SC99715

IN THE SUPREME COURT OF MISSOURI

BROCK SMITH,

Appellant,

v.

ST. LOUIS COUNTY POLICE, *ET AL.*,

Respondents.

Appeal from the St. Louis County Circuit Court
The Honorable Virginia W. Lay, Judge

Substitute Brief of Missouri State Highway Patrol

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Supplemental Statement of Facts

Brock Smith pleaded guilty on December 18, 2005, to first-degree sexual misconduct. D5, p.1; Tr. 6. Eighteen months earlier, Smith purposefully subjected Victim to sexual contact through the Victim's clothing without Victim's consent. D5 p.1. Smith's conduct and subsequent conviction required him to register with the Missouri State Sex Offender Registry (Registry) under both the Missouri Sex Offender Registry Act (SORA) and the Federal Sex Offender Registration and Notification Act (SORNA). D5 p.1; Tr. 10.

Years later, Smith petitioned for removal from the Registry. D2. The trial court, applying precedent from the Court of Appeals, denied Smith's petition because Smith has a lifetime registration requirement resulting from the interplay between SORA and SORNA. D5 p.1–2.

Argument

Standard of Review and Statement on Preservation

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

Smith's claim is not properly preserved for appellate review. Smith's point relied on also is multifarious because it contains multiple claims of error within a single point. *Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. 2017).

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

Nearly ten years ago, this Court held that Section 589.400.1(7) imposes a lifetime registration requirement. *Doe v. Toelke*, 389 S.W.3d 165, 167 (Mo. 2012). 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 his sole point, Smith contends that despite this history, this Court should reexamine its interpretation of Section 589.400.1(7), considering the General Assembly's modification of other provisions of SORA, which created a three-tier classification system with corresponding registration timelines. Smith's Br. 20–32. Smith is wrong.

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 in so doing, contrary to Smith's claims, the General Assembly did not render the tier system surplusage.

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

Smith all but concedes that the General Assembly did not modify the relevant portion of Section 589.400.1(7) when repealing and reenacting Section 589.400 *et seq*. Smith's Br. 15–16. When the legislature reenacted 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

[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

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 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. 2017), *James v. Missouri State Highway Patro*l, 505 S.W.3d 378, 383 (Mo. App. 2016); *but see, e.g., Khatri v. Trotter*, 554 S.W.3d 482, 483 (Mo. App. 2018) (citing both Sections 589.400.3 and 589.400.7); *Doe v. Neer*, 409 S.W.3d 451, 459 n.6 (Mo. App. 2013) (citing Section 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

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seems to have been removed when the 2006 statutes were moved to electronic resources. Resp. App. A1.

binding on the Court of Appeals, and this Court's decision's—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 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)

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

(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 Revenue*, 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 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.

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

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, 387–88 (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 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 Smith 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" "required to register" "under tribal, federal, or military law . . . ." *Id.* *Toelke*'s holding is integral to the modern operation of Missouri's Registry.

After Smith was adjudicated for subjecting Victim to sexual contact through Victim's clothing without Victim's consent, Smith's obligation to register vested under both Missouri and Federal law. Section 589.400.1(7) applied because Smith's offense involved sexual contact, which triggered

SORNA's registration requirements. 34 U.S.C. §20911(5)(A). And SORA otherwise applied because first-degree sexual misconduct is a named offense under the current version of SORA. § 589.414.5(1)(l).

And under the current version of SORNA and SORA's tier provision, Smith would be eligible for removal after fifteen years. § 589.400.4(1). That would, in turn, return Smith to his status post-adjudication. But, under that scenario, Smith 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.

Smith contends that this result would render the 2018 amendments to SORA "meaningless." Smith's Br. 28. But for the reasons in point I.C, *infra*, Smith is wrong. More important, however, is that SORA's plain text 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 need not register and his name "shall be removed

from the registry" or a court has ordered removal under Section 589.401. § 589.400.3(2–3). Smith, as an offender who "has been" required to register under SORNA cannot satisfy subsection 2. Nor can Smith 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 . . . [condition to be met] . . . shall be removed from the registry." § 589.400.8. But that is simply not what the General Assembly has written in this case.

The result of the General Assembly's language 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).

Smith complains that this reading is improper because the purpose of the 2018 amendments was to make it simpler to be removed from the Registry. Smith's Br. 32. But this Court's cases teach that 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 Missourian's 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 use of the phrase "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.

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

Throughout his brief, Smith contends that if the Court rejects his interpretation of the statute, then the Court will be rendering the 2018 amendments to SORA "meaningless." Smith's Br. 28. Not so. Implicit in Smith's argument is the suggestion that there is complete overlap between all registrable offenses under Missouri and federal law. But 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 safe-guard Missourians and 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 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.[5]

[5] 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.

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 are 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).[6]

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 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

[6] 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).

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).[7] 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).

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. Smith's Br. 22. 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

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

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 under SORNA. 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 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).[8] While the

[8] 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.*

General Assembly's language may have been "awkward" that does not mean Smith's position is correct. *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). *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 noted 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, Smith's interpretation of SORA is not required for the 2018 amendments to have had some substantial effect. Smith's Br. 32. 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 Smith's point.

II. The rule of lenity does not apply. – Responds to part of Smith's Point I

In his final argument, Smith argues that SORA is ambiguous and therefore the Court should apply the rule of lenity in his favor. Smith's Br. 34. Although SORA is not ambiguous, this Court should still address Smith'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).

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. v. Beaird*, 28 S.W.3d 875, 877 (Mo. 2000). *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.[9]

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

[9] 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).

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.

Further, 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.

In sum, the Court of Appeals has incorrectly 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.[10]

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, 547 (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

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

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

Conclusion

For the reasons stated above, the rule of lenity should not be applied in any SORA case, and this Court should issue an opinion guiding the lower courts to that conclusion.

Conclusion

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

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Certificate of Compliance

I certify that the attached brief complies with Rule 84.06 and contains 5,457 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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