

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT
AT KANSAS CITY**

JANE DOE I, et al.

Plaintiffs,

v.

THOMAS PHILLIPS, et al.

Defendants.

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**Case No. 03-CV-219085
Division No. 18**

**DEFENDANTS PHILLIPS' AND SANDERS' AMENDED
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendants Thomas Phillips and Michael Sanders, amend their Proposed Findings of Fact and Conclusions of Law in regard to the hearing held on November 24, 2003, and state as follows:

I. Findings of Fact

A. On September 13, 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. 42 U.S.C. § 14071 ("the Wetterling Act"). To receive federal law enforcement funding, the Wetterling Act required that states adopt a sex offender registration law. *Id.* By 1996, every state had done so. *Smith v. Doe*, 123 S. Ct. 1140, 1145; 155 L.Ed. 2d 164, 174 (2003). The State of Missouri enacted the Sex Offender Registration Act ("SORA") in 1994 with an effective date of January 1, 1995. Mo. Rev. Stat. § 566.600.

B. On July 10, 2003, plaintiffs, Jane Doe I and II and John Does I - VI, filed a lawsuit challenging the validity of SORA on the bases of the *Ex Post Facto*/retrospective, open courts

and right to jury trial, equal protection, bill of attainder, and special law clauses of the Missouri Constitution as well as substantive due process. The defendants in this case are Jackson County Sheriff Thomas Phillips, Jackson County Prosecutor Michael Sanders and Colonel Roger D. Stottlemire, Superintendent of the Missouri Highway Patrol.

C. Plaintiffs filed a Motion for Class Certification on July 23, 2003, requesting the certification of three classes: a plaintiff class of all sex offenders required to register in Missouri under SORA, a defendant class of all Missouri sheriffs and a defendant class of all Missouri prosecutors.

D. On October 28, 2003, plaintiffs filed a Motion for Preliminary Injunction requesting that the registration and notification provisions of SORA be suspended during the pendency of this lawsuit based on *Ex Post Facto*/retrospective, equal protection, bill of attainder, special law, and substantive due process arguments.

E. A hearing was held on November 24, 2003 on Plaintiffs' Motion for Class Action and Plaintiffs' Motion for Preliminary Injunction.

F. Defendants Phillips' and Sanders' stipulated that their interests in Missouri's Sex Offender Registration Act (SORA), Mo. Rev. Stat. § 589.400, *et seq.*, are to enforce the laws of the state of Missouri.

G. Defendant Stottlemire stipulated that the Missouri legislature does not maintain a record of legislative history that provides direct evidence as to the intent or purpose of Missouri's Sex Offender Registration Act (SORA), Mo. Rev. Stat. § 589.400, *et seq.*

H. Defendant Stottlemire stipulated that there are currently 9,212 registrations of persons in the Missouri State Highway Patrol's SORA database; that data does not state

registrants are registered as a result of an offense that was adjudicated by a suspended imposition of sentence.

I. Defendant Stottlemyre stipulated that the apparent intents of Missouri's SORA are a) to provide information to law enforcement officers to assist them in investigating future crimes and b) to provide information to members of the public so they may take steps to protect themselves and their children. There may be other purposes.

J. Plaintiffs elicited testimony from three witnesses, all of whom are required to register under SORA but none of whom were parties, about their concerns with regard to the notification provisions of SORA. Because plaintiffs' Motion for Class Certification is denied as outlined below, the testimony from three non-party witnesses is disregarded as their testimony is irrelevant.

K. The purpose of SORA is to protect children from violence at the hands of sex offenders. *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000).

L. Sex offenders have high rates of recidivism, particularly sex offenders whose victims are children; e.g., 50% rate of recidivism after 15 years, 52% after 25 years, 22% after 22 years. Plaintiff's Exhibit 11, Deposition of Roy LaCoursiere, M.D., page 10, line 7 - page 11, line 2; Defendant Stottlemyre's Exhibit 21, Jacob Wetterling Crimes Against Children Registration Act, House Rept. 103-392, p. 34.

