

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

JANE DOE I, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 03-CV-219085
	)	
THOMAS PHILLIPS, et al.,	)	Division No. 4
	)	
Defendants.	)	

**REPLY SUGGESTIONS IN SUPPORT OF  
MOTION FOR CLASS CERTIFICATION**

Defendants Phillips and Sanders and Defendant Stottlemire have filed responses to Plaintiffs’ Motion for Class Certification. Sanders and Phillips do not object to certification of the plaintiff class, nor do they contest that their interests are shared with their respective proposed defendant classes, but object to being named as representatives because, they claim, representation of the remaining county sheriffs and prosecutors would impose an administrative and financial burden on them. DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION (hereinafter “COUNTY DEFENDANTS’ RESPONSE”) at 2. Sanders and Phillips argue that SORA and the defendant classes should be represented by the Missouri Attorney General. *Id.* at 2-3. Stottlemire opposes certification of the plaintiff class as well as the two proposed defendant classes, although he is not proposed to be a representative of either proposed defendant class. Stottlemire contends further, that while the attorney general has entered an appearance on his behalf and intends to defend SORA on his behalf and that of the State, the attorney general has no authority to represent county officials.

(hereinafter "STOTTLEMYRE'S RESPONSE") at 9. In reply, Plaintiffs offer the following suggestions.

### **I. CLASS CERTIFICATION IS NECESSARY**

Defendant Stottlemire contends that, because if this Court agrees that SORA is unconstitutional and enjoins enforcement of its registration or notification provisions, the decision will be generally applicable and will benefit all SORA registrants who share the plaintiffs' characteristics, class certification here adds nothing to the injunctive relief sought and is unnecessary. STOTTLEMYRE'S RESPONSE at 2. It may be so if all that were being considered is the Court's ultimate decision on the constitutionality of SORA. But, here, the need for preliminary relief<sup>1</sup> renders necessary the plaintiff and defendant classes requested. Individuals required to register under SORA continue to register. Without an injunction in place as to each county's sheriff or prosecutor, information gathered about those individuals can be and is being disseminated about them. Furthermore, should individuals covered by SORA fail to heed its directives, they can be prosecuted.

Without a class action, the Court will be subjected to a stream of intervenors in this suit; alternatively, there would be a need for litigation in other counties as well which could result in conflicting decisions. The eight present Doe plaintiffs reside in four different Missouri counties (Jackson, Platte, St. Louis, and Newton). Counsel for Plaintiffs already represent approximately 65 additional individuals from those four and seven more counties.

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<sup>1</sup>A motion for preliminary injunction is forthcoming.

All of these individuals have already been released and have been required to register. Information about them may be publicly disseminated, and they have an interest in having that dissemination halted, and in bringing to an end the requirement of periodically updating their registration. Most, if not all, of them are interested in bringing similar litigation if a class is not certified. Discovery would likely reveal the identities of individuals who are due to be released soon, who have not yet had to register and who have not yet had information about them disseminated to the public who are likely to want to be plaintiffs in litigation to avoid the application of the statute to them. Should this Court preliminarily enjoin the application of SORA, they would be able to do to avoid registration and public dissemination of information of them pending a final decision. Every intervenor-plaintiff will necessitate adding as a defendant the county prosecutor and sheriff from that intervenor-plaintiff's county, or, worse, would result in a multitude of lawsuits being brought in counties throughout the state with potentially varied results. During the pendency of the case, should an intervenor-plaintiff move from one county to another, the county prosecutor and sheriff from the intervenor-plaintiff's new county of residence will have to be substituted. During the pendency of the litigation, newly released individuals subject to SORA's requirements may tend to congregate in Jackson County because if a preliminary injunction is in place in Jackson County, they could avoid registration and dissemination by being here, instead of elsewhere in the State. Certifying the proposed plaintiff and defendant classes will help keep the litigation from becoming unwieldy and will promote judicial efficiency.

Furthermore, it cannot be, as Defendant Stottlemire would have it, that there is no vehicle by which to enjoin as to all affected individuals the implementation and enforcement

of a statute whose constitutionality is at issue and provide preliminary relief while the statute's constitutionality is being litigated. *Ihrke v. Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972), relied on heavily by Stottlemire, does not consider how preliminary relief pending final resolution of the constitutional question renders inapplicable the analysis it applies. Similarly, there was no request for preliminary relief in either *Women's Health Center of West County, Inc. v. Webster*, 670 F.Supp. 845 (E.D. Mo. 1987), or *MacArthur v. Firestone*, 690 F.Supp. 1018 (S.D. Fla. 1988). While *Perez-Funez v. District Director*, 611 F.Supp. 990, 995 (C.D. Cal. 1984), recites the rule for which Stottlemire cites it, there, class certification was granted and a preliminary injunction issued. *Id.* at 992. And, although preliminary relief was requested in *Vietnam Veterans Against the War v. Benecke*, 63 F.R.D. 675 (W.D. Mo. 1974), the determination that the class should not be certified turned more on the failure of plaintiffs to define an identifiable class and identify questions of law or fact which were common to the purported members of the indefinite class than it did on the court's buttressing conclusion, citing the rule advanced by Stottlemire, that no useful purpose would be served by permitting the case to proceed as a class action. *Id.* at 681-82.

