IN THE

Supreme Court of Missouri

No. SC89727

JOHN DOE I, et al.,
Respondents,

v.

COL. JAMES F. KEATHLEY, Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Robert M. Schieber, Circuit Judge

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF FACTS

INTRODUCTION

On December 31, 1994, all but two of the out-of-state or military plaintiff-respondents were lawful residents of Missouri, having become Missouri residents between 1973 or 1974 and 1993. On that date these Missouri residents had no duty to register as sex offenders in Missouri and had not registered. They had had no such duty for all the years they lived in Missouri. And, there is no evidence in the record that any had become Missouri residents for any reason even remotely related to registration.

While noting, seemingly without irony, that the purpose of Missouri's constitutional prohibition on the retrospective application of its laws is "to ensure that citizens have fair notice of the consequences of their actions *at the time of their actions*" (APP'T BR. at 17 (emphasis added)), Appellant Keathley nonetheless argues that these men should somehow submit "themselves to the operation of SORA" (APP'T BR. at 18), enacted years after they became Missourians even though the Missouri Constitution bars the retrospective application of SORA. Awakening on New Year's Day 1995, having engaged in no new activities material to the issues in this case, these men are, Keathley asserts, not entitled to the protection of the Constitution and must forever after assume all the duties of

registration.

The law of this State does not support Keathley's assertion.[1]

In 1994, Missouri enacted a sexual offender registration statute (SORA), informally called "Megan's Law", requiring registration by certain sex offenders with their local sheriff's department. L. 1994, S.B. No. 693, § A (§1, subsecs 1, 2), eff. January 1, 1995, now codified at MO. REV. STAT. §§ 589.400-589.425. LF120 (¶79). Even though Article I, Section 13 of the Missouri Constitution provides: "That no . . . law . . . retrospective in its operation . . . can be enacted", SORA, as passed in 1994 and subsequently amended, purportedly reached back to July 1, 1979, to require registration of "any person" who was convicted, found guilty of, or pled guilty to committing certain offenses. LF121 (¶85); LF120 (¶81). As the result of additional amendments, SORA requires registration of certain misdemeanor sex offenders. LF123-128 (¶¶88-105).

On June 30, 2006, this Court decided *Doe v. Phillips*, 194 S.W.3d 833 (Mo. *banc* 2006) (*Phillips*), in which it determined that the application of the registration requirement to sex offenders for "offense[s] that occurred prior to the registration law's effective date was retrospective in operation in violation of Mo. Const. article

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[1]Two defendants below, the Jackson County Prosecutor and Sheriff, did not appeal the judgment entered against them.

I, section 13." *Doe v. Blunt*, 225 S.W.3d 421, 422 (Mo. *banc* 2007) (*Blunt*).[2]

Either at the filing of this action or the filing of their affidavits, all of the Does except Does III and IV[3] were being required to register, despite the holding of

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[2]In *Blunt*, this Court applied *Phillips* to hold that a misdemeanor offender had no obligation to register because the August, 2004, effective date amending SORA to require those convicted of public display of explicit sexual material to register as a sex offender fell after his guilty plea was entered, at which time no registration obligation for misdemeanor offenders was in effect. *Blunt* controls as to the obligation of Does VII and XI to register pursuant to SORA.

[3]Doe III was told by Pettis County that he no longer had to register with them, but the Missouri State Highway Patrol has advised him that he is required to register for life. He is not currently registered with the MSHP and the Pettis County Sheriff's website is "under construction", so no list appears. Pettis County Sheriff (visited February 25, 2009) <http://www.pettiscomo.com/sher.html>. Until shortly after the filing of this action, Doe IV's name, photograph, and conviction information were displayed on Platte County's registered offender list, but the information was thereafter removed. Initially, Doe IV's information did not appear on the MSHP website; it was then put on the MSHP website's "exempt list" (LF164), but the exempt list is no longer displayed. MSHP Registry

Phillips. Accordingly, they sought declaratory and injunctive relief, which was granted as to all but Doe X. LF210; *see also*, *infra* n. 4. Keathley appealed.