M. Reported rates of recidivism are understated in that sex offenses, particularly child molestation, is significantly under reported. Plaintiff's Exhibit 11, Deposition of Roy LaCoursiere, M.D., page 11, line 19 - page 12, line 9; Defendant Stottlemyre's Exhibit 21, Jacob Wetterling Crimes Against Children Registration Act, House Report 103-392, p. 34.

N. Sex offenders are much more likely than any other criminal class to commit another crime. Defendant Stottlemire's Exhibit 21, Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Improvements Act of 1997, House Report 105-256, p. 6.

O. It is difficult to accurately predict if a sex offender will commit another sex offense. Deposition of Roy LaCoursiere, M.D., page 55, line 13 - page 57, line 3.

II. Conclusions of Law

A. Motion for Class Certification

In addition to factors under Mo. R.Civ. P. 52.08(a), the Court must also consider the practical effect of granting plaintiffs' Motion for Class Certification. In this case, it would result in increasing the complexity of this litigation and the cost to the parties. If the classes were certified and the plaintiffs won the case, SORA would be declared unconstitutional. However, if the classes were not certified and the plaintiffs won the case, SORA would be declared unconstitutional. The outcome is the same, regardless of class certification. There is no benefit to be gained from class certification in this case.

If the Court certified the classes and granted plaintiffs' Motion for Preliminary Injunction, the possible outcomes outlined above are the same. The only change resulting from granting both motions is the suspension of SORA's obligations for all sex offenders across the state of Missouri during the pendency of this lawsuit. Parents and caretakers would be unable to discern with whom to trust their children, increasing the risk that a sex offense will be committed. If a sex offense is committed during the time the preliminary injunction is in effect, law enforcement would be hampered in their investigations, perhaps delaying the apprehension of offenders and

possibly resulting in further crimes against the same or more victims.

The risk is not worth taking when the ultimate outcome is the same; nor is the additional expense to the parties. The court denies plaintiffs' Motion for Class Certification.

B. Plaintiffs' Motion for Preliminary Injunction

1. Where granting a preliminary injunction gives the movant "substantially the relief it would obtain after a trial on the merits," the movant's burden is heavy, *United Industries*, 140 F.3d at 1179 (citing *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993) (quoting *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991)).

2. In determining whether to grant a request for a preliminary injunction, courts consider:

"the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest."

State ex rel. Director of Revenue v. Gabbert, 925 S.W.2d 838 (Mo. 1996) (quoting *Pottgen v. Missouri State High School Activities Assoc.*, 40 F.3d 926, 928 (8th Cir. 1994); *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). Of these, "[n]o single factor in itself is dispositive; rather, each factor must be considered to determine whether the balance of equities weighs toward granting the injunction." *United Industries Corporation v. The Clorox Company*, 140 F.3d 1175, 1179 (8th Cir. 1998).

a. Probability of Success

3. In considering the first factor, plaintiff's probability of success on the merits of

each claim is low. In Missouri, “[s]tatutes are presumed to be constitutional, and the party attacking the constitutionality of a statute ‘bears an extremely heavy burden.’” *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 773 (Mo. 2003) (citing *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999)). Moreover, a court will “not invalidate a statute ‘unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied’ therein.” *Id.*

