No. SC89727

IN THE
SUPREME COURT OF MISSOURI

JOHN DOE I, et al.,

Respondents,

v.

JAMES F. KEATHLEY,

Appellant.

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

APPELLANT KEATHLEY'S BRIEF

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JURISDICTIONAL STATEMENT

Plaintiffs-Respondents John Does I, II, III, IV, V, VI, VIII, and IX are individuals who have been convicted of sex offenses before January 1, 1995, in other states or in a military court and who now reside in Missouri. Plaintiffs John Does VII and XI are Missouri residents who pled guilty to misdemeanor sex offenses in Missouri before August 28, 2000. Plaintiff John Doe X is a Missouri resident who pled guilty after August 28, 2000, to a misdemeanor sex offense that had occurred in 1999. All the Doe plaintiffs claim that requiring them to register as sex offenders under Missouri's Sex Offender Registration Act (SORA; also known as Megan's Law), §§ 589.400 to 589.425, RSMo, is inconsistent with Mo. Const. art. I, § 13, which bars laws that are retrospective in operation.

Here, the Does challenge the application to them of § 589.400.1(7), RSMo,[1] which requires sex offender registration of Missouri residents: 1) who have been convicted of, or pled guilty to, committing or attempting to commit an offense in another state or country or under federal or military law that, if committed in Missouri, would be a violation of Chapter 566, RSMo, or a felony violation of any offense set out in § 589.400.1(2), or 2) who have been or are required to register in another state our under federal or military law. They 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, in light

[1] This subdivision was codified at § 589.400.1(5), RSMo, until June 30, 2008. *See* S.B. 714, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

of the Missouri Constitution's retrospective law bar. Thus this case involves the validity of a Missouri statute.

This action also involves the question of whether sex offenders residing in Missouri, regardless of the dates of their convictions or pleas, can 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, which requires sex offenders to register in their states of residence, in light of Missouri's prohibition on retrospective laws. Thus, this case involves the validity of a statute of the United States.

STATEMENT OF FACTS

The Plaintiff-Respondent Does. The parties stipulated to the following facts regarding the plaintiffs and their offenses.

John Doe I was convicted in California of a violation of Cal. Penal Code § 220, attempted assault to commit rape, in approximately 1989. LF 50 (¶ 11). The acts for which Doe I was convicted in California, if committed in Missouri, would be a violation of § 566.030, RSMo. LF 50 (¶ 11). Doe I moved to Missouri in 1993. LF 50 (¶13).

John Doe II was convicted in Nevada of two counts of lewdness with a minor, in violation of Nev. Rev. Stat. § 201.230, in approximately 1987. LF 50-51 (¶ 17). The acts for which Doe II was convicted in Nevada, if committed in Missouri, would be a violation of § 566.067, RSMo. LF 51 (¶ 17). Doe II moved to Missouri in 2000. LF 51 (¶ 18).

John Doe III was convicted in Minnesota of two counts of criminal sexual conduct in the second degree, in violation of Minn. Stat. § 609.343, Subd. 1(b), on January 26, 1990. LF 51 (¶ 22). Doe III's victims were a 14-year-old male and a 15-year-old male. LF 51 (¶ 22). The acts for which John Doe III was convicted in Minnesota, if committed in Missouri, would be a violation of § 566.068, RSMo, or § 566.090, RSMo. LF 51 (¶ 22). Doe III moved to Missouri in 1993. LF 52 (¶ 24).

John Doe IV was convicted in Texas of indecency with a child, in violation of Tex. Penal Code § 21.11, in 1992. LF 53 (¶ 30). Doe IV had moved to Missouri in 1988, but returned to Texas to face the Texas charges. LF 53 (¶ 31). Doe IV's probation was transferred to and completed in Missouri. LF 53 (¶ 32).

John Doe V was convicted in California of one count of lewd or lascivious act with a child under 14, in violation of Cal. Penal Code § 288, in April 1993. LF 53-54 (¶ 36). The acts for which Doe V was convicted in California, if committed in Missouri, would be a violation of § 566.067, RSMo. LF 54 (¶ 36). Doe V moved to Missouri in 2004. LF 54 (¶ 37).

John Doe VI was convicted on February 21, 1985, in a military court martial at Homestead Air Force Base, Florida, of one count of Article 125 (10 U.S.C. § 125 (U.C.M.J. Art. 125)), sodomy, and three counts of Article 134 (10 U.S.C. § 134 (U.C.M.J. Art. 134)), for acts involving his daughter. LF 54 (¶ 41). The acts for which Doe VI was convicted at the court martial in Florida, if committed in Missouri, would be a violation of § 566.062, RSMo. LF 54 (¶ 41). Doe VI moved to Missouri in 1996, immediately upon his release from military confinement. LF 55 (¶ 43).

John Doe VII pled guilty to a class A misdemeanor charge of sexual misconduct in the first degree, under § 566.090, RSMo, on May 26, 1999. LF 55-56 (¶ 48). Doe VII's victim was a 17 year old female. LF 56 (¶ 48).