Doe Respondents I, II, III, IV, V, VI, VIII, and IX, all pled guilty or were convicted of felony sex offenses[4] prior to the January 1, 1995, effective date of SORA, either in other states or in a military courts martial. LF108 (¶¶7, 8). These eight Does fit into three categories:

Category 1: Moved to Missouri before January 1, 1995, from a state with no

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Disclaimer (visited February 26, 2009) <http://www.mshp.dps.mo.gov/CJ38/disclaimer.jsp>.

[4]Does VII and XI pled guilty or were convicted of misdemeanor sex offenses prior to the effective date of the amendment making their misdemeanors registrable offenses. LF114(¶48); LF119 (¶73); LF125 (¶¶94, 95). Keathley contends that federal law, not SORA, imposes a registration requirement on Does VII and XI. On July 23, 2002, after the August 28, 2000, effective date of the amendment requiring registration of persons convicted of Chapter 566 misdemeanors, Doe X pled guilty to class A misdemeanor sexual misconduct in the first degree for an offense which occurred in 1999. LF118 (¶68). The trial court granted Defendants' Motion for Summary Judgment as to Doe X; he did not appeal. LF220.

duty to register at the time of the move to Missouri;

Category 2: Moved to Missouri before January 1, 1995, from state or military courts martial which imposed a duty to register at the time of the move to Missouri;

Category 3: Moved to Missouri after January 1, 1995, from a state which imposed a duty to register at the time of the move to Missouri.

Category 1

John Doe IV is the only Doe who falls within the ambit of Category 1. Doe IV had moved to Missouri in 1988, but returned to Texas to face charges that he had violated TEX. PENAL CODE § 21.11. He was convicted in 1992. LF53 (¶31); LF112 (¶20). His probation was transferred to and completed in Missouri. LF53 (¶32). He has never been required to register under Texas law. LF85.

Category 2

Four Does moved to Missouri before January 1, 1995, from a state which imposed a duty to register when they moved to Missouri. They are Does I, III, VIII, and IX. Additionally, although incarcerated pursuant to military courts martial for acts committed at Homestead Air Force Base, Florida, Doe VI established residence in Missouri in 1992, *i.e.*, prior to January 1, 1995.

Doe I was convicted in California of a violation of CAL. PENAL CODE § 220, in approximately 1989, released from parole in 1992, and moved to Missouri in

February, 1993. LF131 (¶¶3, 4). The acts for which Doe I was convicted, if committed in Missouri, would be a violation of MO. REV. STAT. § 566.030. LF50 (¶11). As Keathley asserts, APP'T BR. at 20, Doe I would have been required to register in California following his conviction.

Doe III was convicted in Minnesota of two violations of MINN. STAT. § 609.343, Subd. 1(b) on January 26, 1990. LF51 (¶22). The acts for which he was convicted, if committed in Missouri, would be a violation of MO. REV. STAT. § 566.068 or § 566.090. Doe III moved to Missouri in 1993. LF136 (¶4). Doe III completed his probation in 2005 and he was advised by the Minnesota Bureau of Criminal Apprehension that he was no longer required to register in Minnesota, his Minnesota registration requirement was fulfilled, and that his registration status in any other state would be determined by the law of that state. LF136 (¶5).

Doe VI was convicted on February 21, 1985, in a military courts martial at Homestead Air Force Base, Florida, of one count in violation of Article 125 (10 U.S.C. § 125 (U.C.M.J. Art. 125), and three counts in violation of Article 134 (10 U.S.C. § 134 (U.C.M.J. Art. 134). The acts for which John Doe VI was convicted at court marital in Florida, if committed in Missouri, would be a violation of MO. REV. STAT. § 566.062. LF113 (¶41). While Doe VI was serving time in the Leavenworth Disciplinary Barracks, in 1992, his wife moved to Missouri, and, beginning in1992, Doe VI and his wife filed joint federal and Missouri state income

tax returns, establishing Doe VI's Missouri residency as of 1992. LF141 (¶4). When Doe VI was released from prison, on July 1, 1996, he went directly to his home in Ferrelview, Platte County, Missouri. *Id.* He and his wife now live in Independence, Jackson County, Missouri. *Id.*

Doe VIII was convicted, circa 1983, in California of a violation of CAL. PENAL CODE § 288. LF56 (¶53). The acts for which he was convicted, if committed in Missouri, would be a violation of MO. REV. STAT. § 566.067. LF56-57 (¶53). Doe VIII was required to register in California following his conviction. He moved to Missouri in 1993. LF145 (¶5).

