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'S REPLY BRIEF

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The legal landscape for registration of sex offenders shifted on July 27, 2006, one month after this Court's decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006). Yet, the plaintiffs in this appeal fail to recognize this significant change and instead grope for a position that no longer exists and for a foothold that they did not allege, and cannot maintain. The plaintiffs further misapply this Court's decision in *Doe v. Phillips*, stretching what was "an extremely narrow" holding in an attempt to topple the valid requirements of Missouri's "Megan's Law." *Id.* at 837-38 (citing RSMo. §§ 589.400 to 589.425).

On July 27, 2006, the Sexual Offenders Registration and Notification Act ("SORNA") became federal law. This effected two significant changes for sex offenders in Missouri: (A) SORNA created an independent obligation for sex offenders to register in Missouri (*see* 42 U.S.C. § 16913 ("A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides . . . .") (emphasis added)); and, (B) SORNA triggered a requirement in "Megan's Law" that sex offenders must register in Missouri if they are "required to register in another state" or "under tribal, federal, or military law" (RSMo. § 589.400.1(7)).

The changes enacted by Congress in SORNA cannot violate Missouri's prohibition against a Missouri law that is "retrospective in its operation," and they completely undermine the plaintiffs' claims in this case. Mo. Const. Art. I, Sec. 13. Thus, the plaintiffs' arguments must fail and the trial court should be reversed.

A. SORNA Creates an Independent Obligation Under Federal Law That Cannot Violate Missouri's Retrospective Prohibition and Does Not Violate Other Constitutional Provisions.

The Missouri Constitution provides that no Missouri law can be enacted that is "retrospective in its operation." Mo. Const. Art. I, Sec. 13. This provision is the basis for the plaintiffs' claims in this case. (Legal File "LF" 18-30 (alleging only three counts all titled "Retrospective Application of Statutes: Missouri Constitution"). And although it is a Missouri constitutional provision, the plaintiffs attempt to apply it to a federal law. Plaintiffs argue on appeal that they "cannot constitutionally be required to register in Missouri as sex offenders under federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16911 to 16929, given Missouri's prohibition on retrospective laws." Respondents' Brief, p. 9. This completely misstates the law, and was never alleged by the plaintiffs.

1. SORNA creates an independent obligation to register in Missouri that cannot violate the Missouri Constitution.

There is no question that SORNA creates an independent federal obligation for sex offenders to register in Missouri. The plain language of the statute provides, in part, as follows:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a) (titled "Registry requirement for sex offenders") (emphasis added).

Numerous courts have recognized the independent obligation that sex offenders have to register under SORNA. *See, e.g., United States v. Hardeman*, No. CR 08-0847 WHA, --- F. Supp.2d ---, 2009 WL 188035, *5 (N.D. Cal. Jan. 23, 2009) (holding that section 16913 "requires offenders, as a matter of federal law, to register under the appropriate *state's* existing registration system"); *United States v. Shenandoah*, 572 F. Supp.2d 566, 578 (M.D. Ala. 2009) ("A state's failure to update its registration system to conform with SORNA does not alter a sex offender's independent duty to register all information that is required by then-existing state law."). Even the plaintiffs concede that SORNA "requires sex offenders to register in their states of residence."[1] Respondents' Brief, p. 10.

Because SORNA establishes an independent federal duty to register in Missouri, the plaintiffs are left to try to avoid registration by undermining federal law with a Missouri constitutional provision. Their efforts must fail. It is fundamental to our federal system generally, and the Supremacy Clause in particular, that the Missouri Constitution does not apply to Congress or the enactment of federal laws. *See, e.g., State ex rel. Meyer v. Cobb*,

[1] Despite recognizing their independent federal duty to register under SORNA, plaintiffs argue that "it is impossible for the Does to comply with SORNA because it has not yet been implemented in Missouri." Respondents' Brief, p. 31. This is not true since Missouri has much of the necessary framework in place. Moreover, "[a]n offender's registration under SORNA does not hinge on implementation in his state." *United States v. Gould*, 526 F. Supp.2d 538, 542 (D. Md. 2007); *see also Shenandoah*, 572 F. Supp.2d at 578.

467 S.W.2d 854, 856 (Mo. 1971) (repeatedly applying the retroactive operation provision to the "state" alone). Otherwise, individual state legislatures could dictate whether a federal law is valid and thereby override Congress and the United States Constitution.