Class certification has been granted where, as here, preliminary relief is a consideration. In *Doe v. Mundy*, 514 F.2d 1179 (7th Cir. 1975), a class of pregnant women challenged the constitutionality of a county hospital rule regarding abortions. The district court entered a preliminary injunction prohibiting its implementation (which, per the court, could lead to the conclusion that the enabling state statute under which the rule was promulgated was unconstitutional) and defendants appealed. The appellate court held that the

district court did not abuse its discretion in granting plaintiffs a preliminary injunction, since, if preliminary relief were denied, members of plaintiff class would suffer irreparable injury to a fundamental privacy right, since the injunction ordered was narrow enough to avoid unnecessarily injuring or causing inconvenience to defendants, and since the ultimate success of plaintiffs on the merits was probable. “Since the failure to enjoin immediately the operation of the hospital’s policy would subject members of the plaintiff class to violation of this right, the District Court correctly concluded immediate relief was warranted.” *Id.* at 1183. Similarly, here, if there is no class, thereby denying class members the potential protection of a preliminary injunction, each of those to whom SORA applies would suffer the same irreparable dissemination of information injuries as is suffered by the Doe plaintiffs.

In other cases, federal district courts have certified classes and entered preliminary injunctions enjoining statutes with at least tacit approval of courts of appeal and the United States Supreme Court. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 496-98 (1999) (district court certified class of “all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after April 1, 1997, and who will be denied full California AFDC or TANF benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid”, enjoined implementation of the statute, and was affirmed by Ninth Circuit and Supreme Court); *Colautti v. Franklin*, 439 U.S. 379, 383-84 (1979) (class certified and preliminary injunction enjoining implementation of state statute entered by three-judge district court, affirmed by Supreme Court); *Brown v. Chote*, 411 U.S. 452, 456-57 (1973) (in class action challenge to ballot filing fee statutes, preliminary injunction of three-judge district court allowing names of

candidates to be on ballot without payment of fees was held by the Supreme Court not to be an abuse of discretion); *Quinn v. State of Missouri*, 839 F.2d 425, 425-26 (8th Cir. 1988) (no abuse of discretion in entering temporary restraining order, treated on appeal as a preliminary injunction because of its duration, in class action challenge to Missouri constitutional provision requiring St. Louis Board of Freeholders to be owners of real property); *Hodgson v. State of Minnesota*, 1985 WL 6547 (D.Minn. January 23, 1985) (noting, in class action challenge to state statutes requiring parental notice where minors seek abortions, entry of a preliminary injunction enjoining enforcement of that provision of the statute). *See also, Howe v. Varsity Corp.*, 896 F.2d 1107, 1111 (8th Cir. 1990) (acknowledging procedure by which district court conditionally certified a broad class for purposes of preliminary relief and remanding for, *inter alia*, redefinition of the class in light of circuit court's holdings); *cf. Kremens v. Bartley*, 431 U.S. 119, 134-35 (1977) (remanding for reconsideration of class definition and substitution of class representatives where named plaintiffs' claims have become moot).

## **II. THE COMMONALITY, TYPICALITY, AND ADEQUACY OF REPRESENTATION REQUIREMENTS ARE MET**

Stottlemire argues that there are not sufficiently common questions of law and fact to permit certification of a class. But Plaintiffs identified several questions of law or fact common to not only the plaintiff class but to the two defendant classes as well. SUGGESTIONS IN SUPPORT OF MOTION FOR CLASS CERTIFICATION at 5-7. Stottlemire also argues with respect to commonality, typicality, and adequacy of representation that these Plaintiffs will not properly pursue all issues with the same vigor because they may not be as dangerous as others

subject to SORA and might unduly focus on claims related to the statute's failure to provide for individuals who are not dangerous to escape SORA's requirements.

