

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’ PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW ON PETITION FOR DECLARATORY JUDGMENT**

Introduction

In this action, the Doe Plaintiffs and Intervenors (hereinafter collectively referred to as “Plaintiffs”) challenge MO. REV. STAT. §§ 589.44 *et seq.*, Missouri’s Sexual Offender Registration Act (“SORA”) on state constitutional grounds and seek declaratory relief.

On August 5, 2004, the Court received evidence in the form of a stipulation¹ and thereafter received written arguments from the parties on the merits of Plaintiffs’ Petition for Declaratory Relief. By stipulation, the parties agreed that evidence and argument received on or after November 24, 2003, in conjunction with Plaintiffs’ motions for class certification and a preliminary injunction (both subsequently denied) are to be considered as admitted and a part of the record evidence before the Court for purposes of its decision on the merits of Plaintiffs’ Petition. STIP. at ¶ 14. After weighing the evidence and consideration of the arguments, the Court finds in Plaintiffs’ favor on all counts of their Petition for Declaratory

¹STIPULATION, August 5, 2004 (hereinafter cited as “STIP.”).

Relief based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

SORA

1. Missouri first enacted SORA in 1994. STIP. ¶ 1. As amended in 2002, SORA requires that specified sex offenders register “within ten days of conviction, release from incarceration, or placement upon probation” with the chief law enforcement official of the county in which that person resides. § 589.400.2; STIP. ¶ 2.

2. Any person who is required to register under SORA but does not meet all its requirements may be charged with a Class A misdemeanor unless the person has been convicted under Chapter 566 of an unclassified felony, Class A felony, Class B felony, or any felony involving a child under the age of 14, in which case the person may be charged with a Class D felony; any person who commits a second or subsequent violation of SORA’s registration requirements may be charged with a Class D felony, unless the person has been convicted under Chapter 566 of an unclassified felony, Class A felony, Class B felony, or any felony involving a child under the age of 14, in which case the person may be charged with a Class C felony. § 589.425; STIP. ¶ 3.

3. SORA contains no express indication of legislative purpose or intention or objective within its text and the Missouri General Assembly does not maintain a record of legislative history that provides any direct evidence of the intent of or purpose for SORA. HEARING TRANSCRIPT², November 24, 2003, at 7 (citing STOTTLEMYRE STIPULATION³,

²Hereinafter, “TR.”.

³Hereinafter, “STOTTLEMYRE STIP.”

November 24, 2003, at ¶ 1). However, SORA is codified in Title 38, Crimes and Punishment, of the Missouri Revised Statutes, Chapter 589, Crime Prevention and Control Programs and Services.⁴ As of November 21, 2003, there were 9,212 persons registered under SORA in Missouri. TR. at 8 (citing STOTTLEMYRE STIP. at ¶ 2).

4. SORA applies to those individuals who, since July 1, 1979:

(1) have been or are thereafter convicted of, been found guilty of, or pled guilty to committing, or attempting to commit, a felony offense of Chapter 566 or any offense of Chapter 566 in which the victim is a minor⁵;

(2) have been or are thereafter convicted of, been found guilty of, or pled guilty to committing, or attempting to commit one or more of the following offenses: kidnaping, pursuant to MO. REV. STAT. § 565.110; felonious restraint; promoting prostitution in the first, second, or third degree; incest; abuse of a child, pursuant to MO. REV. STAT. § 568.060; use of a child in a sexual performance; promoting sexual performance by a child; and committed or attempted to commit the offense against a victim who is a minor;

(3) have been committed to the department of mental health as a criminal sexual psychopath;

(4) have been found not guilty as a result of mental disease or defect of any offense listed in § 589.400.1(1) or (2);

(5) have been convicted of, been found guilty of, or pled guilty to or *nolo contendere* in any other state or under federal jurisdiction to committing, or attempting to commit, an offense which, if committed in Missouri, would be a violation of Chapter 566 or a felony violation of the offenses listed in § 589.400.1(2) or who has been or is required to register in another state or under federal or military law; and,

(6) has been or is required to register in another state or under federal or military law and who works or attends school or training on a full or part-time (more than fourteen days in a twelve-month period) basis in Missouri.

⁴Chapter 589, Crime Prevention and Control Programs and Services, also contains provisions concerning Sexual Assault Prevention, Motor Vehicle Theft, Missouri Crime Prevention Information Center, and the Interstate Compact for Adult Offender Supervision.

