal funding.

i. Several Missouri offenses require registration under SORA, but not SORNA.

As a result of the interplay between SORNA and Missouri's criminal code, some Missouri offenses require SORA registration but not SORNA registration. These offenses fall largely within three categories: (1) Missouri

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

offenses that do not require sexual contact, (2) Missouri offenses that do not contain a so-called "age-gap" provision, and (3) Missouri offenses that operate regardless of the victim's consent.

Not every Missouri sex offense requires a criminal defendant to have sexual contact with the victim. For instance, an offender can commit first-degree sexual misconduct under Section 566.093.1 by "expos[ing] his or her genitals under circumstances in which he or she knows that his or her conduct is likely to cause affront or harm." § 566.093.1. If the victim is older than thirteen, then there would be no federal registration requirement. 34 U.S.C. § 20911(5)(C).

Many Missouri offenses do not contain an "age-gap" provision, and so they impose more stringent registration requirements than federal law. For years, second-degree child molestation acted as a catch-all for sexual offenses against a Missouri child. § 566.068 (2000). Under the prior version of second-degree child molestation, any defendant—regardless of age or consent—who "subject[ed] another person who is less than seventeen years of age to sexual contact" was guilty of an offense. *Id.*; *State v. Jensen*, 184 S.W.3d 586, 589 (Mo. App. 2006). Sex offenders who committed second-degree child molestation would always have an obligation to register under SORA, but they would only be required to register under SORNA if they were four years older than the

victim. The 2018 amendments lessened—but did not eliminate—the Missouri registration requirement.[6]

After the criminal-code rewrite, vestiges of the former catch-all have persisted. For instance, third-degree child molestation prohibits subjecting "a child who is less than fourteen years of age to sexual contact" regardless of the defendant's age, or the victim's consent. § 566.069 (2017). So there is a class of offenders who, despite committing a registerable sex offense under Missouri law, will have no federal obligation to register. *Compare* § 566.069 *with* 34 U.S.C. § 20911(5)(B). The same is true for other sex offenses. *See*, *e.g.,* § 566.083 (prohibiting any person, regardless of age or consent, from exposing his or her genitals to a child less than fifteen years old to arouse or gratify the sexual desire of any person).[7]

And there are Missouri sex offenses that apply regardless of consent. Some of those offenses impose a lifetime registration requirement even when there is no federal registration requirement. For instance, all first-degree statutory sodomy offenders must register for life under SORA, even though a

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[6] Under the 2018 amendments, any offender within the four-year age-gap provision would be eligible for removal after ten or fifteen years. § 589.414.5(n); *Jensen*, 184 S.W.3d at 589.

[7] Under the 2018 amendments, this sex offender would be eligible for removal after ten or fifteen years if it is a first offense and the punishment is less than a year, or after twenty-five years otherwise. § 589.414.5(1)(b); § 589.414.6(1)(l).

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

subclass of those offenders would not have to register under SORNA. *Compare* § 566.069 (defining first-degree statutory sodomy to include a victim under the age of fourteen) *and* § 589.414.7(2)(e) (classifying first-degree statutory sodomy as a Tier III offense) *with* 34 U.S.C. § 20911(5)(C). Missouri law also prohibits some sexual acts, even when they are otherwise consensual. *See, e.g.,* § 566.086 (prohibiting sexual contact between any secondary school student and a teacher or student teacher regardless of victim's age or consent).[8] Some of these offenders would not have to register under SORNA.

ii. The 2018 amendments significantly altered how often sex offenders must update their registration.

The 2018 amendments introduction of the Tier system also altered the frequency by which Missouri sex offenders must register. Before the 2018 amendments, all registered sex offenders had to report at least twice per year. § 589.414.4 (2008). After the 2018 amendments, Tier I offenders are required to report once per year, Tier II offenders are required to report twice per year, and Tier III offenders are required to report once every ninety days. § 589.414.5 (Tier I); § 589.414.6 (Tier II); § 589.414.7 (Tier III).