In an alternative attempt to circumvent federal law, the plaintiffs argue that Congress intended SORNA's requirements to be "subordinate to the Missouri Constitution and the holdings of *Phillips* and *Blunt*." Respondents' Brief, p. 22. The supposed basis for this argument is a provision in SORNA – 42 U.S.C. § 16925(b). This provision was not intended to subordinate the federal requirements. Rather, the plaintiffs improperly equate the federal obligation imposed on sex offenders by SORNA to register in their states of residence with that Act's financial 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. 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.

Obligations established by federal law, including those in SORNA, are not subject to challenge under Missouri law, including Missouri's prohibition on a law "retrospective in its operation."

2. The plaintiffs never challenged SORNA as an unconstitutional retrospective law or a violation of the United States Constitution.

Recognizing that Missouri's Constitution does not apply to SORNA, the plaintiffs did not allege in the trial court that the requirements of SORNA are prohibited by the Missouri Constitution. (LF 8-30). Indeed, there is not a single reference to SORNA in their Petition. (LF 8-30). This is significant since the plaintiffs acknowledge that "Keathley is implementing and enforcing the federal duty to register." Respondents' Brief, p. 24.

Despite having failed to challenge the provisions of SORNA as a supposed violation of the Missouri Constitution, the plaintiffs argue that "SORNA cannot be used to circumvent the Missouri Constitution." Respondents' Brief, p. 24. This argument misses the point entirely. SORNA is not a means to circumvent the Missouri Constitution, but instead creates an independent obligation for sex offenders to register in Missouri.

Like their failure to claim SORNA violated the Missouri Constitution, the plaintiffs also failed to claim in their Petition that SORNA violated the United States Constitution. Yet, they argue in this Court that SORNA is "prohibited by the *Ex Post Facto* Clause of

Article I, § 10, cl. 1 of the United States Constitution"[2] as well as the "Due Process Clause" of the United States Constitution. Respondents' Brief, pp. 25 & 29. These claims fail because they were never raised before, and because they have been repeatedly rejected by Courts throughout the United States. *See, e.g., Doe v. Phillips*, 194 S.W.3d at 841-45 (citing *Smith v. Doe*, 538 U.S. 84 (2003) (rejecting an *ex post facto* challenge to a similar law in Alaska), and *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (rejecting a substantive due process challenge to Iowa's Megan's Law)).

It is impermissible to raise an argument or claim for the first time on appeal. This is true for constitutional challenges. "Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure." *Hollis v. Blevins,* 926 S.W.2d 683, 683 (Mo. banc 1996). A party may not raise such issues as an afterthought in a post-trial motion or on appeal. *Id.* at 684. And even if the plaintiffs had pled or argued the *ex post facto* or due process clauses in the trial court, their claims would still fail. This Court already rejected similar challenges in *Doe v. Phillips*. 194 S.W.3d at 841-45 (rejecting the "invitation to interpret Missouri due process, equal protection or *ex post facto* clauses more broadly than comparable federal constitutional provisions"). Accordingly, the belated and unfounded challenges to SORNA should be rejected.

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[2] In their Petition, plaintiffs asserted a violation of the *ex post facto* prohibition in the Missouri Constitution. (LF 21 & 29). Apparently recognizing that this claim had already been rejected by this Court, the plaintiffs switched to the federal prohibition on *ex post facto* laws.

3. Keathley cannot be enjoined from enforcing SORNA's independent obligation to register.

Although the plaintiffs cannot, and did not, challenge the requirements in SORNA, they are seeking to enjoin Keathley from "implementing and enforcing the federal duty to register." Respondents' Brief, p. 24. Similar attempts to thwart the requirements of SORNA were recently advanced and rejected in *Doe v. Keathley*, No. 06AC-CC01088 (Cole County Cir. Ct., Feb. 25, 2009) (Attached hereto as Appendix A1-A6), and *Doe v. Lee*, No. ED 90404, --- S.W.3d ---, 2009 WL 21097 (Mo. App. E.D., Jan. 6, 2009).

