

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. )

**PLAINTIFFS= POST-HEARING REPLY TO  
DEFENDANTS PHILLIPS= AND SANDERS= SUGGESTIONS IN  
OPPOSITION AND DEFENDANT STOTTLEMYRE-S RESPONSE**

Following the submission of Plaintiffs=Post-Hearing Brief in Support of Petition for Declaratory Relief, Defendants Phillips and Sanders filed opposing suggestions<sup>1</sup> and Defendant Stottlemire also filed a response<sup>2</sup>. Their filings warrant this brief reply.

*I. Declaratory Relief Is Appropriate Because One Need Not Await Criminal Prosecution to Seek a Determination of Rights*

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<sup>1</sup>DEFENDANTS PHILLIPS AND SANDERS=SUGGESTIONS IN OPPOSITION TO PLAINTIFFS= PETITION FOR INJUNCTION AND DECLARATORY RELIEF, hereinafter **AP & S SUGGESTIONS IN OPPOSITION@**

<sup>2</sup>DEFENDANT STOTTLEMYRE-S RESPONSE TO PLAINTIFFS=POST-HEARING BRIEF, hereinafter **ASTOTTLEMYRE RESPONSE@**

In order to maintain a declaratory judgment action, a party must meet four requirements. *Grewell v. State Farm Mutual Auto Insurance Co., Inc.*, 102 S.W.3d 33, 36 (Mo. banc 2003). First, the party must show that a justiciable controversy exists that presents a real, substantial, presently existing controversy as to which specific relief is sought. *Id.* The party must also demonstrate a legally protected interest directly at issue and subject to immediate or prospective consequential relief. *Id.* Third, the question presented by the party has to be ripe for judicial determination. *Id.* Fourth, the party must also show that he or she does not have an adequate remedy at law. *Id.* Although they rely primarily on law relating to whether or not injunctive relief, as opposed to declaratory relief (as prayed for in Plaintiffs=Petition for Declaratory Judgment<sup>3</sup>), Defendants Phillips and Sanders essentially argue that Plaintiffs have not established the that there is no justiciable controversy or legally protected interest that is ripe at bar because there is no present prosecution of any of them and correspondingly, that they have not shown there is no adequate remedy at law, all because they could violate SORA, await criminal prosecution for that violation, and then file a motion to dismiss. P & S SUGGESTIONS IN OPPOSITION at 4-6.

Missouri case law has squarely and repeatedly controverted this argument:

The fact that in this case the city was not prepared . . . to enforce the ordinance when this action was filed, or that plaintiffs had not then actually violated the restrictions of the ordinance does not make this action premature. The ordinance had been duly

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<sup>3</sup>The prayers for relief in Plaintiffs=Petition Arequest that this Court enter its order declaring Missouri=s SORA unconstitutional and for any such further legal and equitable relief as this Court deems appropriate.@ PETITION at 9, 10-11, 13, 14. The balancing test weighing the effect of an injunction on the parties involved to the effect on the public discussed by Phillips and Sanders (P & S SUGGESTIONS IN OPPOSITION at 6-7), is not part of the accepted declaratory judgment analysis, as the cited passages from *Grewell* suggest.

adopted. It was a law affecting the plaintiffs. The plaintiffs must assume the city will enforce its laws.

*Tietjens v. City of St. Louis*, 359 Mo. 439, 443 (Mo. banc 1949) (holding rent control ordinance invalid). See also *Missouri Health Care Association v. Attorney General of the State of Missouri*, 953 S.W.2d 617, 622 (Mo. banc 1997) (rejecting argument that case was not ripe because Attorney General had not threatened enforcement, because challenged law affected plaintiffs' disclosure obligations and subjected plaintiffs to criminal penalties for failure to comply); *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 425 (Mo.App. E.D. 1988) (plaintiff need not await criminal prosecution before seeking a determination of his rights); *Ferguson Police Officers Ass'n v. City of Ferguson*, 670 S.W.2d 921, 925 (Mo.App. E.D. 1984) (injury need not have occurred prior to bringing a declaratory action; one of the main purposes of the remedy is to resolve conflicts in legal rights before a loss occurs). What is required is that a plaintiff present a case in which specific relief can be given in a decision which will be res judicata as to the issues presented. *Id.* at 924-95 (citing *City of Joplin v. Jasper County*, 161 S.W.2d 411, 413 (1942)). Declaratory judgment is peculiarly suited to interpreting and declaring the validity of statutes, ordinances, and provisions of a charter. *Id.* at 925 (citing *City of Camdenton v. Sho-Me Power Corp.*, 237 S.W.2d 94, 96 (1951); *City of Joplin*, 161 S.W.2d at 412-413).