Doe IX was convicted in California on August 27, 1969 of a violation of CAL. PENAL CODE § 288 for which he was arrested on August 3, 1968. He also would have been required to register under California law. LF117 (¶63) The acts for which he was convicted in California, if committed in Missouri, would be a violation of MO. REV. STAT. § 566.067. LF116-17 (¶59). Doe IX moved to Missouri in 1973 or 1974. LF117 (¶61).

Category 3

Doe II was convicted in Las Vegas, Clark County, Nevada, circa 1987, of two counts of violating NEV. REV. STAT. § 201.230. The acts for which Doe II was convicted in Nevada, if committed in Missouri, would be a violation of MO. REV. STAT. § 566.067. LF109-110 (¶17). Doe II moved to Missouri on October 4, 2000.

LF110 (¶18).

Doe V was convicted in Stanislaus County, California of violating CAL. PENAL CODE § 288. The acts for which Doe V was convicted in California, if committed in Missouri, would be a violation of MO. REV. STAT. § 566.067. LF112-113 (¶36). Doe V moved to Missouri on July 26, 2004. LF113 (¶37).

ARGUMENT

INTRODUCTION

The trial court correctly granted summary judgment in favor of Plaintiff-Respondents John Does I-IX and XI and denied Defendants' motion for summary judgment as to these Plaintiffs. Summary judgment granting declaratory and injunctive relief was appropriate because the Defendants, including Appellant Keathley, were applying Missouri's SORA, MO. REV. STAT. §§ 589.400 to 589.425, to require the Does to register because of convictions or guilty pleas that occurred prior to the effective date of SORA or the amendments making certain misdemeanors registrable offenses[5]. Requiring registration of the Does constitutes a retrospective application of SORA as to them and, thus, violates the Missouri Constitution. *Phillips*, 194 S.W.3d at 852. The trial court also rightly concluded that these respondents residing in Missouri, regardless of the dates of their convictions or pleas, cannot constitutionally be required to register in Missouri as sex offenders under the federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§16911 to 16929, given Missouri's prohibition on retrospective laws. This Court should affirm the judgment.

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[5]The only claim Appellant Keathley makes as to Does VII and XI in this appeal is that they are required to register because of federal law.

STANDARD OF REVIEW

Below, the Does sought declaratory and injunctive relief and the matter was decided by the trial court on cross motions for summary judgment adjudicating constitutional challenges. As Keathley observes (APPT'S BR. at 5-6), this appeal arises out of the Does' claim that § 589.400.1(7) is unconstitutional as applied to sex offenders with out-of-state convictions or guilty pleas that pre-date the January 1, 1995 effective date of SORA given the Missouri Constitution's bar on retrospective laws. This appeal also poses the question of whether sex offenders residing in Missouri can constitutionally be required to register in Missouri as sex offenders under SORNA, 42 U.S.C. §§ 16911 to 16929, which requires sex offenders to register in their states of residence. Therefore, the validity of both Missouri and federal statutes are implicated. The standard of review for constitutional challenges to a statute is *de novo*. *Franklin County ex rel. Parks v. Franklin County Com'n*, 269 S.W.3d 26, 29 (Mo. *banc* 2008) (citing *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. *banc* 2007)). Furthermore, the lower court granted summary judgment and appellate review of summary judgments is "essentially *de novo*." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. *banc* 1993). Accordingly, the review here should be *de novo*.

I. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT DOES WITH OUT-OF-STATE CONVICTIONS OR GUILTY PLEAS FOR SEX OFFENSES OCCURRING BEFORE 1995 COULD NOT CONSTITUTIONALLY BE REQUIRED TO REGISTER AS SEX OFFENDERS UNDER MISSOURI'S SEX OFFENDER REGISTRATION ACT (POINT I)