John Doe VIII was convicted in California of lewd and lascivious crimes against a child, in violation of Cal. Penal Code § 288, on October 18, 1983. LF 56 (¶ 53). The acts for which Doe VIII was convicted in California, if committed in Missouri, would be a violation of § 566.067, RSMo. LF 56-57 (¶ 53). Doe VIII moved to Missouri in 1993. LF 57 (¶ 55).

John Doe IX, on August 27, 1969, was convicted in California of a violation of Cal. Penal Code § 288 for a lewd or lascivious act upon the body of a female under 14. LF 57 (¶ 59). Doe IX had been arrested for this offense on August 3, 1968. LF 57-58 (¶ 59). The

acts for which Doe IX was convicted in California, if committed in Missouri, would be a violation of § 566.067, RSMo. LF 58 (¶ 59). Doe IX moved to Missouri in about 1973 or 1974. LF 58 (¶ 61).

John Doe X pled guilty on July 23, 2002, to an offense that occurred sometime in 1999, specifically, sexual misconduct in the first degree, pursuant to § 566.090, RSMo, a class A misdemeanor. LF 59 (¶ 68). Doe X's victim was a 15-year-old female. LF 59 (¶ 68). Doe X is a Missouri resident. LF 59 (¶ 70).

John Doe XI pled guilty on August 23, 1999, to sexual misconduct in the first degree, pursuant to 566.090, RSMo, a class A misdemeanor. LF 60 (¶ 73). Doe XI's victim was a 6 year old female. LF 60 (¶ 73). Doe XI is a Missouri resident. LF 60 (¶ 77).

Statutory Framework. Missouri's Sex Offender Registration Act (SORA, also known as Megan's Law), §§ 589.400 to 589.425, RSMo, requires certain identified persons to register with the chief law enforcement officer of the county in which the person resides. § 589.400. Those who must register include persons who, since July 1, 1979, have been convicted of, or pled guilty to, felony sex offenses under Chapter 566, RSMo, any offense under Chapter 566 where the victim was a minor, and certain other enumerated offenses, such as promoting prostitution, promoting child pornography, and sexual exploitation of a minor. § 589.400.1(1) and (2). Others who must register include: (1) Missouri residents who, since July 1, 1979, have been convicted of, or pled guilty to, committing or attempting to commit an offense in another state or under federal or military law that, if committed in Missouri, would be a violation of Chapter 566 or a felony violation of any offense set out in

§ 589.400.1(2); or (2) Missouri residents who have been required to register as a sex offender under the law of another state or under federal or military law. § 589.400.1(7).

In *Doe v. Phillips*, 194 S.W.3d 833, 852-53 (Mo. banc 2006), this Court ruled that SORA could not be applied to require registration by persons convicted of sex offenses before SORA's effective date of January 1, 1995, because applying it to persons convicted of, or pleading guilty to, registrable offenses before the effective date of the law was inconsistent with the Missouri Constitution's prohibition on laws that operate retrospectively Mo. Const. art. I, § 13). This Court extended this holding in *Doe v. Blunt*, 225 S.W.3d 421, 422 (Mo. banc 2007), to also bar a registration requirement imposed upon persons who were convicted of, or pled guilty to, offenses that did not become registrable offenses under SORA until after such persons had themselves been convicted.

On July 27, 2006, the United States Congress passed the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587 (2006). A part of this Act is to be known as the Sex Offender Registration and Notification Act (SORNA). 42 U.S.C. § 16901 Note. Under SORNA, sex offenders, including those who have committed sex offenses under state law, must register in the states they reside in. 42 U.S.C. §§ 16911 & 16913.

Course of Proceedings. John Does I-VII filed suit against James F. Keathley (Superintendent of the Missouri State Highway Patrol), Thomas Phillips (Sheriff of Jackson County), and Michael Sanders (Prosecuting Attorney of Jackson County) on December 22, 2006. LF 1. John Does I-VII, joined by John Does VIII-XI, filed a second amended petition against Keathley, Phillips, and James Kanatzar (successor to Sanders as Prosecuting Attorney of Jackson County) on July 5, 2007. LF 3, 8-31. The Doe plaintiffs sought a

declaration that requiring them to register as sex offenders under SORA is inconsistent with this Court's decisions in *Doe v. Phillips* and *Doe v. Blunt* and is, thereby, unconstitutional as a violation of the Missouri Constitution's retrospective law prohibition. LF 19-20, 22, 30. The Does also requested entry of an injunction against any prosecution against them for failure to register. LF 19-20, 22, 30. Defendant Keathley filed an answer on July 18, 2007, and an amended answer on August 1, 2007. LF 3, 32-47.

All parties stipulated to the material facts. LF 48-71. All parties moved for summary judgment. LF 72-209. On June 7, 2008, the court granted summary judgment in favor of plaintiffs John Does I-IX and XI and denied defendants' motion for summary judgment as to these plaintiffs. LF 210. The court also granted defendants' motion for summary judgment as to plaintiff John Doe X and denied plaintiffs' summary judgment motion as to this plaintiff. LF 210. On September 30, 2008, the court entered judgment on its order of June 7. LF 212.