Phillips and Sanders rely on *Hayward v. City of Independence*, 967 S.W.2d 650 (Mo.App. W.D. 1998), but *Hayward* is distinguishable and not controlling. In *Hayward*, the plaintiff claimed her home may be subject to ordinances and that in case of violations, she could be subject to fines. *Hayward* at 653. Here, in contrast, Plaintiffs pleaded that they all

were required by SORA to register. PETITION at ¶ 8; see also at ¶ 48 (¶ Plaintiffs under SORA are automatically required to register . . . ¶); ¶ 54 (¶ When Plaintiffs are required to register as sex offenders they will suffer punishment and injuries consisting of . . . ¶). Furthermore, in *Hayward*, the amended petition failed to set forth facts constituting an actual controversy other than the administrative order which Hayward failed to timely appeal, and the court expressed concern that Hayward was attempting to use a declaratory judgment action to avoid the effect of missed appeal deadlines. *Hayward* at 654. Here, in contrast, should any Plaintiff fail to renew his or her registration or otherwise fail to comply with SORA's provisions, he or she runs the risk of prosecution.

*II. SORA Violates the Prohibition Against Ex Post Facto Laws Because Its Punitive Effect Negates Its Regulatory Purpose*

Plaintiffs do not concede that Missouri's SORA is similar to Alaska's<sup>4</sup> or that the analysis of *Smith v. Doe*, 538 U.S. 84 (2003), deciding whether Alaska's law violates the United States Constitution, is controlling on the issue of whether Missouri's SORA violates the Missouri Constitution. Nor are federal and state cases such as those cited by Phillips and Sanders controlling. Missouri applies its own law and need not follow either federal law or the law of other states to determine the constitutionality of SORA vis à vis the Missouri Constitution. However, to the extent that *Smith v. Doe* is instructive, the critical issue here is whether or not SORA is so punitive in effect as to negate its regulatory purpose. *Smith*, 538

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<sup>4</sup>Indeed, the statutes are dissimilar in at least one key way. Under Alaska's law, for example, not all offenders are required to register quarterly for life. *Smith*, 538 U.S. at 90. If the offender was convicted of a single, nonaggravated sex crime, he or she must provide annual verification of the submitted information for only 15 years. AK. STAT. ' ' 12.63.010(d)(1), 12.63.020(a)(2).

U.S. at 92 (citing *United States v. Ward*, 448 U.S. 242, 248-249 (1980)). Missouri law should be applied to determine whether SORA is so punitive in effect as to negate its purpose.

To be an *ex post facto* law, a law must be retrospective and it must disadvantage the affected offender. *Cooper v. Missouri Board of Probation and Parole*, 866 S.W.2d 135, 138 (Mo. banc 1993). SORA is retrospective in that it applies to persons whose convictions or guilty pleas, commitments, or findings of mental disease or defect date back to July 1, 1979. STIP. 20. SORA alters the consequences attached to a crime for which Plaintiffs have already been sentenced. *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 136 (Mo. banc 1995). Furthermore, Plaintiffs are disadvantaged by the application of the law to them. *State v. Lawhorn*, 762 S.W.2d 820, 824 (Mo. 1988). The Missouri Supreme Court has recognized that registration is punitive, *State v. Larson*, 79 S.W.3d 891, 894 (Mo. banc 2002), but regardless, the disadvantage is obvious from SORA's punitive effect. As Plaintiffs have already emphasized<sup>5</sup>, absent SORA, they would not have been required to register and report annually or every ninety days for the remainder of their lives, nor suffered the public dissemination of their names, addresses, and crimes in the manner facilitated by SORA B in short, they would not have had to endure the stigma and disadvantages that SORA has thrust upon them.

*III. This Court Should Apply Missouri Law to Decide Whether SORA Works a Deprivation of Substantive Due Process Under the Heightened Protection Afforded by the Missouri Constitution*

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<sup>5</sup>SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (hereinafter API SUGGESTIONS IN SUPPORT@), October 29, 2003, at 19-20.

Phillips and Sanders refer the Court to an Illinois case examining that state's sex offender registration law. P & S SUGGESTIONS IN OPPOSITION at 20 (citing *People v. Adams*, 581 N.E.2d 637 (Ill. 1991)). There is no showing that the Illinois Sex Offender Registration Act, 730 ILL. COMP. STAT. ANN. 150/1-12, is similar to Missouri's SORA. Indeed, while all who are subject to Missouri's SORA are liable for registration for life, the Illinois act provides that some offenders will not have to be registered and report for more than ten years. 730 ILL. COMP. STAT. ANN. 150/7. More importantly, the cited decision analyzes the Illinois SORA under the federal and state constitutions as though they provided identical protections. As Plaintiffs have earlier emphasized, Missouri's due process clause provides heightened protection against governmental interference with certain fundamental rights and interests.<sup>6</sup> This Court should not be constrained by decisions which decide the constitutionality of the sex offender registration acts of other states based on either federal constitutional grounds or state constitutional grounds that do not afford the heightened due process protection that Missouri's constitution provides. It should apply Missouri law to conclude that Missouri's SORA impinges Plaintiffs' fundamental liberty interest and imposes significant affirmative obligations and a severe stigma upon them, that it is not narrowly tailored to serve the claimed state interests, and, thus, violates substantive due process guarantees of the Missouri