- Substantive Due Process

4. The Missouri Constitution guarantees its citizens that they will not “be deprived of life, liberty, or property, without due process of law.” Mo. Const., Art. I, § 10. Substantive due process “protects ‘fundamental’ rights, that is, those ‘implicit in the concept of ordered liberty.’” *State ex rel. Cavallaro v. Goose*, 908 S.W.2d 133, 135 (Mo. 1995). A state that “disadvantages a suspect class or impinges a fundamental right” triggers strict judicial scrutiny and must be “necessary to accomplish a compelling state interest.” *Woodson v. Woodson*, 92 S.W.3d 780, 784 (Mo. 2003). “Fundamental rights are ‘created only by the constitution.’” *Goose*, 908 S.W.2d at 135. However, a “statute that neither burdens a suspect class nor impinges a fundamental right need only be rationally related to a legitimate state interest.” *Id.* To establish a violation of substantive due process, a plaintiff must prove that “the government action complained of is ‘truly irrational’, that is ‘something more than . . . arbitrary, capricious, or in violation of state law.’” *Frison v. City of Pagedale*, 897 S.W.2d 129, 132 (Mo. Ct. App. E.D. 1995) (quoting *Anderson v. Douglas County*, 4F.3d 574, 577 (8th Cir. 1993); *Roy v. Missouri Department of Corrections*, 23 S.W.3d 738, 746 (Mo. Ct. App. W.D. 2000) (quoting *Frison*). In addition, “where the right exists only by state law, it is not protected by *substantive*

due process and 'may constitutionally be rescinded so long as the elements of *procedural* due process are observed.'" *Cavallaro*, 908 S.W.2d at 135-36.

In the instant case, the plaintiffs allege only the violation of fundamental rights, not that they are a suspect class. Turning first to plaintiffs' allegation that their liberty interest is infringed by the affirmative obligations imposed by SORA's registration requirements, SORA calls for three types of information: (1) details regarding the sex offense giving rise to the applicability of SORA; (2) the sex offender's location information, including home, employment and institution of higher education if enrolled therein; and (3) the sex offender's personal characteristics; e.g., Social Security number, photograph and fingerprints. Mo. Rev. Stat. § 589.407. This is no more onerous than other duties required of citizens of this state and this country as to certain rights and benefits of citizenship. Voter, motor vehicle, and firearm registration are required for those who wish to vote, or own a motor vehicle or firearm, respectively. Wage earners are required to file both federal and state income tax returns. Requiring offenders to register every ninety days is similar to the self-employed submitting estimated quarterly tax forms. Sex offenders' obligations under SORA are no more onerous than these civic duties and some would say less onerous than filing income tax returns. Plaintiffs are free to move, to change jobs, enroll in any school, or engage in any other activity. No conditions are placed on their activities; nor do they need to obtain permission before engaging in any activity. They must merely report certain facts periodically. Therefore, it is unlikely that SORA infringes the liberty interest of sex offenders.

As to an alleged infringement of plaintiffs' right to travel, SORA does not require that plaintiffs obtain permission before traveling, nor does it set any condition as to when and where a

plaintiff may travel. It merely requires that sex offenders register either quarterly or annually.¹ SORA does not infringe plaintiffs' right to travel.

Plaintiffs also allege that SORA violates their right to privacy and freedom from unwarranted publicity as vested rights that SORA has impaired. However, the right to be free from unwarranted publicity is included in the definition of the right to privacy. *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892, 895 (Mo. 1959). Therefore, it is not a right separate from the right to privacy, and the Court will address only the right to privacy.

The U.S. Supreme Court noted in *Smith v. Doe* that the "consequences [resulting from the public availability of the information] flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Smith v. Doe*, 123 S.Ct. at 1152, 155 L.Ed. 2d at 182. Moreover, sex offenders, as is true of other criminal defendants, are prosecuted publicly, the proceedings of which may be reported by the media. Plaintiffs are objecting to the public disclosure of a public fact, not of private matters. Their right of privacy is not infringed in that SORA provides only for the public disclosure of a public fact.²

Based on the foregoing, it is unlikely that plaintiffs will succeed in their claim that SORA

¹ Reporting is required every ninety days for offenders registered as predatory or persistent sexual offenders; offenders whose victim was less than eighteen years of age at the time of the offense; and any offender who has failed to register or submitted false registration information. Mo. Rev. Stat. § 589.414.5. Other sex offenders must register annually in the month of their birth. Mo. Rev. Stat. § 589.414.6.