[8] Under the 2018 amendments, these sex offenders would be eligible for removal after twenty-five years. § 589.414.6(1)(c).

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

iii. The 2018 amendments are not meaningless; they strike a balance between reducing some registration requirements and protecting Missourians, and ensuring Missouri's access to federal funding.

It is true that the 2018 amendments associated specific registration-length requirements with specific Tiers. But those changes are not rendered meaningless because not every offense listed in Tier I or Tier II correspond to a federal obligation to register. The legislature's approach adheres to its cautious view of removing sex-offender registration requirements. *See, e.g., Phillips*, 194 S.W.3d at 840 (recognizing that for years "Missouri's law went beyond federal registration requirements" by requiring registration of non-sexual kidnapping offenders). In addition, the General Assembly has provided for the possibility of a gradual reduction in the number of new offenders who are required to register. If Congress more narrowly defines "sex offender" in the future, then future Missouri sex offenders will receive that benefit without future intervention by the General Assembly because those future offenders will not have had a federal registration obligation.

In the meantime, the General Assembly has guarded Missouri's access to federal funds by continuing to require the registration of those who "have had" a federal obligation to register. *Selig v. Russell*, 604 S.W.3d 817, 821–22 (Mo. App. 2020). That is because if the United States Attorney General determines that Missouri is not in "substantial compliance," then Missouri will

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

lose ten percent of the federal funds it receives under the Omnibus Crime Control and Safe Streets Act of 1968. *Id.*; 34 U.S.C. §20927(a).[9] While the General Assembly's language may have been "awkward," that does not mean this Court should adopt MacColl's proposed reading of the statute. *J.S.*, 28 S.W.3d at 876 (recognizing SORA's purpose despite "awkward" language).

Before the 2018 amendments, SORA provided certain sex offenders the opportunity to petition for removal from the Registry after ten years under Section 589.400.7 or after two years under Section 589.400.8. Without Section 589.400.1(7), SORA would not have substantially complied with SORNA during this time because of these short time periods for registration. The addition of the Tier system after the 2018 amendments provides more protection of federal funds by modeling the system and its time periods after those present in SORNA.

But these amendments did not try to remove the lifetime registration requirement found in Section 589.400.1(7). While the two-year and ten-year removal provisions were in place, the Court of Appeals recognized that a sex offender still had a lifetime requirement under Section 589.400.1(7).

[9] Missouri appears to have received $ 6,001,777.00 of federal funding through this program in (federal) fiscal year 2021. U.S. Dep't. of Justice, NCJ 304372, Justice Assistance Grant (JAG) Program 4 (June 2022) available at https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jagp20.pdf Missouri ranks 12th in terms of federal funding from this program. *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Wilkerson, 533 S.W.3d at 761. After the Missouri Court of Appeals decided *Wilkerson*, the legislature passed the 2018 amendments but left the relevant language in 589.400.1(7) undisturbed. This is despite the *Wilkerson* court specifically noting that the "[t]he lifetime registration obligation which results from *Toelke* is far longer than the registration obligation imposed by either State or federal law, considered in isolation," and noting that this result was "troubling." *Id*. The *Wilkerson* court further pondered whether the General Assembly intended sex offenders' registration requirements to "ratchet up" to a lifetime requirement. *Id*. The *Wilkerson* opinion stopped just short of calling on the General Assembly to amend the statute, and the General Assembly responded by leaving the "has been" language in 589.400.1(7) undisturbed when implementing the 2018 amendments. *Selig*, 604 S.W.3d at 826–27 ("Thus, we can only presume that the legislature intended this result.").