⁵Minor is defined as a person under the age of eighteen years. § 589.400.1(2).

§ 589.400.1(1)-(6); *see also* STIP. ¶ 20.

5. Persons are required to register when they are found guilty by a jury or pled guilty to the enumerated offenses even if they were given a suspended imposition of sentence (“SIS”) or suspended execution of sentence (“SES”), even though a final judgment of conviction from which an appeal will lie does not result from an SIS. STIP. ¶ 24.

6. Registrants must complete a form which includes, but is not limited to a statement, signed by the registrant, giving his or her name, address, Social Security number, phone number, place of employment, enrollment within any institution of higher education, the crime requiring registration, whether the registrant was sentenced as a persistent or predatory offender pursuant to MO. REV. STAT. § 558.018, the date, place, and a brief description of the crime, the date and place of conviction or plea regarding the crime, the age and gender of the victim at the time of the offense, whether the registrant successfully completed the Missouri sexual offender program, and the fingerprints and photograph of the registrant. § 589.407; Exhibits 1, 2⁶. While much of the information collected is available only to courts, prosecutors, and law enforcement agencies, any person may request a “short list” which consists of a list of the names, addresses, and crimes for which offenders are registered from a county’s chief law enforcement official. § 589.417; STIP. ¶ 5. The statute contains no restrictions as to what any person may do with that short list. STIP. ¶ 5. Missouri does not regulate public access to the facts of SORA registration based on any assessment of the level of dangerousness of any given offender. STIP. ¶ 6.

7. After initial registration, all registrants are required to *annually* report *in person* in

⁶“Exhibit” references are to exhibits admitted at the November 24, 2003, hearing.

the month of their birth to the county law enforcement agency to verify the information given in their § 589.407 statement. § 589.414.6. If working or attending school or training out of state, Missouri registrants are required to report to the chief law enforcement officer in the area of the state where they work or attend school or training and register in that state. § 589.414.7. If an offender is registered as a predatory or persistent sexual offender, if the victim was less than eighteen years of age at the time of the offense, or if the offender is found guilty of failing to register or submitting false information when registering, he or she must report *in person* to the county law enforcement agency *every ninety days* to verify the information given in their § 589.407 statement. § 589.414.5(1)-(3).

8. Additional reporting requirements can be triggered by various changes of circumstance. If a registrant changes residence or address within the county, *within ten days*, he or she must inform the county's chief law enforcement officer *in writing* of the new address, and if the phone number is changed, the new phone number. § 589.414.1; Exhibit 3. If a registrant changes residence or address to a different county, *within ten days*, he or she must appear *in person* and inform both the chief law enforcement official with whom the registrant last registered *and* the chief law enforcement official of the county of the new address or residence and, if the phone number is changed, the new phone number. § 589.414.2. If the registrant becomes the resident of another state, he or she shall appear *in person within ten days* and inform both the chief law enforcement official with whom he or she was last registered and the chief law enforcement official of the area in the new state of residence or address of the new address. *Id.* Chief law enforcement officials of the previous county of residence are to inform the Missouri State Highway Patrol of intrastate changes of

residence; interstate residence changes of registrants are to be reported by the Missouri State Highway Patrol to responsible officials in the new state. *Id.* Any registrant who changes “his or her enrollment or employment status with any institution of higher education within this state by either beginning or ending such enrollment or employment” shall report that change to “the chief law enforcement officer” *within seven days*, but the statute does not specify whether such report is to be made in writing or in person. § 589.414.3. Similarly, although there is no specification as to whether the report is to be made in writing or in person, any registrant who changes his or her name shall report that change to “the chief law enforcement officer” *within seven days* after the change is made. § 589.414.4.

9. Missouri’s SORA imposes lifetime registration requirements with all its provisions unless all offenses requiring registration are reversed, vacated or set aside or unless the registrant is pardoned of the offenses requiring registration. § 589.400.3. STIP. ¶ 22. Other than the fact of the conviction or guilty plea, SORA does not include, as a pre-condition to its requirement to register, the requirement that a court or government agency make an assessment of a present danger to society or any degree of risk the offender presents to the public. STIP. ¶ 23.