² SORA requires that individuals register under SORA who, since July 1, 1979, have been convicted of, been found guilty of, or pled guilty to committing or attempting to commit one of a series of enumerated offenses. Mo. Rev. Stat. § 589.400. Other individuals who meet certain criteria are also required to register. *Id.*

violates plaintiffs' fundamental rights of liberty, travel, and privacy.

5. If SORA does not infringe plaintiffs' fundamental rights, it need only be rationally related to a legitimate state interest. The intent of the Missouri legislature in enacting SORA "was to protect children from violence at the hands of sex offenders." *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). A state is "not required to convince the courts of the correctness of [its] legislative judgments." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. 1991) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981)). Moreover, a court may not "question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. 1991) (quoting *Winston v. Reorganized School District 8-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982)). Instead, the challenger must prove that the classification "could not reasonably be conceived to be true by the governmental decision maker." *Id.* In cases where a "question of legislative judgment remains at least debatable, the issue settles on the side of validity." *Mahoney*, 807 S.W.2d at 513 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)).

In the instant case, the interest of protecting children from violence at the hands of sex offenders is legitimate and rationally related to the registration and notification provisions of SORA. In fact, such an interest is compelling. Without SORA, law enforcement would not know the whereabouts of sex offenders in Missouri for quick apprehension and the possible prevention of additional crimes. Without SORA, Missouri citizens would not know with whom they cannot trust their children and may unwittingly place their children in the hands of a sex

offender.

Moreover, SORA is a state law; thus the right to be free from its requirements exist only under state law. As such, it must observe only the elements of procedural due process. Plaintiffs have not alleged a violation of their procedural due process rights. Therefore, SORA does not violate plaintiffs' rights to procedural due process.

Because SORA does not infringe a fundamental right and is rationally related to a legitimate state interest, this Court must favor the legislature's judgment and the validity of this law. It is, therefore, unlikely that plaintiffs will succeed in their claim that SORA violates plaintiffs' right to substantive due process.

- Equal Protection

6. The Equal Protection clause of the Missouri Constitution provides "that all persons are created equal and are entitled to equal rights and opportunity under the law." Art. 1, § 2. A court uses the same analysis in determining the constitutionality of a statute under the Equal Protection clause as it does for a claim of substantive due process violation:

determine whether the classification 'operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.' If so, the classification is subject to strict scrutiny and th[e] Court must determine whether it is necessary to accomplish a compelling state interest. If not, review is limited to determining whether the classification is rationally related to a legitimate state interest.

Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771, 774 (Mo. 2003) (quoting *Marriage of Kohring*, 999 S.W.2d 228, 231-232 (Mo. banc 1999)). As outlined above in § II.B.4., SORA does not infringe a fundamental right and is rationally related to a legitimate state interest of protecting children from sex offenders. To assist caretakers and parents in

accomplishing this purpose, the Legislature sought to publish upon request the names and locations of known sex offenders. To assist law enforcement agencies in the quick apprehension of sex offenders, they have access to the whereabouts of known sex offenders. Such actions are rational and relevant to SORA's purpose. As such, the judgment of the Missouri legislature may not be questioned.

Even if SORA involved a suspect class or infringed a fundamental right, the protection of children is a compelling state interest. To achieve this purpose, SORA is narrowly drawn. Only known sex offenders are required to register, and a list of such sex offenders are disseminated only upon request. Armed with this information, parents and caretakers know with whom they cannot trust their children. Plaintiffs fail to identify a less restrictive means or one that is more carefully tailored to achieve this purpose. Under either level of scrutiny, plaintiffs are unlikely to succeed in their claim that SORA violates the Equal Protection clause of the Missouri Constitution.