Defendant Keathley filed his notice of appeal on November 6, 2008. LF 214-22.

POINTS RELIED ON

I.

The trial court erred in determining that the plaintiffs 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, §§ 589.400 to 589.425, RSMo, and in denying the defendants' motions for summary judgment and granting the plaintiffs' motion for summary judgment as to these plaintiffs because requiring registration of persons who must register under the Act due to their pre-1995 offenses in other states or under federal or military law is not inconsistent with Missouri's prohibition on laws that apply retrospectively (Mo. Const. art. I, § 13) in that persons who have committed offenses in other jurisdictions that require registration in Missouri voluntarily accept Missouri's registration obligation by moving to Missouri and, in the case of persons who must register under the Act because they have been required to register by another jurisdiction, their registration obligation in Missouri is not a new duty or obligation but only the continuation of a pre-existing obligation.

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

Weaver v. Graham, 450 U.S. 24 (1981);

Miller v. Mitchell, 25 S.W.3d 658 (Mo. App. W.D. 2000);

§ 589.400.1, RSMo.

II.

The trial court erred in determining that the plaintiffs could not constitutionally be required to register as sex offenders in Missouri, and in denying the defendants' motions for summary judgment and granting the plaintiffs' motion for summary because all the plaintiffs are required to register in Missouri under the federal sex offender law (42 U.S.C. §§ 16901 to 16929), in that they have been convicted of sex offenses and they reside in Missouri and the federal law requires persons convicted of sex offenses to register in the state they reside in.

Sex Offender and Registration and Notification Act, 42 U.S.C. §§ 16901 to 16929;

28 C.F.R. § 72.3;

Doe v. Lee, No. ED90404, 2009 WL 21097 (Mo. App. E.D. Jan. 6, 2009);

§ 589.400, RSMo.

STANDARD OF REVIEW

The standard of review on the appeal of summary judgment "is essentially *de novo*." *White v. Zubres*, 222 S.W.3d 272, 274 (Mo. banc 2007). The reviewing court is to apply the same standard for testing the propriety of summary judgment as used by the trial court. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Because "[t]he propriety of summary judgment is purely an issue of law," the reviewing court "need not defer to the trial court's order granting summary judgment." *Id*. The record on appeal is viewed "in the light most favorable to the party against whom judgment was entered." *Id*.

Summary judgment is appropriately entered only "if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *White*, 222 S.W.3d at 274 (quoting Rule 74.04(c)(6)). "The moving party bears the burden of establishing a right to judgment as a matter of law." *Id*.

ARGUMENT

I.

The trial court erred in determining that the plaintiffs 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, §§ 589.400 to 589.425, RSMo, and in denying the defendants' motions for summary judgment and granting the plaintiffs' motion for summary judgment as to these plaintiffs because requiring registration of persons who must register under the Act due to their pre-1995 offenses in other states or under federal or military law is not inconsistent with Missouri's prohibition on laws that apply retrospectively (Mo. Const. art. I, § 13) in that persons who have committed offenses in other jurisdictions that require registration in Missouri voluntarily accept Missouri's registration obligation by moving to Missouri and, in the case of persons who must register under the Act because they have been required to register by another jurisdiction, their registration obligation in Missouri is not a new duty or obligation but only the continuation of a pre-existing obligation.

A. Background

This Court, in *Doe v. Phillips*, 194 S.W.3d 833, 852-53 (Mo. banc 2006), ruled that Missouri's Sex Offender Registration Act (SORA), §§ 589.400 to 589.425, RSMo, cannot be applied to require registration by persons convicted of, or pleading guilty to, sex offenses before SORA's effective date of January 1, 1995, because applying it in such instances would be inconsistent with the Missouri Constitution's prohibition on retrospective laws

(Mo. Const. art. I, § 13). But in *Doe v. Phillips*, this Court was considering registration under SORA only as prescribed by § 589.400.1(1) and (2), which require registration for specified offenses committed in Missouri.

Registration is also required of Missouri residents who have been convicted of, or pled guilty to, offenses in another state or country or under federal or military law that, if committed in Missouri, would be a violation of Chapter 566, RSMo, or a felony violation of any offense set out in § 589.400.1(2). § 589.400.1(7). This subdivision further mandates registration by Missouri residents who have been required to register as sex offenders in another state or under federal or military law. *Id*. In *Doe v. Phillips*, this Court was not considering SORA's application to out-of-state, federal, and military offenses and its reasoning does not apply such offenses. The *Doe* opinion does not even mention § 589.400.1(5), the substantially identical predecessor provision to § 589.400.1(7) that was in effect when *Doe* was decided.[2]

The only constitutional problem with SORA that this Court noted in *Doe v. Phillips* was that application of SORA's registration requirements to persons convicted before the Act's effective date constituted an impermissible retrospective application of law. 194 S.W.3d at 852. The Court concluded that mandating registration of persons whose offenses occurred

[2] Although the conviction of John Doe II from the *Doe* case was from Kansas, see 194 S.W.3d at 848, that fact did not factor into the arguments of the parties or the decision of the Court.