10. Missouri imposes registration requirements even though Missouri’s registration data administrator acknowledges that some unknown number of registrants will never re-offend. Defendant Stottlemyre’s expert on sexual offenders, Ray Lacoursiere, M.D., testified at deposition 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. SORA treats

similarly some unknown number of offenders highly *likely* to re-offend with another unknown number highly *unlikely* to re-offend, without making any effort whatsoever to distinguish between the two. Furthermore, Missouri also sweeps onto the registration list persons who committed or at least pled guilty to charges that are not commonly recognized as sex offenses (*see* TR. at 21:19-22 (Ms. S); at 36:11-12, 36:9-16 (Mr. B)) and they are not among “sex offenders” likely to re-offend. But these non-sex offenders are required to register and bear for life all the burdens of sex offender registrants.

The Parties

11. All of the plaintiffs are convicted sex offenders, living in the State of Missouri, and required by SORA to register in their counties of residence; some must register every ninety days. STIP. ¶ 21. They are all currently registered. STIP. ¶ 7. None of the plaintiffs has been found to be a dangerous offender by any court or governmental agency, other than by the fact of their convictions or pleas of guilt. STIP. ¶ 19. There is no provision in SORA for them to establish, individually or as a class, in court or elsewhere, that they should not be required to register. STIP. ¶ 21. Nor does SORA provide a means by which Plaintiffs and other SORA registrants can avoid or end registration by altering the course of their activities or by making any showing as to the likelihood of re-offense, the gravity of their offense, or the degree of danger they present to society. STIP. ¶ 25.

12. Defendant Thomas Phillips is the present Sheriff of Jackson County, Missouri and is its chief law enforcement officer. STIP. ¶ 8. As is the case for all other chief law enforcement officers of all 115 Missouri counties, Phillips must register individuals subject to SORA’s requirements. § 589.400.2. Within three days of receipt of a registration form, he

must forward it to the Missouri State Highway Patrol. § 589.410. He is to forward a copy of each registration form to local law enforcement authorities if so requested. § 589.400.2. He must receive written and in person changes in residence to registration information and shall inform the Missouri State Highway Patrol of those changes. § 589.414. He is to be informed of changes in enrollment or employment status and of registrants' name changes. *Id.* He is to receive in person reports every ninety days of persons who are registered as predatory or persistent sexual offenders, of persons who committed a crime where the victim was less than eighteen years of age, and of persons who pled guilty or were found guilty of failing to register or submitting false information. *Id.* He must receive the annual, in person reports of registrants, verifying the information in their § 589.407 statements. *Id.* He is charged with maintaining, for all offenders registered in Jackson County, a complete list of the names, addresses and crimes for which offenders are registered and provide it to any person who requests it. § 589.417.2. *See also* STIP. ¶ 4.

13. Defendant Michael Sanders is the prosecutor for Jackson County, Missouri. He is charged by law with the responsibility of enforcing SORA in Jackson County. MO. REV. STAT. § 56.060 (except where such duties are performed by a county counselor, “[e]ach prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county”); § 56.450 (“The circuit attorney of the city of St. Louis shall manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction [and] shall appear for the state in

all misdemeanor cases appealed from the circuit court of the city of St. Louis to the court of appeals.”); STIP. ¶ 9.

14. Defendant Colonel Roger D. Stottlemyre is the Superintendent of the Missouri State Highway Patrol (“MSHP”). STIP. ¶ 10. The MSHP is a state agency created and operating under Chapter 43 of the Missouri Revised Statutes. § 43.020. The MSHP Superintendent has command of the patrol and is to perform all duties imposed on the superintendent. § 43.030. The MSHP Superintendent is required to collect, compile and keep available for the use of peace officers of the state the information deemed necessary for the detection of crime and identification of criminals. § 43.120.4. Pursuant to SORA, the MSHP is to develop the offender registration form which offenders subject to SORA must complete and which the chief law enforcement officers of Missouri counties must send to MSHP within three days of registration. § 589.407. SORA requires that upon receipt of a completed registration form, MSHP must enter the information into the Missouri Uniform Law Enforcement System (“MULES”) where it is available to members of the criminal justice system and other entities upon inquiry. § 589.410. Whenever a registrant changes residence, the MSHP is provided with that information, § 589.414.2, and, presumably, given the dictate of § 589.410, updates that registrant’s information in MULES. When a registrant moves from Missouri to a new state, the MSHP must inform the responsible official in the new state of residence of the registrant’s move. § 589.414.2.