The holding of *Phillips* is that SORA's registration requirements cannot be imposed on individuals because of their "pre-Act criminal conduct." *Phillips*, 194 S.W.3d at 852. Requiring registration of those whose conduct pre-dates SORA's effective date is constitutionally impermissible because doing so "looks solely at their past conduct and uses that conduct" to require registration. The registration requirement of SORA "specifically requires the Does to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on their offenses prior to its enactment." *Id.* That principle applies regardless of whether the offense occurred elsewhere or whether prosecuted under military or federal law. *Blunt* makes clear that the constitutional prohibition also applies to any amendments to SORA which bring more groups of offenders within its reach. Citing *Phillips*, this Court also applied the same principle in *R.L. v. State of Missouri Dept. of Corrections*, 245 S.W.3d 236 (Mo. *banc* 2008), to hold that MO. REV. STAT. § 566.147, which had become effective in June, 2006, and which imposed residency restrictions on sex offenders who committed sex offenses before

statute's effective date violated Missouri's constitutional prohibition of retrospective laws because the statute attached new obligations to past conduct. *Id.* at 237-38. As to the Does identified in each of the three categories described, *supra* at 4-5, all of whom have pleas or convictions predating January 1, 1995, the principle explicated in *Phillips* applies and the resulting conclusion is that requiring their registration under SORA violates their right under the Missouri Constitution to be free from retrospective application of a law. Thus, the grant of summary judgment in their favor should be affirmed.

A. Category 1 – Doe IV

Doe IV had moved to Missouri in 1988, before he was convicted in Texas in 1992. He has never been required to register under Texas law. *Supra* at 5. Keathley essentially concedes that the Missouri Constitution prohibits imposing a registration requirement under SORA on Doe IV . APP'T BR. at 23.

B. Category 2 – Does I, III, VI, VIII, and IX

1. Fair notice

Keathley argues that a sex offender who moves to Missouri after SORA's effective date who has committed an offense elsewhere that would be a registrable offense if it occurred here would be aware that the effect of that offense is that registration will be required after a move to Missouri and that those offenders voluntarily submit themselves to the operation of SORA. APP'T BR. at 17-18. This

argument cannot apply, however, to Does I, III, IV, VIII, and IX, all of whom moved to Missouri *before* SORA's effective date. None of them knew when they moved to Missouri that SORA would be enacted and that registration would be required of them. None of them had fair notice of the registration requirement.

2. Pre-existing duty

Keathley also argues that because Does I, III, IV, VIII, and IX were required to register elsewhere, registration in Missouri is no more than the continuation of a previously existing obligation to register imposed by another jurisdiction, and that, therefore, it is not inconsistent with the retrospective law bar. APP'T BR. at 18. But registration in Missouri is, in fact, different registration with different conditions (in duration, in frequency, etc.) in a different state by different officials governed by a different statute with different penalties for non-compliance. Thus, it is a new and different obligation. That there are substantial differences – such as in the case of Doe III, whose registration requirement has expired under Minnesota law[6] – means that the obligation is a new and different duty under Missouri law.

3. Lack of similar constitutional protection elsewhere

Keathley suggests that because few other states offer the same constitutional protection against the application of retrospective laws, Missouri could become a

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[6]LF52 (¶25).

haven for sex offenders from other states. APP'T BR. at 18-19. He argues that offenders from states who have imposed registration on them should not be allowed to engage in "evasion by turning Missouri into a "haven" or attractive "destination" for sex offenders from other states.

That argument is without merit. First, the record in this case does not contain even a hint that any of these respondents moved to Missouri to "evade" registration. There is not a shred of evidence that they even imagined that years after their move to Missouri this Court would apply the constitutional prohibition to their situations and create a "haven" for them. Second, there is no evidence even suggesting that other persons with fifteen or thirty year old convictions have moved to Missouri as a haven from registration or would do so. Such speculation is not a sufficient basis upon which to write an exception into the Constitution, especially when the plain text of the constitutional prohibition does not bear the weight of such an exception.

C. Category 3 – Does II and V

1. Fair notice

Keathley also contends that SORA requires Does II and V to register because they had fair notice of Missouri's SORA when they moved to Missouri *after* the January 1, 1995 effective date. But it can also be said that these Does also had "notice" of Missouri's prohibition on the retrospective application of the law. Keathley cannot claim that one provision of Missouri law was waived by notice, but

the other was not.