before SORA became effective amounted to the imposition of a new duty upon these persons based solely on their pre-SORA offenses. *Id.*

The apparent purpose of the Missouri Constitution's prohibition on laws that operate retrospectively is to ensure that citizens have fair notice of the consequences of their actions at the time of those actions. *Cf. Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the ex post facto] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"); *Miller v. Mitchell*, 25 S.W.3d 658, 663 (Mo. App. W.D. 2000) (identifying similar purpose of constitutional prohibition on ex post facto laws, which are specifically defined as retrospective). The Court's conclusion in *Doe* that this constitutional provision bars application of SORA's registration requirements with respect to offenders convicted or pleading guilty before the Act became effective is easily understood in light of this purpose. Such pre-SORA offenders would not have had fair notice at the time they were convicted or pled guilty that a consequence of that conviction or plea would, some day, be an obligation to appear at their local Sheriff's Office to provide specified information about themselves, to update this information whenever it changed, and to confirm the information two to four times a year.

B. General Analysis

A person moving into Missouri after SORA's effective date who has committed an offense elsewhere that would be a registrable offense if it occurred here will be aware, regardless of the date of that out-of-state offense, that the effect of that offense is that registration will be required after the move to Missouri. By moving to Missouri, such

offenders are voluntarily submitting themselves to the operation of SORA. Unlike the pre-1995 Missouri offenders considered by this Court in *Doe*, persons with pre-1995 out-of-state offenses who move to Missouri have fair notice of the consequences of the move and the ability to exercise an informed choice: they can move to Missouri and register, or they can avoid registration by not moving to Missouri. Though the duty to register is contingent on conduct occurring before the enactment of SORA, the duty actually arises from the post-SORA decision to move to Missouri and, thereby, become subject to Missouri law. Because there is fair notice of the registration requirement before out-of-state offenders move to Missouri, application of SORA to these out-of-state offenders is not an unconstitutional retrospective application of the law.

Neither is imposition of the duty to register upon persons moving to Missouri who have previously been required to register as sex offenders in other states, or under federal or military law, a new duty implicating the prohibition on laws that apply retrospectively. For these persons who have been required to register elsewhere, registration in Missouri is nothing more than the continuation of a previously existing obligation to register imposed by another jurisdiction. As a pre-existing obligation, the continued duty to register in Missouri is not inconsistent with the retrospective law bar.

A large majority of the states do not have constitutional provisions forbidding retrospective laws. 16B Am. Jur. 2d *Constitutional Law* § 695 (1998).[3] Thus, it is

[3] This article identifies eight states with constitutional prohibitions on retrospective or retroactive laws. 16B Am. Jur. 2d *Constitutional Law* § 695 n.27 (1998).

permissible for most other states to require registration of sex offenders whose offenses occurred before the enactment of their sex offense registration laws.[4] If sex offenders who have been required to register in other states because of offenses occurring before 1995 are able to move to Missouri without being required to register here, Missouri will become an attractive destination for such offenders. Missouri could well become a haven for sex offenders from other states. Persons who move away from states that have imposed registration requirements upon them should not be permitted to evade that requirement by moving here. Missouri's prohibition on retrospective laws does not prevent Missouri from blocking such evasion because, as discussed above, application of SORA to persons with pre-1995 sex offenses from other states merely continues an already existing obligation.

Because requiring sex offender registration of Missouri residents with pre-1995 sex offenses from other jurisdictions and of Missouri residents who have been required to register by the law of another jurisdiction does not impose any new obligation or duty based on past conduct, the holding in *Doe v. Phillips* does not apply to such offenders, and they may constitutionally be required to register under SORA.

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[4] Even in Ohio, a state that does have a constitutional prohibition on retroactive laws, the state Supreme Court has determined that this prohibition does not bar application of Ohio's sex offender registration law to conduct occurring before the effective date of that law. *State v. Cook*, 700 N.E.2d 570, 576-79 (Ohio 1998), *cert. denied*, 119 S. Ct. 1122 (1999).

C. Does I, II, III, V, VI, VIII, and IX May Constitutionally Be Required to Register as Sex Offenders

John Doe I. In approximately 1989, John Doe I was convicted in California of attempted assault to commit rape, a violation of Cal. Penal Code § 220. LF 50 (¶ 11). The acts for which Doe I was convicted in California, if committed in Missouri, would be a violation of § 566.030, RSMo (forcible rape and attempted forcible rape). LF 50 (¶ 11). Doe I moved to Missouri in 1993. LF 50 (¶13).

California has had a sex registration law since 1947. *Di Genova v. State Bd. of Ed.*, 367 P.2d 865, 879 (Cal. 1962). That law requires registration of persons convicted of violations of Cal. Penal Code § 220. Cal. Penal Code § 290(a)(2)(A). Registration has been required for such offenses since at least 1988. LF 92-95 (Westlaw copy of Cal. Penal Code § 290 as it existed in 1988; *see* § 290(a) in particular). Thus, Doe I was required to register in California following his conviction.