- Bill of Attainder

7. The Missouri Constitution prohibits the General Assembly from enacting a bill of attainder. Art. 1, § 30. A bill of attainder "singles out a 'specifically designated person or group' . . . and inflicts punishment on that person or group." *State ex rel. Bunker Resource Recycling and Reclamation, Inc.*, 782 S.W.2d 381, 386 (Mo. 1990) (citing *Selective Service System v. Minnesota Public Interest Research Group, et al.*, 468 U.S. 841, 104 S.Ct. 3348, 3352, 82 L.Ed. 2d 632 (1984)). Specificity as to a person or group "does not automatically offend the Bill of Attainder Clause" if there is "a reasonable, nonpunitive basis for limiting the act . . ." *Id.* at 386-87 (citing *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 2806,

53 L.Ed. 2d 867 (1977)). Further, “legislation which is intended to prevent future dangerous acts, rather than to punish past action, by members of a group or class of persons, is not unconstitutional as a bill of attainder.” *King v. Swenson*, 423 S.W.2d 699, 704 (Mo. 1968) (overruled on other grounds) (citing *American Communications Ass’n v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 691[25], 94 L.Ed. 925 (1950)).

If the law satisfies the specificity requirement, “[t]he question becomes whether the legislation imposes a constitutionally forbidden punishment.” *Id.* at 387. To answer that question, a court must determine:

- (1) whether the challenged statute falls within the historical meaning of legislative punishment,
- (2) whether the statute, viewed in light of the severity of burdens it imposes, can reasonably be said to advance a nonpunitive legislative purpose, and
- (3) whether the legislative record discloses an intent to punish.

Id.

In the instant case, SORA requires that sex offenders register. The high recidivism rates of sex offenders, particularly when compared with other types of offenders, serves as a reasonable, nonpunitive basis for limiting registration to sex offenders and the dissemination of information to sex offenses only. As a result, it is unlikely that SORA violates the Bill of Attainder clause.

As to whether SORA creates a constitutionally forbidden punishment, the court must first consider if the challenged statute falls within the historical meaning of legislative punishment. The U.S. Supreme Court has already ruled that the effects of Alaska’s sex offender registration act did not resemble historical punishments. *Smith v. Doe*, 123 S.Ct. at 1150, 155 L.Ed. 2d at 180 (stating that “[a]ny initial resemblance to early punishments is, however, misleading”).

SORA is similar to the Alaska law in material respects. Regarding registration, if completing a form constitutes punishment in the historical sense, income tax returns could be so regarded as well. Nor does notification fall within historic legislative punishments. In contrast to historical “shaming” punishments, “[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender.” *Id.*, 123 S.Ct. at 1150; 155 L.Ed. 2d at 181. SORA does not fall within the historical meaning of legislative punishment and is unlikely to meet the first element of the definition of a constitutionally forbidden punishment.

As to the second element, SORA advances a nonpunitive legislative purpose, the protection of children from sex offenders. SORA’s requirements are necessary to accomplish this purpose. Therefore, it likely that SORA fails to meet the second element of a constitutionally forbidden punishment.

Regarding the third element, the legislature did not disclose a purpose, but the Missouri Supreme Court has ruled that its purpose was to protect children from violence at the hands of sex offenders. *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). The Legislature’s placement of SORA within Chapter 589, “Crime Prevention and Control Programs and Services,” supports this ruling. SORA was enacted to prevent future dangerous acts, not to punish sex offenders for their committing sex offenses in the past. Thus, it is likely that SORA fails to meet the third element to be considered a constitutionally forbidden punishment and is not unconstitutional as a bill of attainder.

It is probable that SORA fails to satisfy the elements necessary for a finding of a violation of the Bill of Attainder clause of the Missouri Constitution. First, it does not satisfy the specificity element. SORA, although specifically applying to sex offenders, has a nonpunitive,

reasonable basis for doing so. Further, by attempting to prevent future dangerous acts, it is not unconstitutional, despite its specificity. Second, SORA does not satisfy the punishment element in that SORA's effects do not resemble historical judgment and it accomplishes the legislative purpose of protecting children from sex offenders. Thus, it is unlikely that plaintiffs will succeed on the merits of this claim.