CONCLUSIONS OF LAW

I. Count I: Substantive Due Process Under Article I, Section 10 of the Missouri Constitution

Plaintiffs maintain that they have demonstrated that SORA unconstitutionally infringes on a fundamental liberty right, has no express purpose and, even if it had served a compelling interest, is not narrowly tailored to do so and, thus, denies Plaintiffs of substantive due process. This Court agrees.

Under the Missouri Constitution, “no person shall be deprived of life, liberty, or property without due process of law.” MO. CONST. art. I, § 10. Missouri’s due process clause provides heightened protection against governmental interference with certain fundamental rights and interests. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. 2003) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995)). Article I, Section 2, which proclaims that all individuals have “natural rights to life, liberty and the pursuit of happiness,” and Article I, Section 10, which prohibits the deprivation of life, liberty, and happiness without due process, require that Missouri afford more protection of paternal rights than is recognized by the U.S. Supreme Court under the federal due process and equal protection clauses. *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. 1978) (“we are disinclined to so dilute these important rights . . . the Missouri Constitution, art. I, §§ 2 and 10, requires” a different standard for determining a father’s parental rights than that set forth by the U.S. Supreme Court). When, as here, the challenged government action is legislative, due process protects fundamental rights and liberties that are “deeply rooted in this Nation’s history and traditions,” and “implicit in the concept of ordered liberty.” *Glucksberg*, 521 U.S. at 720-21.

The asserted interests must be carefully described. *Woodson*, 92 S.W.3d at 783 (citing *Glucksberg*, 521 U.S. at 721).

Substantive due process protects “fundamental” rights “implicit in the concept of ordered liberty.” *Cavallaro*, 908 S.W.2d at 135 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (rights and liberties “so rooted in the traditions and conscience of our people as to be ranked as fundamental”). Fundamental rights are “created only by the constitution.” *Id.*, (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring), and citing *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995)). The Due Process Clause guarantees more than fair process, and the “liberty” it protects includes more than the absence of physical restraint. *Glucksberg*, 521 U.S. at 719 (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Substantive due process protects such rights against “certain government actions regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Under substantive due process analysis, a law which impinges upon a “fundamental right” is subject to the “strict scrutiny” test, which requires that the law be narrowly tailored to serve some compelling state interest. *Deaton v. State*, 705 S.W.2d 70, 73 (Mo.App. E.D. 1985) (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

The Court concludes that SORA infringes upon Plaintiffs’ fundamental and constitutional liberty right to exercise personal choice and freedom as guaranteed by the Missouri Constitution, Article I, Sections 2 and 10. Plaintiffs have a fundamental liberty interest, deeply rooted in history and tradition, in being free from restriction upon their

personal freedom once their sentences have been served and/or they have successfully completed their probation or parole. *United States v. Solerno*, 481 U.S. 739, 746 (1987) (while the liberty interest to be free from detention is fundamental, it can be overcome by clear and convincing evidence of a compelling government interest, which interest is determined after a hearing consistent with the Due Process Clause); at 755 (“In our society, liberty is the norm . . .”); *see also State ex rel. Oliver v. Hunt*, 247 S.W.2d 969 (Mo. banc 1952) (recognizing that a person who is fully discharged from parole by the state is restored to all rights and privileges of citizenship); MO. REV. STAT. § 561.016⁷. SORA also infringes

⁷Section 561.016 states in pertinent part:

1. No person shall suffer any *legal* disqualification or disability because of a finding of guilt or conviction of a crime or the sentence on his conviction, unless the disqualification or disability involves the deprivation of a right or privilege, which is

- (1) Necessarily incident to execution of the sentence of the court; or
- (2) Provided by the constitution or the code; or
- (3) Provided by a statute other than the code, when the conviction is of a crime defined by statute; or
- (4) Provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived. (emphasis added)

§ 561.016.1.