In sum, MacColl's requested interpretation of SORA is not required for the 2018 amendments to have had some substantial effect. The 2018 amendments allow for a class of sex offenders to be removed from the Missouri registry. The 2018 amendments significantly alter the frequency of registration. And the 2018 amendments provide for automatic SORA narrowing for future sex offenders if Congress narrows its legislation. Given all of this, Section 589.400.1(7)'s lifetime registration requirement does not conflict with the canon that requires the assumption that the legislature

intends a substantive change when it amends an act. *See, e.g., State ex rel. T.J.*, 632 S.W.3d at 357.

Conclusion

For the reasons stated above, the Court should find that Section 589.400.1(7) continues to require registration for those who "have been . . . required to register" under SORNA, and deny MacColl's fifth point.

III. MacColl is a Tier III offender under SORA. – Responds to MacColl's Point II

In her brief, MacColl contends that she is a Tier I offender under SORA. (MacColl's Br. 22, 28, 32). But MacColl is a Tier III offender because sexual misconduct under Section 566.090—the statute under which MacColl was convicted—does not appear in either Tier I or Tier II. It is, therefore, a Tier III offense. In the alternative, MacColl's conviction for sexual misconduct carried a sentence of exactly one year's imprisonment and so falls outside of Tier I, which requires a sentence of *less* than one year, and it falls outside of Tier II, which requires a sentence of *more* than one year.

After the 2018 amendments, SORA lists which offenses require registration and for how long while maintaining a catch-all provision that categorizes an offense as Tier III if it is not listed in Tier I or Tier II. §

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

589.414.[10] MacColl points out that some types of sexual misconduct appear in Tier I and Tier II. MacColl's Br. 32.

SORA provides the following:

Tier	Relevant Provision	Citation
Tier I	Sexual misconduct involving a child under section 566.083 if it is a first offense and the punishment is less than one year	§ 589.414.5(1)(b)
Tier I	Sexual misconduct in the first degree under section 566.093	§ 589.414.5(1)(l)
Tier II	Sexual misconduct involving a child under section 566.083 if it is a first offense and the penalty is a term of imprisonment of more than a year	§ 589.414.6(1)(l)
Tier III	Any offender who is adjudicated in Missouri for any offense of a sexual nature requiring registration under sections 589.400 to 589.425 that is not classified as a tier I or tier II offense in this section.	§ 589.417.7(5)

MacColl was not convicted of sexual misconduct under Section 566.083 or under Section 566.093; she was convicted of sexual misconduct under Section 566.090(2). D9, p. 14; § 566.090 (RSMo. 1979). When performing statutory interpretation, this Court looks to the plain language of the statute. *Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO, Council 61*, 653 S.W.3d at 120. This Court may not read words or clauses into the statute that it or one party

[10] Tier III requires lifetime supervision, a requirement which previously applied to all sex offenders prior to the 2018 SORA amendments. *Hixson v. Missouri State Hwy. Patrol*, 611 S.W.3d 923, 925 (Mo. App. 2020). Those within the catch-all provision are in the same position before and after the SORA amendments.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

may wish were present. *Asbury*, 846 S.W.2d at 202 n. 9. SORA is clear that sexual misconduct must have been committed under Sections 566.083 or 566.093 in order to be classified as Tier I or Tier II. Accordingly, Sections 589.414.5(1)(b), 589.414.5(1)(l) and 589.414.6(1)(l) do not apply to MacColl. When a registerable offense is not listed within Tier I or Tier II, then the offense falls within SORA's catch-all provision in Tier III. § 589.414.7(5).

MacColl focuses her argument on the differences between Section 589.414.5(1)(b) and 589.414.6(1)(l), which channel sexual misconduct under Section 566.083 into Tier I or Tier II depending on whether "the punishment is less than one year" or whether "the penalty is a term of imprisonment of more than a year." MacColl's Br. 18–22. In support of her argument, MacColl invokes the canons of construction, the definitions of punishment and penalty, and the rule of lenity.[11] The Court need not address those arguments for two reasons. First, MacColl was adjudicated under Section 566.090 (RSMo. 1979), so a discussion of Section 556.083 is irrelevant. And second, MacColl's arguments assume that SORA is ambiguous. It is not. If an offense is not specifically enumerated, then it falls within Tier III. § 589.417.7(5). A person adjudicated under Section 566.083 and sentenced to a term of exactly one year would be adjudicated of an offense not specifically listed within Tier I or Tier