Because Doe I has been required to register under California law, he is required to register in Missouri while he resides here. § 589.400.1(7). As discussed above, this requirement does not constitute a retrospective application of law because it is the continuation of an already existing duty.

That Doe I moved to Missouri before 1995, and thereby experienced a break in his registration obligation between his move to Missouri from a state that required registration and the later enactment of Missouri's SORA, does not present any retrospective law problems. Doe I had an obligation to register before he came to this state. Even though the Missouri obligation to register was enacted after his move here, the obligation to register,

although quiescent for a time, is still not a new obligation. Missouri's enactment of an obligation to register on the part of persons who have been required to register in other states simply reactivates a preexisting obligation that such persons had managed to evade for a time by moving away from the state that had imposed the obligation to register. Persons who move away from states that have imposed registration requirements should not be permitted to permanently evade that requirement by moving to another state.

John Doe II. In approximately 1987, John Doe II was convicted in Nevada of two counts of lewdness with a minor, in violation of Nev. Rev. Stat. § 201.230. LF 50-51 (¶ 17). The acts for which Doe II was convicted in Nevada, if committed in Missouri, would be a violation of § 566.067, RSMo (first degree child molestation). LF 51 (¶ 17). Doe II moved to Missouri in 2000. LF 51 (¶ 18).

Persons convicted of a violation of § 566.067 are required to register in Missouri. § 589.400.1(1). Because Doe II's offense, if committed in Missouri, would be a violation of Chapter 566, RSMo, Doe II is required to register while he resides in Missouri. 589.400.1(7). As discussed above this requirement to register does not constitute a retrospective application of law because Doe II has voluntarily submitted to the application of SORA by moving to Missouri after its enactment.

Additionally, Nevada required persons convicted of violating Nev. Rev. Stat. § 201.230 to register at the time of Doe II's conviction for that offense in 1987. Nev. Rev. Stat. § 207.152 (setting out registration requirement for sex offenders) & Nev. Rev. Stat. § 207.151 (defining "sex offender" to include persons convicted of violating § 201.230)

(Westlaw copies of §§ 207.152 & 207.151 as they existed in 1987 are set out at LF 96-97). Thus, Doe II was required to register in Nevada following his conviction.

Because Doe II has been required to register under Nevada law, he is required to register in Missouri while he resides here. § 589.400.1(7). As discussed above, this requirement does not constitute a retrospective application of law because it is the continuation of an already existing duty.

John Doe III. On January 26, 1990, John Doe III was convicted in Minnesota of two counts of criminal sexual conduct in the second degree, in violation of Minn. Stat. § 609.343, Subd. 1(b). LF 51 (¶ 22). Doe III's victims were a 14-year-old male and a 15-year-old male. LF 51 (¶ 22). The acts for which Doe III was convicted in Minnesota, if committed in Missouri, would be a violation of § 566.068, RSMo (second degree child molestation), or § 566.090, RSMo (first degree sexual misconduct). LF 51 (¶ 22). Doe II moved to Missouri in 1993. LF 52 (¶ 24).

Doe III was required to register as a sex offender under Minnesota law. LF 52 (¶ 25). Because Doe III has been required to register under Minnesota law, he is required to register in Missouri while he resides here. § 589.400.1(7). This is so, even though he no longer has to register under Minnesota law now that he has completed his probation. LF 52 (¶ 25). Missouri law requires registration of any person who "has been" required to register in another state. *Id.* Doe III "has been" required to register in another state, regardless of any later expiration of that registration requirement under the law of the other state.

And, as discussed above, the requirement that Doe III register in Missouri does not constitute a retrospective application of law because it is the continuation of his pre-existing

duty to register under Minnesota law. It is immaterial that this pre-existing Minnesota duty has expired. It is the imposition of the duty to register by another state that is material. Any particular form of registration (such as with whom, how often, and what information must be provided) or time limits on registration are incidental only. That Missouri law may require Doe III to continue to register while he resides in this state does not create a new obligation. He had to register before, and he is merely being required to continue to register.

John Doe IV. Although John Doe IV moved to Missouri before the enactment of SORA and he has never been required to register under Texas law, he is still required to register, as are all the other plaintiffs, under federal law as discussed below in Point II.

John Doe V. In April 1993, John Doe V was convicted in California of one count of lewd or lascivious act with a child under 14 in violation of Cal. Penal Code § 288. LF 53-54 (¶ 36). The acts for which Doe V was convicted in California, if committed in Missouri, would be a violation of § 566.067, RSMo (first degree child molestation). LF 54 (¶ 36). Doe V moved to Missouri in 2004. LF 54 (¶ 37).

Persons convicted of a violation of § 566.067 are required to register in Missouri. § 589.400.1(1). Because Doe V's offense, if committed in Missouri, would be a violation of Chapter 566, RSMo, Doe V is required to register while he resides in Missouri. 589.400.1(7). As discussed above this requirement to register does not constitute a retrospective application of law because Doe V has voluntarily submitted to the application of SORA by moving to Missouri after its enactment.