Or, Keathley's argument would seem to be that such "notice" of Missouri law would encompass notice that the Constitution's prohibition on retrospective application somehow did not apply to their pre-1995 acts because they were out-of-state acts. But, the prohibition contains no such exceptions. This notice cuts both ways and does not illuminate an answer as to whether or not the constitutional clause applies to out-of-state pre-SORA acts. There is no principled reason for denying its application. A pre-SORA act is still pre-SORA conduct whether it occurred in Missouri or Maine.

2. Pre-existing duty

Even though Does II and V moved to Missouri after January 1, 1995, it is the same as for the Category 2 Does. They are being required to engage in registration for conduct that pre-dated the enactment of SORA. The prohibition on retrospective application of laws is broadly worded and contains no exception for conduct that occurred in other states. It applies to *all* conduct prior to the January 1, 1995 effective date regardless of the site of that conduct.

3. Lack of similar constitutional protection elsewhere

The argument, *supra* at I.B.3, applies with the equal force to Does II and V as it does to Does I, III, IV, VIII, and IX and is incorporated here without further discussion.

For these reasons, the trial court did not err in determining that Does with out-of-state convictions or guilty pleas for sex offenses occurring before 1995 could not constitutionally be required to register as sex offenders under Missouri's sex offender registration act and summary judgment in favor of Does I-IX and X should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE DOES COULD NOT CONSTITUTIONALLY BE REQUIRED TO REGISTER AS SEX OFFENDERS IN MISSOURI EVEN THOUGH FEDERAL LAW PURPORTEDLY REQUIRES THEM TO REGISTER (POINT II)

Keathley's argument that all of the Does must register under SORNA should be rejected.

A. The Supremacy Clause Does Not Apply

1. Congressional intent does not support the conclusion that state law is to be superceded

Keathley maintains that the Supremacy Clause[7] "overrides the retrospective law prohibition of the Missouri Constitution with regard to the obligation to register under 42 U.S.C. § 16913(a)" because the obligation is imposed by federal law. APP'T BR. at 29. The Does counter that the Supremacy Clause does not apply under

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[7]"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. CONST. art. VI, cl. 2.

this circumstance, *i.e.*, where there is insufficient indicia that Congress' purpose was to supercede state constitutional provisions and interpreting decisions.

> Thus, since our decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law *that conflicts* with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act *unless that [is] the clear and manifest purpose of Congress*." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1189, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963)).

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). In the absence of an express congressional command, state law is pre-empted if that law *actually conflicts with federal law*, *see Pacific Gas & Elec. Co. v. State*

Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983), or if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230, 67 S.Ct., at 1152).

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (emphasis added); *see also Northern Natural Gas Co. v. Iowa Utilities Bd.*, 377 F.3d 817, 820-21 (8th Cir. 2004). Here, as more fully explained, *infra* at II.B, Congress has made its intent clear to defer to the constitutions of the various states as interpreted by the states' highest courts. 42 U.S.C. § 16925. Accordingly, this is not a circumstance where the federal law and state law conflict such that federal law should supersede state law. Because SORNA specifically defers to the states' constitutions – and has provided a mechanism to take into account state constitutional limitations on registration – there is no conflict invoking the Supremacy Clause.[8]

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[8]The Does acknowledge the holding in *Doe v. Lee*, ___ S.W.3d ___, 2009 WL 21097 (Mo.App. January 6, 2009), but respectfully disagree.

2. *Phillips* provides no exception to the retrospective bar for Section 589.400.1(7)

Keathley also contends that because the Does must register under SORNA, SORA's provision requiring registration of those required to register under federal law – § 589.400.1(7) – is triggered. APP'T BR. at 29. The language in *Phillips* supports the opposite conclusion, referring to "registration provisions of sections 589.400 to 589.425," *Phillips*, 194 S.W.3d at 837, and invalidating "registration requirements" of Megan's Law. *Id.* at 838 ("Megan's Law's registration requirements may not be enforced as to this small group of persons"), at 852 ("Missouri's constitutional bar on laws retrospective in their operation compels this court to invalidate Megan's Law's registration requirements . . .. This ruling applies only to the registration requirements."). Nothing in *Phillips* exempts § 589.400.1(7) from its application and that section, like all the other sections relating to registration requirements is subject to the retrospective bar. Thus, it cannot be triggered by the existence of the SORNA obligation.