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[11] The rule of lenity is inapplicable as discussed in point IV, *infra.*

II. § 589.414.5(1)(b); § 589.414.6(1)(l). That offense is, therefore, within Tier III. § 589.417.7(5).

MacColl makes one final argument: that Respondent is attempting to "reopen the original case against [MacColl] and to re-characterize the offense to which [MacColl] pled guilty as a more serious offense. . . ." MacColl's Br. 22. MacColl is mistaken. Missouri law is clear that a misdemeanor offense can reside within Tier III. *J.B. v. Vescovo*, 632 S.W.3d 861, 863 (Mo. App. 2021) (requiring lifetime registration under Tier III for class A misdemeanor endangering the welfare of a child). MacColl's real argument is that the General Assembly's policy decisions are unfair as applied to her. But policy considerations are for the General Assembly, not the Court. *State v. Bazell*, 497 S.W.3d 263, 266 (Mo. 2016) (citing *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. 2012) ("If the words are clear, the Court must apply the plain meaning of the law.")).

Conclusion

MacColl's adjudication for sexual misconduct was under Section 566.090, and that provision does not appear within either Tier I or Tier II. It is, therefore, a Tier III offense under the catch-all provision. In the alternative, MacColl's adjudication for sexual misconduct carried a sentence of exactly one year. That makes it a Tier III offense under the catch-all provision because Tier I sexual misconduct requires a punishment of *less* than one year of

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

imprisonment, and Tier II sexual misconduct requires a penalty of *more* than one year of imprisonment. Under either scenario, MacColl is a Tier III offender and subject to SORA's lifetime registration requirement.

IV. The rule of lenity does not apply to SORA cases. – Responds to MacColl's Points II, III & IV

Throughout her brief, MacColl invokes the rule of lenity to persuade the Court to grant relief. MacColl's Br. 21, 26, 47. Although SORA is not ambiguous, this Court should still address MacColl's argument in order to correct a split in authority about whether the rule of lenity applies to civil acts like SORA. The rule of lenity should not apply in SORA cases because the act is civil and because the rule of lenity is a canon of last resort, not a canon of first refuge.

A. SORA is civil, not criminal, so the rule of lenity does not apply.

The rule of lenity is an ancient doctrine and its applicability to *only* penal statues is just as ancient. 1 William Blackstone, *Commentaries* *88. The rule has two purposes: respecting the rights of individuals, and ensuring "that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.). In Missouri, this has been the law for more than 150 years. *See, e.g., Ellis v. Whitlock*, 10 Mo. 781, 783 (1847).

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

But in 2000, this Court appeared to break with this tradition when it applied the rule of lenity to a civil statute in *J.S.*, 28 S.W.3d at 877. *United Pharmacal Co. of Mo. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 913 (Mo. 2006) (Stith, J., concurring) ("*J.S.* "was the first to use the rule of lenity to interpret a civil statue in a declaratory judgment action."). *J.S.* has stood on shaky ground since it was decided. This Court's rule of lenity analysis appeared in an alternative holding based on one paragraph in the appellant's brief that was not answered in the respondent's brief. *Compare J.S. v. Beaird*, SC82274, 2000 WL 34546776, App.'s Br. at *19–20 (Mo. 2000) *with J.S. v. Beaird*, SC82274, 2000 WL 34546773, Resp.'s Br. (Mo. 2000). From there, Missouri courts began to apply the rule of lenity to civil cases.