But these arguments go more to whether the class is sufficiently subdivided. Plaintiffs do not concede that there are insufficient common questions of law and fact. However, should the Court conclude that because the Plaintiffs do not include among their member individuals who would be in a higher risk category, they are not sufficiently representative, this is not cause to refuse class certification. Although preliminary relief for many already subject to SORA will consist of a cessation of dissemination of information about them and foreclosure of the need to update their registrations, while for others yet to be released, preliminary relief would allow them to avoid registration as well as dissemination and re-registration, the overriding thrust of the complaint is to invalidate the statute. A broadly defined class is not inappropriate at this preliminary stage. It well may be that as issues develop, additional class representatives should be identified through discovery to represent various subclasses which the Court has authority to order. Indeed, as cases cited *supra* at 4-6 indicate, it is not unusual for courts to order preliminary injunctive relief for broadly defined classes and for parties and court work to properly define and refine the class, assuring proper representation of subclasses, and tailor final injunctive relief accordingly.

Even though Plaintiffs have alleged that they are not dangerous, that does not render them incapable of adequately representing the interests of other members of the class who "have multiple offenses and a poor record for abiding by the law when they are not in prison." STOTTLEMYRE'S RESPONSE at 6. All individuals who are subject to SORA have the same interest in assuring that its provisions are not applied absent requisite constitutional

protections and the same interest in invalidating an unconstitutional statute. Stottlemyre fears that Plaintiffs have an incentive to pursue their own separate interests at the expense of the interest of other members of the class who have multiple offenses and a poor record. But the interest of the Does in having an unconstitutional law invalidated is no different than the interest of those who have multiple offenses and a poor record. The effect of an invalidation is the same on all offenders because SORA could not be applied as to any of them. This is not a case for damages in which a fact finder could conclude, for example, that the application of SORA to a one-time offender with a good record damaged him or her more than a multiple offender with a bad record was damaged, rendering a higher award more appropriate for the former and a lower award more suited to the latter. In such a case, it is conceivable that those having a good chance for larger damages might not represent well the claims of those whose chances for large damages are poor and subclasses would most likely be warranted. But this case seeks a declaration of unconstitutionality and injunctive relief as to all class members, not just some of them.

Plaintiffs are not interested in “perfecting” SORA. It is not for Plaintiffs to advocate any particular “fixes” for the statute’s unconstitutional flaws, nor is it this Court’s role to prescribe them. From Plaintiffs’ perspective as litigators, the statute is either constitutional or it is not. Plaintiffs’ goal is to have SORA declared unconstitutional as to all individuals.

That Plaintiffs may not be currently dangerous or as dangerous as other offenders subject to SORA has little to do with the claims Plaintiffs make that SORA is unconstitutional. For example, the claim that SORA violates the Missouri Constitution’s prohibition against laws which have retrospective application would, if successful, invalidate

the law as to all offenders as to whom the law had applied in such retrospective fashion irrespective of the present level of dangerousness presented by any particular offender. Plaintiffs' claims of unconstitutionality are sufficiently broad that they present sufficient issues of common questions of law and fact to permit certification. It may be that there are individuals as to whom being subject to SORA's unconstitutional provisions may seem more *unfair*. It may be that there are individuals, who, because of the egregious nature of their offenses or because of their recidivism, might be viewed as presenting a greater risk if freed from the prospect of registration and notification, and who, if there were a requirement that the State prove a need to register or a process for an individual to obtain an exemption from SORA's application, would never be able to escape SORA's requirements. But this does not mean there are not common questions of law and/or fact. The point is that if SORA is unconstitutional as to those with one prior sex offense, it is unconstitutional as to those with multiple offenses. If it is unconstitutional as to those on parole, it is unconstitutional as to those released from supervision; if it is unconstitutional as to those offenders who have lived within the law for years, it is unconstitutional as to those who have repeatedly violated parole or committed additional crimes.

There are common questions of law and fact presented by Plaintiffs' claims and the commonality, typicality, and adequacy of representation requirements are met here. Accordingly, as explained above and in Plaintiffs' opening suggestions, the requested plaintiff class should be certified.

### III. THE PROPOSED DEFENDANT CLASSES SHOULD BE CERTIFIED

Phillips and Sanders admit that their interests are shared with their respective proposed defendant classes, and do not argue that no defendant classes should be certified, but object to being named as class representatives, claiming that representation of the remaining county sheriffs and prosecutors would impose an administrative and financial burden on them.