B. SORNA Contemplates an Exception to the Obligation of Sex Offenders to Register Based on State Constitutional Limitations

SORNA contemplates circumstances in which the highest court of a jurisdiction has held that the jurisdiction's constitution is in conflict with SORNA's requirements. The statute provides:

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter

> *because of a limitation imposed by the jurisdiction's constitution*, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

42 U.S.C. § 16925(b) (emphasis added). *See also*, National Guidelines for Sex Offender Registration and Notification, U.S. DOJ, Office of the Attorney General (July, 2008) at 11[9]. This statutory language renders SORNA's requirement subordinate to the Missouri Constitution and the holdings of *Phillips* and *Blunt*, and, accordingly, those excused from the registration obligation under *Phillips* are not required to register because of the enactment of SORNA.

Senator Kennedy's comments during consideration of H.R. 4472 and Senate Amendment 4686 add support to this argument:

> . . . section 125 of the compromise is very important. Each State will face challenges in the implementation of these new Federal requirements, and States should not be penalized if exact compliance with the act's requirements would place the State in violation of its constitution or an interpretation of the

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[9]U.S. DOJ website, (visited February 26, 2009) <http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf>.

State's constitution by its highest court.

> The Massachusetts Supreme Judicial Court has concluded that offenders are entitled to procedural due process before being classified at a particular risk level and before personal information about them is disseminated to the public. Massachusetts has been vigilant in implementing a comprehensive and effective sex offender registry, and it should not lose much needed Federal funding where there is a demonstrated inability to comply with certain provisions of this new Federal law.
>
> No State should be penalized and lose critical Federal funding for law enforcement programs as long as reasonable efforts are under way to implement procedures consistent with the purposes of the act.

152 CONG REC. S. 8023 (daily ed. July 20, 2006) (statement of Sen. Kennedy); <http://thomas.loc.gov/cgi-bin/query/F?r109:7:./temp/~r109bxgutA:e93520:> (visited August 9, 2007). These comments emphasize that Congress contemplated that application of SORNA would have to take into consideration limiting provisions of a State's constitution and the interpretation of that constitution by its highest court.

In sum, like SORA, SORNA "impose[s] an affirmative obligation on [offenders] to register upon release and then regularly thereafter. The obligation to register by its nature imposes a new duty or obligation. . . . the application of that

requirement truly is retrospective in its operation." *Phillips*, 194 S.W.3d at 852. Because this Court has so held, and given Congress' direction to take into consideration the dictates of a State's constitution and the interpretation of that constitution by its highest court, SORNA cannot be used to circumvent the Missouri Constitution.

Keathley claims this statutory language applies only to the Act's encouragement to the states to implement a registry system in compliance with the Act's guidelines and not to the federal obligation to register in their states of residence imposed by SORNA. APP'T BR. at 30-31. But the federally imposed duty is to register in the jurisdiction in which the offender resides and Keathley is implementing and enforcing the federal duty to register by requiring the Does to meet SORA's registration requirements. And SORA's registration requirements, as interpreted by this Court, cannot apply to those whose conduct prior to January 1, 1995, is the basis of the alleged requirement to register. Inherent in substantial implementation is that offenders are being required to register. But in evaluating "whether a jurisdiction has substantially implemented" the requirements of the federal law – which include registering those whose convictions predate the effective dates of SORNA and SORA – the Attorney General should conclude that because of the limitations established by the Missouri Constitution as interpreted by this Court in *Phillips*, Missouri has substantially implemented SORNA even though

Missouri cannot, under its constitution, require registration of those sex offenders whose offenses occurred before January 1, 1995. Thus, the Missouri Constitution's ban on laws with retrospective application is respected and the Does' rights as Missouri citizens are observed.

It is axiomatic that the central concept of federalism is that the national and state levels of government exercise power separately and directly on the people at the same time. While the Missouri exercises authority over its citizens, so does the federal government. And, under the balance of power within the federal system, the powers not delegated to the national government are reserved to the states. The United States Attorney General cannot excise SORNA's recognition of state constitutional limitations on SORNA's application and thereby, in an executive exercise of discretion, apply Congress's prerogatives under the Supremacy Clause.