Not all disqualifications or disabilities that historically have resulted from conviction of a criminal felony statute are encompassed by section 561.016. The legislature has not expressed intent within the statute to make a protected class of convicted felons who have concluded the penalty for their miscreant activity. Significant in understanding the purpose of the statute is the included phrase “legal disqualification or disability.” The adjective “legal” qualifies the subject of the statute. The legislature intended that only “legal” disqualifications and disabilities be the subject of the statute. The statute expresses the intent of the General Assembly to remove much of the legal stigma resulting from conviction for a felony. Previously, many resulting legal disabilities had no rational relationship to the nature of the conviction. . . . Legal disqualifications or disabilities are those disqualifications and disabilities imposed by law that restrict the legal ability of a convicted person to participate in civil activities and to enjoy certain rights ascribed to citizenship. To

upon Plaintiffs' fundamental and constitutional right to privacy and freedom from unwanted publicity and their right to travel.

The Court concludes that SORA adversely infringes upon Plaintiffs' fundamental liberty interest and imposes significant affirmative obligations and a severe stigma upon them because, as the Court has found, *supra* at ¶¶ 9-11, SORA covers all sex offenders from the time of initial registration until death without relation to whether or not they are likely to

reduce the several legal disqualifications and disabilities historically imposed on convicted felons and to articulate the identification of those not otherwise articulated and imposed by statute, the General Assembly has provided that convicted felons will not suffer from "legal disqualification or disability" as a result of their convictions, except as provided by state constitution, code, or statute. *Presley v. United States*, 851 F.2d 1052, 1053 (8th Cir. 1988); § 561.016. The legislature's grant of social reinstatement of convicted felons is not comprehensive, however. The General Assembly has continued to disqualify convicted felons by statute from enjoying several activities attendant to citizenship within our culture. For example, convicted felons are prohibited from holding public office, § 561.021.1, RSMo 2000, and from voting, § 561.026(1), RSMo 2000, while serving their sentence for the conviction. Upon conclusion of the imposed sentence, these rights are restored. §§ 561.021.2 and 561.026(1), RSMo 2000. The right to serve on a jury is not regained, however, § 561.026(3), RSMo 2000, and neither is the ability to hold office as a sheriff, § 57.010.1, RSMo 2000, nor is the legal ability to be employed as a highway patrol officer, § 43.060.1, RSMo 2000.

The prohibition from imposing legal disqualification or disability as articulated by section 561.016 is limited by the provisions of subparagraphs (1) through (4). These subparagraphs provide that a state constitution provision, code, or statute specifically disqualifying or restricting a convicted felon's participation in civil life is excluded from section 561.016.1. The result of the remaining legal disqualifications and disabilities not eliminated by section 561.016 and other statutes means that the convicted felon is not returned to full enjoyment of citizenship. . . .

The General Assembly, therefore, did not intend that section 561.016 eliminate all disqualifications or disabilities resulting from felony conviction. The legislature considered only legal disqualifications and disabilities in section 561.016. *Chandler v. Allen*, 108 S.W.3d 756, 761-62 (Mo.App. W.D. 2003). However, this does not mean that statutory provisions specifically disqualifying or restricting a convicted felon's participation in civil life are immune from attack as being violative of substantive due process.

repeat their offense, the gravity of their offense, or the current danger, if any, that they pose to society. § 589.400.3; *supra* at ¶ 9-11. An offender who is subject to SORA's provisions must provide a statement in writing providing extensive personal information to law enforcement authorities. § 589.407; *supra* at ¶ 6. He or she must appear in person annually in the month of his or her birth to verify the information given in the registration statement required by § 589.407. § 589.414.6; *supra* at ¶ 7. If registered as a predatory or persistent sexual offender, if the victim was less than eighteen at the time of the offense, or if the offender is found guilty of failing to register or submitting false information when registering, the offender must report in person to the county law enforcement agency every ninety days to verify the information in their § 589.407 statement. § 589.414.5(1)-(3); *supra* at ¶ 7. Furthermore, changes of circumstance trigger additional duties under SORA. *Supra* at ¶ 8. If a person subject to SORA's registration provisions changes residence or address and phone number within a county, he or she must inform the county's chief law enforcement officer of those changes within ten days. § 589.414.1; *supra* at ¶ 8. If he or she moves to another county or state, he or she must appear in person within ten days to notify both the chief law enforcement officer of the past county of residence and the chief law enforcement officer of the new county of residence of the change in address, and if applicable, change in phone number. § 589.414.2; *supra* at ¶ 8. A change in enrollment or employment status with any institution of higher education must be reported to the chief law enforcement officer within seven days. § 589.414.3; *supra* at ¶ 8. A change of name must also be reported to the chief law enforcement officer within seven days. § 589.414.4; *supra* at ¶ 8. The Court concludes that these are significant impositions on Plaintiffs' liberty.