Following *J.S.*, the Western District expanded the holding to a municipal ordinance. *City of Kansas City v. Tyson*, 169 S.W.3d 927, 929 (Mo. App. 2005). One year later, this Court then relied on its own dicta and the Western District's expansion of that dicta when deciding *United Pharmacal Co. of Missouri*. Since then, the precedent has only been applied in SORA cases.[12]

[12] In fact, following *United Pharmacal Company of Missouri*, the Western District correctly refused to extend the rule of lenity to the Sexually Violent Predator Act because extending the rule would require "deviat[ing] so grossly from previous Missouri Supreme Court precedent only holding the rule of lenity applicable to criminal and penal statutes." *Holtcamp v. State*, WD66661, 2007 WL 2700551, at *3 n.6 (Mo. App. Sept. 18, 2007) (Opinion of Breckenridge, J.), *vacated on transfer by Holtcamp v. State*, 259 S.W.3d 537 (Mo. 2008).

But this Court has twice held that SORA is not a penal statute. In *R.W. v. Sanders*, 168 S.W.3d 65, 70 (Mo. 2005), this Court applied the five-factor balancing test and concluded the thrust of registration requirements in SORA were civil and regulatory, not penal. *Sanders*, 168 S.W.3d at 70. And in 2013, the Court reaffirmed that holding. *Roe v. Replogle*, 408 S.W.3d 759, 766–67 (Mo. 2013); *see also State v. Wade*, 421 S.W.3d 429, 436 (Mo. 2013) (holding that a statute prohibiting sex offender's presence at parks was a criminal statute because it was not like the civil registration scheme.)

In other contexts, this Court has used SORA as the civil benchmark in comparing whether other statues are criminal or civil. When statutes are more punitive and are not designed to assist SORA, they have been found to be criminal, not civil. *See, e.g., Wade*, 421 S.W.3d at 437. This Court's use of SORA as the example of a civil law further militates against applying the rule of lenity.

Even more, this Court recently reaffirmed that the SVPA—which involves physical confinement of sexually violent predators—is civil, not criminal. *Kirk*, 520 S.W.3d at 450. This is true even though the SVPA implicates liberty interests. *Id.* Although the purpose of the SVPA—to protect Missourians from the "particularly noxious threat" of sexually violent predators, *Holtcamp*, 259 S.W.3d at 537—is similar to the purpose of SORA, there can be no serious argument that SORA is more punitive than the SVPA.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

In sum, the Court of Appeals has applied the rule of lenity in SORA cases despite the holding that SORA is civil and not criminal. The lower courts' use of the rule of lenity flows from this Court's dicta in *J.S. v. Beaird*. Given all of this, this Court should issue an opinion returning to the long-standing and well-established understanding that the rule of lenity does not apply to civil regulatory schemes, at least insofar as SORA is concerned.[13]

Against this history and nearly universal principles, MacColl relies on *Dixon v. Mo. State Hwy. Patrol*, 583 S.W.3d 521 (Mo. App. 2019), *J.S. v. Beaird*, 28 S.W.3d 875, 877 (Mo 2000), and *City of Kansas City v. Tyson*, 169 S.W.3d 927 (Mo. App. 2005). MacColl's Br. 21. As discussed above, *J.S.* is infirm, and *Tyson* relies completely on *J.S. Dixon*'s rule of lenity analysis, in turn, relies on *J.S.* as well. *Dixon*, 583 S.W.3.d at 528. Accordingly, this Court should decline to extend *Dixon*, and should overturn its rule of lenity analysis.[14]

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[13] This Court need not reconsider *United Pharmacal Company of Missouri* or consider *Tyson* in this case.

[14] *Dixon* also contains separate analysis about the implication of transferring statutory provisions whose elements remain the same. *Dixon*, 583 S.W.3d at 526. MacColl has not raised that argument, so it is waived. The argument would, in any event, fail because Section 556.090's elements are different from Section 556.083's elements.

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

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B. The General Assembly enacted SORA to protect children and Missourians, and SORA is not ambiguous, so the rule of lenity should not apply in any event.