III. ALTERNATIVELY, IF THE SUPREMACY CLAUSE APPLIES, SORNA'S REGISTRATION REQUIREMENT VIOLATES THE FEDERAL CONSTITUTION'S BAN ON *EX POST FACTO* LAWS

Assuming *arguendo*, but not conceding, that the Supremacy Clause applies, this Court should affirm the judgment in any event because SORNA's registration requirement is a retroactive punishment prohibited by the *Ex Post Facto* Clause of Article I, § 10, cl. 1 of the United States Constitution insofar as it requires

registration of sex offenders whose offenses predated SORNA's effective date.

The analysis of whether SORNA constitutes an impermissible *ex post facto* law first requires ascertaining "whether the legislature meant the statute to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). If the legislature's intention was to impose punishment, the inquiry is ended. *Id.* If the intention was to enact a regulatory scheme that is civil and nonpunitive, the next step is to examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (quoting *Hendricks* quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). Courts ordinarily defer to the legislature's stated intent, *Hendricks*, 521 U.S. at 361, and, thus, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. *Smith*, 538 U.S. at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *Ward*, 448 U.S. at 249) and citing *Hendricks*, 521 U.S. at 361; *United States v. Ursery*, 518 U.S. 267, 290 (1996); and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984)).

Whether a statutory scheme is civil or criminal is a question of statutory construction requiring examination of the statute's text and structure to determine the legislative objective. *Smith*, 538 at 92-93. The first inquiry is whether the legislature "indicated either expressly or impliedly a preference for one label or the

other." As in *Smith*, where the Court was examining Alaska's SORA, here, Congress has expressed its objective in the statutory text itself. The stated purpose of SORNA is "to protect the public from sex offenders and offenders against children" and to establish "a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901.

But even if SORNA was intended to be civil and nonpunitive, unlike the Alaska statute examined in *Smith*, here, the actual statutory scheme is so punitive that it violates the *Ex Post Facto* Clause. This is so as to the Does because the registration requirements Keathley would have them observe are the requirements imposed by SORA – not some separately established minimum SORNA requirements – and because the ongoing amendments to SORA make registration so much more burdensome than in its past iterations, to the extent that it is truly punitive in nature and amounts to punishment.

For example, S.B. 714, signed into law in 2008, now requires that any person required to register as a sexual offender must provide county law enforcement with any online identifying information he or she uses. Although that information is not included in a general profile of the offender, it is made available to the public on the sex offender registry website through specific searches using the online identifier. MO. REV. STAT. §§ 589.402 and 589.407. If a person, who is required to register as a sexual offender under §§ 589.400 to 589.425, changes or obtains a new on-line

identifier as defined in MO. REV. STAT. § 43.651, the person shall report such information in the same manner as a change of residence before using such on-line identifier. MO. REV. STAT. § 589.414.6. In addition to the other registration information required of a sex offender, he or she must now also provide palm prints and a DNA sample if one has not already been taken. MO. REV. STAT. § 589.407. Offenders must allow the chief law enforcement officer to take a current photograph of the offender rather than providing a photograph. MO. REV. STAT. § 589.414. The length of time within which initial registration must be accomplished and/or changes in registration information must be reported has been shortened. MO. REV. STAT. §§ 589.400.2 and 589.414. The same legislation now publicly shames registered sex offenders on Halloween in that they are required to avoid all Halloween-related contact with children, remain inside his or her residence between 5 and 10:30 p.m. unless there is just cause to leave, post a sign outside stating, "No candy or treats at this residence", and leave all outside residential lighting off during the evening hours. MO. REV. STAT. § 589.426. And, although the statute specifies which sex offenders are impacted as opposed to imposing the restriction on all who must register, Missouri has limited where sex offenders may live, in that they cannot reside within 1,000 feet of a school, or be present in or loiter within 500 feet of a school. MO. REV. STAT. §§ 566.147 and 566.149. There is no reason to believe that the legislature will not continue to ratchet up registration requirements and

restrictions on sex offenders who are required to register, but for now, it is enough to conclude that the statutory scheme is so punitive that it violates the *Ex Post Facto* Clause.