COUNTY DEFENDANTS' RESPONSE at 2-3. Stottlemire observes in this connection that there is no willingness on the part of Sanders and Phillips to serve or that their counsel agrees to serve as class counsel. STOTTLEMIRE'S RESPONSE at 8-9. At first blush, in times of economic and financial challenge for local, county, and state governments, Sanders and Phillips present what may be an appealing argument, but it should be rejected. First, Phillips and Sanders have not established that there is no mechanism for them to obtain the financial assistance of the other counties whose sheriffs and prosecutors would be represented. Nor is it likely that any other county sheriff and/or prosecutor is in a better financial situation and would be a better choice. Which of the 114 other sheriffs and which of the other 114 prosecutors would be better class representatives? As to each class, the burden will have to fall on a prosecutor and a sheriff. No *better* representatives than these are available.

Second, *not* appointing Phillips and Sanders as class representatives could actually increase the cost of litigating SORA's constitutionality because even if Phillips and Sanders are not class representatives, the County Counselor, and/or specially appointed counsel for Phillips and Sanders, will still represent them in this litigation, and, particularly if no plaintiff class is certified, will have to represent them in the litigation of all the other individual plaintiffs who live in Jackson County. And, other county sheriffs and prosecutors will have to

be represented by their respective county attorneys or specially appointed counsel, increasing the numbers of attorneys, in this case and in the multiple cases that inevitably will be brought in other counties. All of this litigation would substantially increase the cost to *all* Missouri counties. It makes better financial and economic sense by far to appoint Phillips and Sanders as class representatives and to find a mechanism to spread the cost of defending SORA among all Missouri counties.

*Missouri Health Care Association v. Attorney General of the State of Missouri*, 953 S.W.2d 617, 621 (Mo. 1997), cited by Phillips and Sanders, is distinguishable. In *Missouri Health Care*, the attorney general was empowered by the express language of the statute in question, MO. REV. STAT. § 407.020.4, to enforce that statute. But SORA specifies no such role for the attorney general. *State ex rel Westhues v. Sullivan*, 224 S.W. 327, 331 (Mo. 1920), is also distinguishable. There, the Missouri Supreme Court held that a county prosecuting attorney could not proceed in the name of the state on matters arising outside the jurisdiction of such prosecuting officer. That case does not stand for the proposition that county prosecutors and sheriffs are not proper class representatives where prosecutors and sheriffs have prescribed duties under a statute such as is the case for sheriffs and prosecutors under SORA.

Stottlemire objects to the proposed defendant classes because the various members of the proposed classes perform their duties only within limited jurisdictions. STOTTELMYRE'S RESPONSE at 6-7. Plaintiffs acknowledge the holding in *Ellis v. O'Hara*, 105 F.R.D. 556 (E.D. Mo. 1985), cited by Stottlemire, but submit that it is inapposite here. *Ellis*, in which plaintiffs sought monetary relief as well as declaratory and injunctive relief, borrows its

analysis from *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), *Thillens, Inc. v. Community Currency Exchange Assoc. of Illinois, Inc.*, 97 F.R.D. 668, 675 (N.D. Ill.1983), and *In re Gap Store Securities Litigation*, 79 F.R.D. 283, 293-95 (N.D. Cal.1978). Each of these cases sought damages from defendant classes whereas here, no monetary relief is requested. Accordingly, the considerations underpinning application of the rule in *Ellis, LaMar, Thillens*, and *In re Gap Store* are not present here.

Furthermore, overlooked by the *Ellis* court is the recognition, in *LaMar, Thillens*, and *In re Gap Store* that there is an exception to the rule that a defendant class is improper unless each named plaintiff has a claim against each defendant class member. The exception, present here, is described in *Thillens*:

The requirement that each named plaintiff must have a claim against each defendant may be waived where the defendant members are related by a conspiracy or “juridical link.” A “juridical link” is some legal relationship which relates all defendants in a way such that single resolution of the dispute is preferred to a multiplicity of similar actions.

*Thillens*, 97 F.R.D. at 675-76 (N.D. Ill. 1983); *see also LaMar*, 489 F.2d. at 469-70. For other examples of juridical links, *see Broughton v. Brewer*, 298 F.Supp. 260 (N.D. Ala. 1969) (the Governor of Alabama, the Attorney General of Alabama, and various Mobile County and city officials); *Samuel v. University of Pittsburgh*, 56 F.R.D. 435 (W.D. Pa. 1972) (all state and state related universities and colleges in the Commonwealth of Pennsylvania similarly situated); and *Washington v. Lee*, 263 F.Supp. 327 (M.D. Ala. 1966), *aff’d*, 390 U.S. 333 (1968) (Commissioners of Corrections, members of the Board of Corrections, all county sheriffs and wardens and jailers of city and town jails in the state). In the light of these authorities this Court should we decline to follow the limited application of the rule in *Ellis*

and should certify the requested defendant classes.