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<sup>6</sup>PI SUGGESTIONS IN SUPPORT at 10-12 (citing *In re Marriage of Woodson*, 92 S.Q.2s 780, 783 (Mo. 2003); *Cavallaro*, 908 S.W.2d at 135; *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. 1978)).

constitution.

*IV. Plaintiffs Did Not Stretch the Facts Beyond That Which Could Be Fairly Inferred from the Evidence*

Defendant Stottlemire charges that Plaintiffs stretch the stipulated facts beyond recognition and beyond the meaning of the Stipulation, exhorting the Court to review carefully the factual assertions citing the Stipulation of Fact for support. STOTTEMYRE RESPONSE at 2, 4. But in each instance cited as an example, the assertions are supported either by the Stipulation or other evidence before the Court, and do not go beyond what could be fairly inferred from that evidence.

Stottlemire would have the Court believe that the assertion that there are some persons required by SORA to register who are not dangerous to others<sup>7</sup> is insufficiently supported by Stipulation & 19. Stipulation & 19 reads:

None of the plaintiffs or intervenors has been found to be dangerous offenders [sic] by any court or governmental agency, other than by the fact of their convictions or pleas of guilt.

It can be inferred from the fact that since all of the Plaintiffs are required to register and none of them have been found by any fact finding body to be dangerous, that some persons required by SORA to register are not dangerous to others. But even if the Court agrees that Stipulation & 19 did not adequately support the assertion, there can be no dispute that the record evidence supports the statement. In addition to & 19, & 23 makes clear that there is no requirement in SORA that as a precondition to registration, an offender undergo an assessment of present dangerousness to society or degree of current risk presented to the public. Stottlemire's own

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<sup>7</sup>PLAINTIFFS=POST-HEARING BRIEF at 4.

expert, Dr. Ray Lacoursiere, M.D., testified that there are some offenders not likely ever to offend again and that there are evaluations which can be employed to determine who at least some of them are. LACOURSIERE DISCOVERY DEPOSITION, September 5, 2002, at 21:22-22:15<sup>8</sup>. As at least one Missouri Supreme Court judge has recognized:

most psychiatrists and psychologists say they can never reliably predict recidivism among sex offenders; Justice Department analyses reportedly show recidivism is lower among sex offenders than in the general criminal population.

*In re the Matter of the Treatment of Norton*, 123 S.W.3d 170, 178 (Mo. banc 2003) (Wolff, J., concurring). As Judge Wolff observes, after offenders have served sentences for their reprehensible acts, they face indefinite consequences (in *Norton*, the constitutionality of indefinite confinement, pursuant to civil commitment either without or after imprisonment, of sexually violent predators), not for what they have done, but for what we are afraid they might do. *Id.* at 177. And, there is good reason to believe Jane Doe II is not dangerous:

All but a handful of the sex offenders confined as sexually violent predators nationwide are men. The only woman in Missouri to be confined as a sexually violent predator was recently released from confinement. *In the Matter of the Care and Treatment of Angela M. Coffel*, 117 S.W.3d 116 (Mo.App. 2003). The court of appeals reversed the probate division's determination that Coffel was a sexually violent predator, noting that there is very little known about recidivism for female sex offenders and the data that exist suggest the rate is very low. The studies regarding male offenders are not applicable to female offenders because the reasons men and women commit sex offenses are fundamentally different.

*Id.* at 177 n. 1. Accordingly, this Court should conclude that the statement is fairly supported

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<sup>8</sup>This deposition is part of the record evidence the Court may consider. STIPULATION, August 5, 2004, at ¶ 14; TR., November 24, 2003, at 10.

by the evidence and the reasonable inferences the evidence permits.