The rule of lenity should not apply in SORA cases for another reason: the rule applies "only if, after seizing everything from which aid can be derived, [the court] can make no more than a guess as to what the legislature intended." *State v. McCord*, 621 S.W.3d 496, 499 (Mo. 2021) (quoting *State v. Liberty*, 370 S.W.3d 537 (Mo. 2012)). This understanding is not exclusive to this Court. *See, e.g., Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (The rule of lenity "applies only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended.") (quotations omitted).

In *McCord*, this Court declined to apply the rule of lenity to a statute that prevented sex offenders from residing within 1000 feet of a school, where the sex offender claimed that it was unclear whether "school" included the playground. *McCord*, 621 S.W.3d at 498. The Court rejected his argument because the legislative intent, as reflected in the statute's plain text, was clear. *Id*. at 499.

More than twenty years ago, this Court announced that the purpose of SORA was "to protect children from violence at the hands of sex offenders." *Phillips*, 194 S.W.3d at 839 (quoting *J.S.*, 28 S.W.3d at 876). That purpose

Electronically Filed - SUPREME COURT OF MISSOURI - November 09, 2022 - 11:37 PM

holds true today. As a result, the Court can make "more than a guess as to what the legislature intended."

Conclusion

The rule of lenity applies only to criminal statutes, and only when the statute is ambiguous and the court cannot employ any other canon of construction. As demonstrated above, SORA is civil in nature, it is not ambiguous, and the Court can do more than guess at the statute's purpose. Therefore, the rule of lenity should not be applied to SORA.

V. MacColl's other challenges are wrong or irrelevant. – Responds to the Remainder of MacColl's Brief

Although the preceding points resolve MacColl's appeal in favor of the State, Respondent addresses the remainder of MacColl's arguments in this final point.

In her brief, MacColl contends that the circuit court's citation to Section 589.400.1(5) (2000) is not a proper basis to find that MacColl has a registration obligation. MacColl's Br. 25. MacColl is right that retrospective application of state laws violates the Missouri constitution. *Phillips*, 194 S.W.3d at 853. But this point is irrelevant in light of the proceeding points and the fact that this Court has held that Section 589.400.1(7)—the main issue in this appeal—does not violate the retrospective application of laws provision of the Missouri

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Constitution because it involves the offender's *present* status as a sex offender who has been required to register. *Toelke*, 389 S.W.3d at 167.

MacColl also contends that SORNA's predecessor did not impose an obligation to register as a sex offender. MacColl's Br. 11–14. But the Court need not address this argument because MacColl was obligated to register as a sex offender under SORNA. *See* Point I, *supra*. Moreover, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act *did* impose an obligation to register if the offender lived in a state that otherwise required registration. If the offender failed to register, then the offender was subject to federal criminal sanctions. *See, e.g., United States v. Elk Shoulder*, 738 F.3d 948, 950 (9th Cir. 2013); *see also In re: McClain*, 741 S.E.2d 893, 895 (N.C. App. 2013) (quoting 42 U.S.C. § 14071(b)(6)(A)) ("[a] person required to register under subsection (a)(1) of this section shall continue to comply with this section . . . until 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation . . .").

Conclusion

Respondent addresses MacColl's important points in points I, II, III, and IV, *supra*. The remainder of MacColl's arguments are contained in this point and are either irrelevant because of the resolution of points I, II, and III, or they are wrong. Either way, they do not impact the disposition of this appeal.

Conclusion

Wherefore, the Highway Patrol asks the Court to affirm the trial court's decision to deny MacColl's petition, and to issue an opinion clarifying that the rule of lenity applies only to criminal statutes and not to SORA.

Respectfully submitted,

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Certificate of Compliance

I certify that the attached brief complies with Rule 84.06 and contains 8,619 words, excluding the cover, the table of contents, the table of authorities, this certification, and the signature block, as counted by Microsoft Word; and that under Rule 103.08, the brief was served on all other parties through the electronic filing system.

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