- Ex Post Facto

8. The Missouri Constitution forbids the enactment of *Ex Post Facto* laws. Missouri Const. Art. I, § 13. Missouri courts have applied federal law to *Ex Post Facto* claims under both the United States and Missouri constitutions. *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133 (Mo. 1995); *Missouri v. Lawhorn*, 762 S.W.2d 820 (Mo. 1988); *State v. Thompson*, 42 S.W. 949 (Mo. 1897). As a result, federal law is applicable in this case.

An *Ex Post Facto* law is one that “imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed” *Cummings v. Missouri*, 71 U.S. 277, 325-26 (1866). The key to determining if SORA is an *Ex Post Facto* law is whether it inflicts punishment for a past act. *See Austin v. United States*, 509 U.S. 602, 610 (1993). “[M]ere ‘disadvantage’ to an offender” is not enough to implicate the *Ex Post Facto* clause. *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 136 (Mo. 1995) (citing *California Dept. of Corrections v. Morales*, 131 L. Ed. 2d 588, 115 S. Ct. 1597, 1601-02 (1995)). Therefore, the question in this case is whether the registration and notification requirements under SORA impose additional punishment for the prior conviction of a sex offense.

The U.S. Supreme Court ruled on this issue in *Smith v. Doe* in regard to Alaska's sex

offender registration act. 123 S.Ct. 1140, 155 L.Ed. 2d 164 (2003). The Court found that it was nonpunitive and its retroactive application did not violate the *Ex Post Facto* Clause. *Id.* Without a significant distinction between Missouri's and Alaska's sex offender registration acts, this ruling necessitates the same finding in this case.

As discussed in II.B.4., *supra*, registration requirements are no more demanding than other incidents of citizenship. They represent no more than a "mere disadvantage" for the plaintiffs and, therefore, are not a violation of the *Ex Post Facto* clause. Plaintiffs also cite the consequences of the public dissemination of their names, addresses and crimes as SORA provides. However, others may discover their prosecution for a sex offense through other means, as the prosecution was a public proceeding and a matter of public record and was likely reported in the media. It is dissemination, however, that ensures the protection of Missouri children by helping parents and those acting in a parental capacity determine with whom to trust their children.

Because SORA's requirements do not constitute punishment, it is unlikely that plaintiffs will succeed in their claim that SORA violates the *Ex Post Facto* clause.

- Retrospective Law

9. The Missouri Constitution prohibits any law "retrospective in its operation." Art. I, § 13. The "term *retrospective* refers exclusively to laws related to civil rights and remedies." *Thomaston*, 726 S.W.2d at 459. As a law codified in Title 38, Crimes and Punishment, and its violation prosecuted as a felony or misdemeanor,³ SORA is a criminal law

³ A person who fails to register is subject to a prosecution for a class A misdemeanor for the first offense. Mo. Rev. Stat. § 589.425. Subsequent offenses constitute a class D felony. *Id.*

and may be analyzed under the *Ex Post Facto* clause. This Court finds that the application of a retrospective analysis to a criminal law is inappropriate and therefore disregards plaintiffs' arguments on this basis.