In *Doe v. Keathley*, Judge Callahan applied *Doe v. Phillips*, and held that "[a]lthough SORA cannot be applied to require plaintiff to register as a sex offender, he is required to register in Missouri under the federal Sex Offender and Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901 to 16929." (Apdx. A2). As a result, the request "that he be free from registering as a sex offender in Missouri" and that the court enter an "order directing defendant Keathley . . . to free plaintiff from <u>any</u> requirement that he register as a sex offender" was rejected. (Apdx. A1).

In *Doe v. Lee*, Judge Baker, writing for the Missouri Court of Appeals, Eastern District, faced a nearly identical challenge. The plaintiff sought only a "declaration that he was no longer required to register as a sex offender under Missouri's Sex Offender Registration Act ("SORA")." There was no direct claim that the federal requirements in SORNA were unconstitutional. Thus, the court analyzed *Doe v. Phillips*, but concluded that granting relief on the basis of *Doe v. Phillips* would be ineffectual because the plaintiff was

"required by federal law to register in Missouri regardless of the Missouri constitution's bar on laws that are retrospective in their operation." *Doe v. Lee*, 2009 WL 21097, *4.

Based on the plaintiffs' independent obligations to register in Missouri as sex offenders under federal law, which is neither subject to the Missouri Constitution's prohibitions on retrospective laws nor otherwise unconstitutional, the claims in this case should be rejected and the trial court reversed.

B. "Megan's Law" Requires Sex Offenders to Register in Missouri Based on an Existing Duty to Register in Another State, or Under Tribal, Federal, or Military Law.

Not only does SORNA create an independent federal obligation for sex offenders to register in Missouri, but SORNA also triggers a provision in "Megan's Law" that requires sex offenders to register in Missouri if they have a duty to "register in another state" or "under tribal, federal, or military law." RSMo. § 589.400.1(7). This requirement is yet another basis on which to deny the plaintiffs' claims, and is likewise not retrospective in its operation.

1. The provision at issue in this case – RSMo. § 589.400.1(7) – was not considered by this Court in *Doe v. Phillips*.

In an attempt to avoid the requirements of "Megan's Law," the plaintiffs take the position that section 589.400.1(7) is invalid because this Court in *Doe v. Phillips* referred to the "'registration provisions of sections 589.400 to 589.425,'" and by this general reference supposedly invalidated the "'registration requirements' of Megan's Law." Respondents' Brief, p. 20. This argument misapplies the holding of *Doe v. Phillips*.

In *Doe v. Phillips*, this Court considered registration under "Megan's Law" only as prescribed by RSMo. § 589.400.1(1) and (2), which require registration for those who are convicted, found guilty, or pled guilty in Missouri since July 1, 1979. This Court did not consider RSMo. § 589.400.1(7). Indeed, there was no evidence or suggestion that the plaintiffs in *Doe v. Phillips* were required to register in any other state or in accordance with tribal, federal, or military law.

Unlike the provisions considered in *Doe v. Phillips*, which involved only the sex offender's conduct or actions since July 1, 1979, RSMo. § 589.400.1(7) requires registration based on an existing duty to register in another state, or in accordance with tribal, federal or military law. All but one of the plaintiffs in this case conceded that they are required to register in another state. And presumably (although not in the record), all are required to register under federal law. Thus, the provision before this Court is entirely different than the provisions considered in *Doe v. Phillips*.

2. Section 589.400.1(7) is not retrospective in that the duty to register in Missouri is based on an existing duty and not past conduct.

"'A retrospective law is one which creates a new obligation, imposes a new duty or attaches a new disability with respect to transactions or considerations already past.'" *Doe v. Phillips*, 194 S.W.3d at 850 (quoting *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (1911)). A law is not retrospective merely because it "'relates to prior facts or transactions . . . or because some of the requisites for its action are drawn from a time antecedent.'" *Id*. at 851 (quoting *Jerry-Russell Bliss v. Hazardous Waste*, 702 S.W.2d 77, 81 (Mo. banc 1985)). Moreover, there is no "vested right in the law remaining unchanged." *Id.*

at 852. Thus, as long as a statute does not look solely at past conduct it is permissible under the Missouri Constitution. *See id.* (noting that the law imposes a new duty to register "based solely on their offenses prior to its enactment"). Section 589.400.1(7) is not at all focused solely on past conduct, but instead looks to an existing duty to register in another state or under tribal, federal, or military law.