Additionally, as noted above, California has had a sex registration law since 1947. *Di Genova*, 367 P.2d at 879. That law requires registration of persons convicted of

violations of Cal. Penal Code § 288. Cal. Penal Code § 290 (a)(2)(A). Registration has applied to the crime of lewd acts upon children since at least 1968. *Dixon v. Municipal Court*, 73 Cal. Rptr. 587, 588 (Cal. App. 1968). *See also* § 290(a) as it existed in 1988. LF 92 (requiring registration of persons convicted of violations of Cal. Penal Code § 288). Thus, Doe V was required to register in California following his conviction.

Because Doe V has been required to register under California law, he is required to register in Missouri while he resides here. § 589.400.1(7). As discussed above, this requirement does not constitute a retrospective application of law because it is the continuation of an already existing duty.

John Doe VI. John Doe VI was convicted on February 21, 1985, in a military courts martial at Homestead Air Force Base, Florida, of one count of Article 125 (10 U.S.C. § 125 (U.C.M.J. Art. 125)), sodomy, and three counts of Article 134 (10 U.S.C. § 134 (U.C.M.J. Art. 134)), for acts involving his daughter. LF 54 (¶ 41). The acts for which Doe VI was convicted at court martial in Florida, if committed in Missouri, would be a violation of § 566.062, RSMo (first degree statutory sodomy). LF 54 (¶ 41). Doe VI moved to Missouri in 1996, immediately upon his release from military confinement. LF 55 (¶ 43).

Persons convicted of a violation of § 566.062 are required to register in Missouri. § 589.400.1(1). Because Doe VI's offense, if committed in Missouri, would be a violation of Chapter 566, RSMo, Doe VI is required to register while he resides in Missouri. § 589.400.1(7). As discussed above this requirement to register does not constitute a retrospective application of law because Doe VI has voluntarily submitted to the application of SORA by moving to Missouri after its enactment.

Additionally, under Pub. L. 105-119, 111 Stat. 2440, 2466 (1997), the enactment of a note to 10 U.S.C. § 951 directed the Secretary of Defense to specify offenses under the Uniform Code of Military Justice for which state law should require sex offender registration under 42 U.S.C. § 14071(a). Under this authority, the Secretary identified the military offenses that would require registration in Enclosure 27 to Dep't of Defense Instr. No. 1325.7. This instruction and enclosure may be found at < http://www.dtic.mil/whs/directives/corres/pdf/132507p.pdf (at pdf document pages 25 & 109) > last viewed on November 11, 2007. LF98-103 (copies of the relevant pages of this instruction.) Enclosure 27 establishes that persons convicted of violating Articles 125 and 134 (for acts with a minor) trigger state sex offender registration requirements. LF 101. Thus, Doe VI is required by military law to register in the state where he resides.

Because Doe VI has been required to register under military law, he is required to register in Missouri while he resides here. § 589.400.1(7). As discussed above, this requirement does not constitute a retrospective application of law because it is the continuation of an already existing duty.

John Doe VIII.[5] On October 18, 1983, John Doe VIII was convicted in California of lewd and lascivious crimes against a child, in violation of Cal. Penal Code § 288. LF 56 (¶ 53). The acts for which Doe VIII was convicted in California, if committed in Missouri,

[5] John Doe VII is not an out-of-state offender; he pled guilty to a Missouri misdemeanor sex offense. LF 8-9 (¶ 48).

would be a violation of § 566.067, RSMo (first degree child molestation). LF 56-57 (¶ 53). Doe VIII moved to Missouri in 1993. LF 57 (¶ 55).

As noted above, California requires registration of persons convicted of violations of Cal. Penal Code § 288. Cal. Penal Code § 290(a)(2)(A). As also noted above, registration has applied to the crime of lewd acts upon children since at least 1968. *Dixon*, 73 Cal. Rptr. at 588. Thus, Doe VIII was required to register in California following his conviction.

Because Doe VIII has been required to register under California law, he is required to register in Missouri while he resides here. § 589.400.1(7). As discussed above, this requirement does not constitute a retrospective application of law because it is the continuation of an already existing duty.

John Doe IX. On August 27, 1969, John Doe IX was convicted in California of a violation of Cal. Penal Code § 288 for a lewd or lascivious act upon the body of a female under 14. LF 57 (¶ 59). Doe IX had been arrested for this offense on August 3, 1968. LF 57-58 (¶ 59). The acts for which John Doe IX was convicted in California, if committed in Missouri, would be a violation of § 566.067, RSMo (first degree child molestation). LF 58 (¶ 59). Doe IX moved to Missouri in about 1973 or 1974. LF 58 (¶ 61).

Doe IX's situation is comparable to Doe VIII's situation in all material respects and Doe IX must register in Missouri for the same reasons as does Doe VIII.