- Special Law

10. The Missouri Constitution prohibits the passage of "any local or special law where a general law can be made applicable." Art.1, § 40 (30). A statute is a special law if "members of a stated class are omitted from the statute's coverage whose relationship to the subject matter cannot by reason be distinguished from that of those included." *State ex rel. Bunker Resource Recycling and Reclamation, Inc.*, 782 S.W.2d at 385. However, "[e]ven a facially special statute does not violate the constitutional prohibition if some characteristic of the excluded class provides a reasonable basis for its exclusion." *Id.* The party challenging the constitutionality of the statute bears "the burden of showing that it is essentially arbitrary and unreasonable." *Id.* The legislature is entitled to define the class. *Blaske*, 821 S.W.2d at 832. However, it must have "a rational basis for establishing the limits of the class as it did." *Id.* What makes a law special is not "what a law includes . . . but what it excludes." *Collector of Revenue v. Parcels of Land*, 517 S.W.2d 49, 53 (Mo. 1974). In other words, special laws do "not embrace all of the class to which they are naturally related. *Id.* As a result, a rational basis test applies, the same as that in an equal protection analysis where no fundamental right or suspect class is involved. *Savannah R-III School District v. Public School Retirement System of Missouri*, 950 S.W.2d 854, 859 (Mo. 1997). A law is not special if it is open-ended; i.e., if other members can join the class. *Zimmerman v. State Tax Commission of Missouri*, 916 S.W.2d 208, 208 (Mo. 1996) (ruling that a statute applying only to first class charter counties is open-ended in

that other counties may join); *see also* *Parcels of Land*, 517 S.W.2d at 53 (ruling that a statute applying to only one member at the time of enactment is not a special law if other members may later join after satisfying the stated criteria); *cf. State ex rel. City of Blue Springs*, 853 S.W.2d 918, 920-21 (Mo. 1993) (finding that a statute based on population at a specific time before the enactment of the law may be a special law).

In the instant case, other members may join the class. Those who qualify as sex offenders under SORA in the future may join the class. As a result, SORA is open-ended and therefore not a special law. Even if SORA was considered a special law, it satisfies the rational basis test, as outlined under § II.B.5., *supra*. No other Missouri law would serve the same purpose as SORA because none would list the current whereabouts of sex offenders, nor do those laws provide for the release of that information to the public. Therefore, it is unlikely that SORA will be found to violate Missouri's prohibition against special laws.

b. Other factors for a preliminary injunction

11. The threat of irreparable harm to the movant absent the injunction.

Absent the injunction, movants will suffer no irreparable harm. SORA disseminates information about plaintiffs' sex offenses that is already public. Proceedings with regard to plaintiffs' prosecutions were public. Plaintiffs' attempt to suppress such public information is like shutting the barn door after the livestock has escaped. It is too late. Moreover, the harm to plaintiffs stems from their committing a sex offense, not from SORA's notification of their crimes to the public upon request.

12. The balance between this harm and the injury that the injunction's issuance would inflict on other interested parties.

The threat of harm to Missouri's children is greater than any that may be endured by plaintiffs. Sex offenders may suffer damage to their reputations; a victim of a sex offense suffers much more.

13. **The public interest.**

The citizens of Missouri have a compelling interest in protecting their children from violence at the hands of sex offenders.

14. Because plaintiffs are unlikely to succeed on the merits of this case, the threat to children outweigh any damage to plaintiffs' reputations and the public has an interest in protecting children from sex offenders, this Court finds that the equities weigh in favor of denying plaintiffs the preliminary injunction they seek. Therefore, this Court denies their Motion for Preliminary Injunction.

III. Conclusion

Accordingly, this Court hereby denies plaintiffs' Motion for Class Certification and denies plaintiffs' Motion for Preliminary Injunction.

SO ORDERED.

Respectfully submitted,

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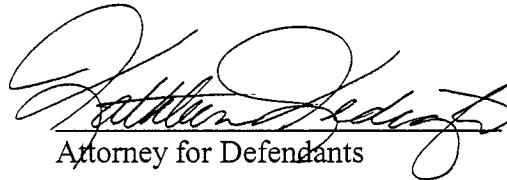
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, via U.S. mail, postage prepaid, on this 29th day of December, 2003 to:

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I hereby certify that a true copy of the foregoing was hand-carried to the chambers of The Honorable Jon R. Gray with a 3-½ inch computer diskette that was new and has been scanned for viruses and is virus-free.


Attorney for Defendants