Stottlemire next criticizes Plaintiffs' assertion that registration causes some registrants to lose their employment. STOTTLEMYRE RESPONSE at 2 (citing PLAINTIFFS' POST-HEARING BRIEF at 5 (citing STIPULATION & 26b)). Stottlemire claims that the loss of Jane Doe II's job is attributable to her failure to be forthcoming in her application about her inclusion on a sex offender registration list. *Id.* But & 26b indicates that Jane Doe II was terminated for having declined to answer on her job application whether or not she *had pled guilty to or been convicted of a felony*, not whether she was required to register under any law. Pursuant to Missouri statute, persons who receive a suspended imposition of sentence can deny arrest and conviction. *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. banc 1995) (citing MO. REV. STAT. § 491.050); *Yale v. City of Independence*, 846 S.W.2d 193, 196 (Mo. banc 1993) (A word "conviction," standing alone, does not include the disposition of a "suspended imposition of sentence" either in the City of Independence personnel manual or, for that matter, in legislative enactments where it may be used as a predicate for punitive action in a collateral proceeding). A passage from *Yale* illustrates the conflict between the legislative intention in providing for suspended imposition of sentence and the requirement that those receiving SIS's be required to register:

The obvious legislative purpose of the sentencing alternative of suspended imposition of sentence is to allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow. That legislative purpose is further evidenced in statutes concerning closed records; under § 610.105, RSMo 1986, if imposition of sentence is suspended, the official records are closed following successful completion of probation and termination of the case. Closed records are made available only in limited circumstances and are largely inaccessible to the general public. § 610.120, RSMo Supp. 1991. Thus, with suspended imposition of sentence, trial judges have a tool for handling offenders worthy of the most lenient

treatment. Worthy offenders have a chance to *clear their records* by demonstrating their value to society through compliance with conditions of probation under the guidance of the court.

*Id.* at 195.<sup>9</sup>

But Jane Doe II would never have been fired had the friend of the anonymous letter writer not noticed Jane Doe II's name on the registration list. Furthermore, the assertion that registration has caused individuals to lose employment is also supported by the testimony of Ms. S. at the November 24, 2003 hearing. Ms. S. testified that she truthfully answered a question on a Home Depot job application asking if she was required to register under any law for any reason and, having asked whether it would affect her chance of getting the job

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<sup>9</sup>There are statutorily created exceptions. For example, the Missouri legislature has provided that the term "criminal history" includes any suspended imposition of sentence for the purposes of applying for employment in a direct care position in any public or private facility, day program, residential facility, or specialized service operated, funded, or licensed by the department or any mental health facility or mental health program in which people are admitted on a voluntary basis or are civilly detained pursuant to chapter 632. MO. REV. STAT. § 630.170.5(2). Under § 630.170.2 and .3, any person who has received a suspended imposition of sentence following a plea of guilty to, *inter alia*, any felony sexual offense as defined in chapter 566, is disqualified from holding any such position. Similarly, an applicant for a position to have contact with patients or residents of a provider must disclose his or her criminal history including any suspended imposition of sentence. MO. REV. STAT. § 660.317.5(2).

was told it would. Indeed, she did not get the job. TR. at 20.

Finally, Stottlemire complains that the sentence Missouri's SORA imposes the same burdens of registration, without any severity distinction, upon sets of person defined by opposing characteristics, is not supported by & 23 of the Stipulation and that he does not agree. Defendant is free to disagree that SORA does not impose the same burdens on persons defined by opposing characteristics. Paragraph 23 of the Stipulation, indicating that there is no precondition to registration that there be any assessment of present danger to society from the offender or any degree of risk presented to the public by the offender, does support that portion of the sentence that says there is no severity distinction made and that all must register, which is what it was intended to support. The citation to & 23 might have been better placed after the word A distinction. A better choice of word than A opposing might have been A differing. But the fact remains that all are required to register without distinction, a fact well supported in the record and in the language of the statute itself.

WHEREFORE, for these reasons and for all the reasons set forth in Plaintiffs= Suggestions in Support of Motion for Preliminary Injunction and in Plaintiffs= Post Hearing Brief in Support of Petition for Declaratory Relief, this Court should declare SORA unconstitutional and order such legal and equitable relief as is appropriate.

Respectfully submitted,

ARTHUR BENSON & ASSOCIATES

By  
Arthur A. Benson II Mo. Bar #21107  
Jamie Kathryn Lansford Mo. Bar #31133  
4006 Central Avenue (Courier Zip: 64111)

P.O. Box 119007  
Kansas City, Missouri 64171-9007  
(816) 531-6565  
(816) 531-6688 (telefacsimile)  
abenson@bensonlaw.com  
jlansford@bensonlaw.com  
Attorneys for Plaintiffs

**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 3<sup>rd</sup> day of September, 2004, on counsel listed below:

Ms. Lisa Gentleman  
Deputy Jackson County Counselor  
2nd Floor, Jackson County Courthouse  
415 E. 12th Street  
Kansas City, Missouri 64106  
(816) 881-3355; (816) 881-3398 (telefacsimile)  
kkedigh@jacksongov.org

Mr. Michael Pritchett  
Assistant Attorney General  
Missouri Attorney General's Office  
P.O. Box 899  
Jefferson City, Missouri 65102  
(573) 751-3321; (573) 751-9456 (telefacsimile)  
mike.pritchett@mail.ago.state.mo.us

Attorney for Plaintiffs