*Mudd v. Busse*, 68 F.R.D. 522 (N.D. Ind. 1975), *aff'd on other grounds*, 582 F.2d 1283 (7th Cir. 1978), *cert. denied*, 439 U.S. 1078 (1979), makes clear that the *LeMar* analysis does not apply in every situation and that this case is the kind of exception *LeMar* contemplated:

The *LeMar* court did recognize that in certain instances, where all members of the defendant class were connected by a common “juridical link,” a plaintiff class versus a defendant class suit could be appropriate, even though no named plaintiff would have personal claims against most members of the defendant class. Such “juridical links” would most often be found in instances where all members of the defendant class are officials of a single state and are charged with enforcing or uniformly acting in accordance with a state statute, or common rule or practice of state-wide application, which is alleged to be unconstitutional. In such a case an action against the defendant class is simply a procedural alternative to challenging the constitutionality of a statute by suit against the state directly . . .

*Mudd*, 68 F.R.D. at 527-28. There is a common juridical link here among all county prosecutors and all county sheriffs charged with enforcing or uniformly acting in accordance with SORA.

Finally, all three defendants raise due process concerns, citing *City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53 (Mo.App. W.D. 2000). But the due process considerations that were present in *Elms Redevelopment Corp.*, a condemnation action, are not present here. In that case, the City and the LCRA sought to extinguish the property interests of what were known as “Gold Key Club members” who had purchased timeshare rights to stay at the Elms Hotel. Due process required that all of the members receive either adequate representation or actual notice of the condemnation action, but the absent members received neither. Thus, adequacy of representation was clearly lacking.

Here, of course, no one is seeking to condemn the property rights of the proposed defendant classes.

Moreover, the individuals named as representatives of the defendant class while unwilling to serve, were Gold Key Club members who were unsophisticated individuals, all but one of whom were not even represented by counsel. “The representatives demonstrated virtually no inclination to represent anyone’s interest even their own.” *Elms Redevelopment Corp.*, 18 S.W.3d at 60. Here, Prosecutor Sanders is an attorney and Sheriff Phillips is a professional, elected law enforcement official. Thus, the underlying concern for adequacy of representation is assuaged.

[T]he test for adequate representation of a defendant class is similar to that employed to determine whether a plaintiff will fairly protect the interests of the class members[.] The defendant class member or members named and served by the plaintiff must be represented by qualified counsel and they must have common interests with and not be antagonistic towards their fellow class members . . . . [S]ome courts have noted that closer scrutiny is necessary in determining the adequacy of the representation of a defendant class because of the risk that plaintiff [in selecting the named representatives] will seek out weak adversaries to represent the class. Of course, if there is any evidence that the defendant representative is not able to or will not vigorously defend the action, then the class should not be certified.

*Id.* (citing 7A CHARLES A. WRIGHT, ARTHUR MILLER AND MARY KANE, FEDERAL PRACTICE AND PROCEDURE § 1770 (2d ed. 1986)). Sanders and Phillips are represented by qualified counsel, and should the Court determine that their interests are sufficiently divergent as to require separate counsel, separate counsel could be appointed for one or the other of the defendant classes. Otherwise, Sanders shares the same interest in the outcome of this litigation as would be held by any other prosecutor in the state and, similarly, Phillips shares the same interest in the outcome of this litigation as would be held by any other sheriff in the

state. Certainly, neither has presented any evidence of, or even identified any antagonism toward the other members of their respective classes. It could hardly be said that in selecting the prosecutor and sheriff of Jackson County, Missouri, which is one of the most populous counties in the state, the plaintiffs sought out weak adversaries to represent the two proposed classes. While it may be that Sanders and Phillips would rather not represent their respective classes because of administrative and financial considerations, neither expressed the intention to not defend the lawsuit, and, especially if no classes are certified, they will be defending the claims for themselves in any event. As observed above, the time and expense that goes into that effort might just as well inure to the benefit of all of Missouri's prosecutors and sheriffs.

In sum, the proposed defendant classes are appropriate here, because the due process concerns raised by Defendants are not applicable and by virtue of the juridical link which exists among all county prosecutors and sheriffs charged with responsibilities under SORA. Given that the proposed defendant classes are appropriate, there are no better class representatives for the proposed defendant classes than those nominated and the proposed defendant classes do not present so great an administrative and financial burden on Jackson County that the advantages of certifying the proposed defendant classes are outweighed. The Court should certify the proposed defendant classes.

WHEREFORE, for the above reasons and those set forth in the suggestions in support of the motion, Plaintiffs suggest their motion should be granted.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was served via First Class U.S. Mail, postage prepaid, this \_\_\_\_\_ day of September, 2003, on counsel listed below:

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