This Court's recent decision in *State v. Holden*, No. SC89635 (Mo. banc Mar. 17, 2009), is instructive on this point. In *State v. Holden*, this Court focused on the relevant language of section 589.400 as the "key factor" in the analysis of whether the provision was retrospective in operation. *Id.* at 6. The provision at issue in *State v. Holden* focused on those "convicted, found guilty of, or who have pled guilty to the underlying offense." *Id.* Therefore, the "trigger date for purposes of retrospective analysis" was the date of the conviction or plea, "not the date of the underlying offense." *Id.* The provision at issue in the instant case focuses on the requirement to register. Thus, the "trigger date for purposes of retrospective analysis" in this case is the date that the plaintiffs were/are required to register in another state or in accordance with tribal, federal, or military law. *Id.* Neither the "date of the underlying offense," nor the date of the plea or conviction, apply in the analysis.

In contrast, the plaintiffs attempt to label section 589.400.1(7) as a statutory provision focused solely on past conduct so that they can claim it violates the retrospective prohibition in the Missouri Constitution. They argue that they are required to register in Missouri under section 589.400.1(7) "because of convictions or guilty pleas that occurred prior to the effective date of SORA." Respondents' Brief, p. 9. However, they fail to recognize, or simply try to minimize, the existing duty to register which is the basis for registration in

Missouri under RSMo. § 589.400.1(7). Indeed, although the duty to register under RSMo. § 589.400.1(7) may relate to "prior facts or transactions" in other states or under tribal, federal, or military law, it does not impose a new duty. Instead, it recognizes and applies an existing duty to register in another jurisdiction or under another jurisdiction's law. RSMo. § 589.400.1(7) is not based solely, or even primarily, on prior acts or conduct. It applies to existing conduct or obligations, and, therefore, does not violate Missouri's prohibition on retrospective laws.

Under plaintiffs' theory, sex offenders could be required to register for the rest of their lives in every jurisdiction in the United States, and by virtue of tribal, federal, and military law, but if they move to Missouri they would not have to register if their present duty to register relates in any way to "prior facts or transactions." This is an unfounded reading of the Missouri Constitution and the cases that interpret the prohibition on retrospective laws. *See Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993) (holding that a statute is presumed to be valid and will not be declared unconstitutional unless it "clearly contravenes some constitutional provision"). Furthermore, how this interpretation does not create an incentive for sex offenders to move to Missouri is a mystery, particularly given the relatively few states that have a retrospective application law. This is not the law, and should not be the law.

3. Courts routinely require registration by sex offenders if required by another jurisdiction – despite differences in laws.

The plaintiffs also argue that because the registration requirements may have differences from state to state, those differences – no matter how small – create a new duty

prohibited by Missouri's Constitution. Respondents' Brief, p. 13. This ignores all practical realities and is contrary to the overwhelming authority. Indeed, the plaintiffs cite no authority for this proposition.

Of course, there will always be some differences in state laws concerning registration of sex offenders. Yet, state courts have routinely held that if a sex offender is required to register in one state they will be required to register in another state if they move. *See, e.g., Turner v. State*, 937 So.2d 1184 (Fla. Ct. App. 2006) (requiring registration in Florida when required to register in Minnesota); *People v. Johnson*, 770 N.Y.S.2d 844 (N.Y. Dist. Ct. 2003) (requiring registration in New York when required to register in Maryland); *Flowers v. State*, 213 S.W.3d 648 (Ark. Ct. App. 2005) (requiring registration in Arkansas when required to register in Louisiana); *Trandall v. Genesee County Prosecutor*, 2002 WL 44328 (Mich. Ct. App. 2002) (requiring registration in Michigan based on conviction in federal court). To hold otherwise would create significant gaps in registration, and make certain states destination points for sex offenders.

Once again, if the plaintiffs' argument is taken to its ultimate conclusion, a sex offender would not be required to register in Missouri if there were any differences in state registration laws. This would defeat the very purpose of Missouri's "Megan's Law" and could render utterly useless any attempt to require sex offenders who move into Missouri to register. As such, the plaintiffs' arguments and claims fail.

CONCLUSION

For the foregoing reasons, defendant-appellant Keathley requests this Court reverse the judgment of the Jackson County Circuit Court and remand with instructions that summary judgment be entered in favor of defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that two copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, the 23rd day of March, 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 3,703 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.

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Deputy Solicitor General

APPENDIX

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