IV. ALTERNATIVELY, IF THE SUPREMACY CLAUSE APPLIES, SORNA'S REGISTRATION REQUIREMENT CONSTITUTES A SUBSTANTIVE DUE PROCESS VIOLATION AS TO THE DOES

The Due Process Clause, providing that no state shall "deprive any person of life, liberty, or property without due process of law contains both substantive and procedural components. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846-47 (1992) (quotations omitted). Substantive due process bars the prevents infringement upon fundamental rights that are deeply rooted in history and tradition unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). It protects persons against arbitrary government action that "shocks the conscience." *Rochin v. California*, 342 U.S. 165 (1952). "Only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). When the statute implicates a fundamental right, the state must show a legitimate and compelling governmental interest for interfering with that right. If

the statute does not implicate a fundamental right, a less exacting standard of review is applied under which the statute will stand as long as it is rationally related to a legitimate governmental purpose. In *Connecticut Dept. of Public Safety v. Doe*, 531 U.S. 1 (2003), although rejecting claims that procedural due process was violated by public disclosure of Connecticut's sex offender registry insofar as it deprived registered sex offenders of a liberty interest and because registrants were not afforded a predeprivation hearing to determine whether they are likely to be currently dangerous, the Court acknowledged, and the concurring opinions emphasized that such claims might fare better cast in terms of substantive due process violations. *Id.* at 8 ("It may be that respondent's claim is actually a substantive challenge to Connecticut's statute "recast in 'procedural due process' terms."); at 8 (Scalia, J., concurring) ("Absent a claim (which respondent has not made here) that the liberty interest in question is so fundamental as to implicate so-called 'substantive' due process, a properly enacted law can eliminate it."); at 9 (Souter, J., joined by Ginsberg, concurring) ("I join the Court's opinion and agree with the observation that today's holding does not foreclose a claim that Connecticut's dissemination of registry information is actionable on a substantive due process principle. To the extent that libel might be at least a component of such a claim, our reference to Connecticut's disclaimer [citation omitted] would not stand in the way of a substantive due process plaintiff.").

The Does' substantive due process rights are violated by SORNA's registration requirement because they are deprived of a fundamental liberty interest and their right to privacy when their names and other personal information are listed on registries and published. Furthermore, it is impossible for the Does to comply with SORNA because it has not yet been implemented in Missouri. For this alternative reason, the trial court's judgment should be affirmed.

CONCLUSION

This Court's decision in *Phillips* dictates that Does with out-of-state or military convictions or guilty pleas for sex offenses occurring before 1995 cannot constitutionally be required to register as sex offenders under Missouri's SORA. Furthermore, not only does the Supremacy Clause not require that the Missouri Constitution bow to SORNA given that requisite Congressional intent is not present and SORNA's express deference to State constitutional limitations, SORNA violates the federal constitutional ban on *ex post facto* laws and, because it impinges on fundamental rights, deprives the Does of substantive due process rights. Thus, this Court should affirm the trial court's judgment.

Respectfully submitted,

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February 27, 2009

IN THE MISSOURI SUPREME COURT

JOHN DOE I, et al.,	)	
	)	
Respondents,	)	
	)	
v.	)	Case No. SC89727
	)	
COL. JAMES F. KEATHLEY,	)	
	)	
Appellant.	)	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of MO. SUP. CT. R. 84.06(b). It contains no more than 27,900 words of text (specifically, containing 7,227 words). It was prepared using Word Perfect 6/7/8/9/10/11/12 for Windows. The enclosed CD-ROM disc also complies with MO. SUP. CT. R. 84.06(g) in that it has been scanned and is virus free. The files on the CD-ROM disc contain the brief in both Word Perfect 6/7/8/9/10/11/12 for Windows and "saved as" MSWord 97/2000 formats.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, ~~2009,~~ the original and ten copies of Respondents' Brief as well as a CD-ROM disc containing the word processing file of same in Word Perfect 6/7/8/9/10/11/12 and "saved as" Word 97/2000 formats were sent by Federal Express to the Clerk of the Court for filing; two copies of Respondents' Brief and a CD-ROM disc containing the word processing file of same in Word Perfect 6/7/8/9/10/11/12 and "saved as" Word 97/2000 formats were served by U.S. mail; and Respondents' Brief in pdf format was served via electronic mail, on:

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