D. Summary[6]

John Does I, II, III, V, VI, VIII, and IX are required to register under § 589.400.1(7) as Missouri residents who have committed offenses in other jurisdictions that would require registration if committed in Missouri or as persons who have been required to register by other jurisdictions. Requiring registration of persons with pre-1995 out-of-state sex offenses who moved to Missouri after January 1, 1995 is not barred by Missouri's retrospective law prohibition because these persons had fair notice of this requirement before moving here. Requiring registration of those who have been required to register by other jurisdictions is not barred by the retrospective law prohibition because the registration required of these persons is not a new duty or obligation, but rather the continuation of a pre-existing obligation imposed by another state.

Under the stipulated facts, the law enforcement authority defendants in this case were entitled to judgment as a matter of law with regard to the claims of John Does I, II, III, V, VI, VIII, and IX that it is improper to require them to register under SORA. The decision of the circuit court to the contrary should be reversed.

[6] The remaining plaintiffs, John Does X and XI are not out-of-state offenders; they pled guilty to Missouri misdemeanor sex offenses. LF 12-13 (¶¶ 68 & 73).

II.

The trial court erred in determining that the plaintiffs could not constitutionally be required to register as sex offenders in Missouri, and in denying the defendants' motions for summary judgment and granting the plaintiffs' motion for summary because all the plaintiffs are required to register in Missouri under the federal sex offender law (42 U.S.C. §§ 16901 to 16929), in that they have been convicted of sex offenses and they reside in Missouri and the federal law requires persons convicted of sex offenses to register in the state they reside in.

A. Federal Law Preempts Missouri's Retrospective Law Bar and Requires Registration of All Sex Offenders Residing in Missouri

The federal Sex Offender and Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901 to 16929, requires sex offenders throughout the country to register as sex offenders in the states they reside in. Under 42 U.S.C. § 16913 (a): "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides . . . ." A "sex offender" is "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1). The definition of "sex offense" includes "a criminal offense that has an element involving a sexual act or sexual contact with another." 42 U.S.C. § 16911(5)(A)(i). The term "criminal offense" includes criminal offenses under state and military law. 42 U.S.C. § 16911(6).

Under 42 U.S.C. § 16913(d), the United States Attorney General was directed to specify whether the sex offender registration requirements of the federal registration law are to apply to persons convicted before July 27, 2006 (the effective date of the federal law). In 28 C.F.R. § 72.3, the United States Attorney General sets out the determination that the

requirements of the federal sex offender law "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."

The criminal offenses to which all the Doe plaintiffs pled guilty had elements involving a sexual act or sexual contact with another. LF 50-61 (¶¶ 11, 17, 22, 30, 36, 41, 48, 53, 59, 68, and 73). As offenders whose offenses involved sexual acts or sexual contact with others, plaintiffs here are sex offenders as defined by federal law and, thereby have an obligation, under 42 U.S.C. § 16913(a), to register as sex offenders in the jurisdiction in which they reside. Plaintiffs all reside in Missouri. LF 10-15 (¶¶ 5-16). As Missouri residents, plaintiffs have an obligation under federal law to register in Missouri.

Moreover, Missouri's SORA requires registration of any Missouri resident who "has been or is required to register under federal . . . law." § 589.4001.1(7). Therefore, because plaintiffs have a duty to register under federal law, they are also required to register in Missouri.

Because the requirement that plaintiff register is a federal requirement, neither *Doe v. Phillips*, 194 S.W.3d 833, 852-53 (Mo. banc 2006), nor *Doe v. Blunt*, 225 S.W.3d 421, 422 (Mo. banc 2007), bars the obligation that the Does plaintiffs register, even though the federal law was not enacted until after they were convicted of, or pled guilty to, the offenses that they are to register for. The Supremacy Clause of the United States Constitution overrides the retrospective law prohibition of the Missouri Constitution with regard to the obligation to register under 42 U.S.C. § 16913(a) because this is an obligation imposed by federal law. Thus, all sex offenders residing in Missouri, including all the Doe plaintiffs in this case, must

register in Missouri as sex offenders regardless of the dates of their convictions or pleas.

The Missouri Court of Appeals, Eastern District, recently reached this exact conclusion in *Doe v. Lee*, No. ED90404, 2009 WL 21097, at *4 (Mo. App. E.D. Jan. 6, 2009), where it held:

> The Supremacy Clause, SORNA and the Attorney General's promulgation of 28 C.F.R. § 72.3 collectively operate to preempt [the] holding [of *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. banc 2006)] that "Missouri's constitutional bar on laws retrospective in their operation compels this Court to invalidate Megan's Law's registration requirements as to, *and only as to, those persons who were convicted or pled guilty prior to the law's January 1, 1995, effective date*." (Emphasis in original.)

B. SORNA Does Not Provide Exception to Obligation of Sex Offenders to Register Based upon State Constitutional Provisions

The Doe plaintiffs argued in the circuit court that the federal registration requirement imposed by SORNA provides an exception to this requirement, through 42 U.S.C. § 16925(b), for instances in which the highest court of a state has determined that registration is improper under state constitutional provisions. But the Does improperly equate the federal obligation imposed on sex offenders by SORNA to register in their states of residence with that Act's encouragement to the states to implement a registry system in compliance with the Act's guidelines (failure to comply with federal guidelines for sex offender registries could, under § 16925(a), result in the reduction of federal funding).

The duty to register is imposed on the sex offender, not the states. Under § 16913(a), the "*sex offender* shall register, and keep the registration current, in each jurisdiction where the offender resides." (Emphasis added.) In contrast, § 16925(b), applies only to the maintenance and characteristics of sex offender registries that states are encouraged to enact. Even if the federal guidelines regarding the information to be included in state registries (42 U.S.C. § 16914), the duration of the registration requirement (42 U.S.C. § 16915), periodic in-person verification by offenders of their registration information (42 U.S.C. § 16916), notification to offenders of their duty to register (42 U.S.C. § 16917), and public access to certain registration information (42 U.S.C. § 16918) were stripped from SORNA, the federal sex offender registration requirement (42 U.S.C. § 16913) would still exist as an independent federally imposed duty upon sex offenders to register in the jurisdiction in which they reside.

This distinction between the offender's obligation to register and the states' obligations regarding a registration system should it decide to comply with federal guidelines can be seen in the terms of § 16925(b). Section 16925(b)(1) provides that the United States Attorney General is to evaluate "whether a jurisdiction has substantially *implemented*" (emphasis added) the requirements of the federal law for a sex offender registration system. The states can "implement" a registration system. But they do not "implement" the federal duty upon sex offenders to register. That is a federal obligation imposed upon sex offenders that is completely independent of any state registration requirement and also independent of

any requirements of the federal law that state registration systems must meet.[7]

C. Summary

Regardless of whether a state may be excused from any federal guidelines relating to sex offender registries under § 16925, § 16913 imposes a federal requirement upon sex offenders to register in their states of residence. Any diminishment by state law of this federal obligation to register would directly conflict with federal law. "[S]tate law is pre-empted if that law actually conflicts with federal law." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Therefore, sex offenders living in Missouri must register in Missouri (due to federal law) regardless of the dates of their offenses. Even though Missouri's state constitutional bar to retrospective laws does apply to the duty of sex offenders to register under state law, that state constitutional bar must give way to federal supremacy where the federal obligation of sex offenders to register is concerned.

[7] Because the federal duty of sex offenders to register under SORNA is an obligation applicable directly to the offenders themselves (and is independent of sex offender registry guidelines states must comply with to obtain full federal funding), the United States Attorney General has no authority to diminish that obligation on sex offenders in any way through his power under § 16925(b) to relieve a state of the obligation to comply with particular aspects of the SORNA guidelines that would place it in violation of its constitution. It is only with regard to the maintenance and characteristics of state sex offender registration systems that the United States Attorney General's evaluation under § 16925(b) is concerned.

Because SORNA requires registration of all sex offenders in their states of residence, all the Doe plaintiffs must register in Missouri because they reside in this state. Under the stipulated facts, the law enforcement authority defendants were entitled to judgment as a matter of law in their favor as to all the Doe plaintiffs. The circuit court's grant of summary judgment in favor or John Does I-IX and XI and the denial of summary judgment in favor of the defendants as to these plaintiffs should be reversed and this case remanded with instructions that summary judgment is to be entered in favor of the defendants as to all plaintiffs.[8]

[8] The circuit court's judgment in favor of the law enforcement authority defendants and against plaintiff John Doe X was not appealed. This portion of the judgment was appropriate even in the absence of the application of SORNA because Doe X pled guilty on July 23, 2002, to an offense that occurred sometime in 1999 (specifically, sexual misconduct in the first degree, pursuant to § 566.090, RSMo, a class A misdemeanor). LF 59 (¶ 68). Doe X's victim was a 15-year-old female. LF 59 (¶ 68). Misdemeanor offenses of Chapter 566, RSMo, became registrable offenses under SORA in 2000. LF 66-67 (¶¶ 97-98). In 2002, SORA was amended to require registration for misdemeanor offenses of Chapter 566 only if the victim of the offense was less than 18 years old. LF 67 (¶¶ 100-02). Because Doe X pled guilty to a misdemeanor offense of Chapter 566 against a victim younger than 18 years old after such offenses became registrable offenses, Doe X is required to register as a sex offender. *See Doe v. Phillips*, 194 S.W.3d at 838 & 852-53 (emphasizing that key date in

CONCLUSION

For the foregoing reasons, defendant-appellant Keathley urges this Court to reverse the judgment of the Jackson County Circuit Court as to plaintiffs-respondents John Does I-IX and XI and to remand this case with instructions that summary judgment be entered in favor of the law enforcement authority defendants and against the these plaintiffs-respondents on all issues. (The circuit court's judgment in favor of the law enforcement authority defendants and against plaintiff John Doe X was not appealed. If that portion of the judgment had been appealed, it should be affirmed.)

Respectfully submitted,

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determining whether retrospective law prohibition applies is the date of the conviction or plea).

CERTIFICATE OF SERVICE

AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)

I hereby certify that one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, the 30th day of January, 2009, to:

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I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 7,657 words, excluding the cover, this certificate, the signature block, and the appendix.

I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses, and is virus-free.

_____
Assistant Attorney General

APPENDIX