The Court also concludes that SORA also imposes a severe stigma – for life – on those to whom it applies. Although the general public may only request a complete list of the names, addresses, and crimes for which the offenders are registered – information, which, admittedly, is already public – in some counties, information is made even more readily available. Even without wide dissemination of all the registration information or Internet dissemination of only the publicly available information, the stigmatizing effect is severe and undeniable. The Court finds that the registration and reporting obligations imposed by SORA on sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole. *Smith v. Doe*, 538 U.S. 84, 111 (2003) (Stevens, J., dissenting in No. 01-729 and concurring in the judgment in No. 01-1231, *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003)); *id.* at 115 (Ginsburg, J., dissenting). They evoke the “shaming punishments that were used earlier in our history to disable offenders from living normally in the community”, *Smith*, 538 U.S. at 109 (Souter, J., concurring in the judgment), and “to mark an offender as someone to be shunned.” *Id.* at 116 (Ginsburg, J., dissenting). They expose registrants “to profound humiliation and community-wide ostracism.” *Id.* at 115; *see also id.* at 109 (Souter, J., concurring in the judgment). Even though the information is already public, SORA goes farther, sending “a message that probably would not otherwise be heard, by selecting some conviction information . . . and broadcasting it Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.” *Id.* at 109 (Souter, J., concurring in the judgment).

Although he admits that the Missouri legislature does not maintain a record of legislative history that provides direct evidence as to the intent or purpose, Defendant Stottlemire nonetheless claims “apparent” compelling state interests in assisting in the investigation of future crimes and to provide information to members of the public to facilitate them in protecting themselves and their children. TR. at 7 (citing STOTTLEMYRE STIP. at ¶ 1); TR. at 8 (citing *id.* at ¶ 3); STIP. at ¶ 11).⁸ And, indeed, the Missouri Supreme Court has observed that the “obvious legislative intent for enacting sec. 589.400 was to protect children from violence at the hands of sex offenders.” *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. banc 2000); STIP. ¶ 12.

Even if these are compelling interests, however, the Court also concludes that SORA is not narrowly tailored to serve the claimed state interest because it covers *all* offenders from the time of their release until their death regardless of whether or not they are likely to repeat their offense, the gravity of their offense, or the danger they currently present to society. *See supra* at ¶¶ 9-11. This is so even though the State knows that not all offenders are likely to re-offend and it knows that there are evaluations which can be performed to distinguish those sex offenders who are likely to re-offend from those who are not. LACOURSIERE DISCOVERY DEPOSITION, September 5, 2002, at 21:22-22:15. Thus, the system is hardly narrowly tailored to achieve even legitimate state interests and denies due process to those registrants who could prove they were not going to re-offend with evidence sufficient to satisfy even the

⁸County defendants Sanders and Phillips claim only an interest in enforcing the laws of the State of Missouri. TR. at 6 (citing SANDERS AND PHILLIPS STIPULATION, November 24, 2003, at ¶ 1); STIP. at ¶ 13. This is not a substantial interest in that they have no legitimate interest in enforcing an unconstitutional law of the State of Missouri. Their purported interest merely begs the questions Plaintiffs raise in their challenge to SORA.

State's own expert.⁹ The registration requirement constitutes a severe deprivation of liberty, it is imposed in a totally arbitrary fashion on anyone who is convicted or who pleads guilty to a specified offense, and it is imposed only on those criminals and no others. Defendants have not convinced this Court that SORA is narrowly tailored to serve a compelling state interest. Therefore, the Court concludes that SORA lacks any legitimate rationality.

In sum, the Court finds that SORA adversely infringes upon Plaintiffs' fundamental liberty interest in freedom from restriction after serving the sentence prescribed for their offense and/or release from probation or parole and that SORA imposes significant affirmative obligations. SORA also imposes severe stigma on persons to whom it applies. Despite the fact that constitutional fundamental liberty interests are being abridged by SORA, no compelling state interest is cited to justify the deprivation and SORA is not narrowly tailored to serve a compelling state interest. Accordingly, the Court concludes that Plaintiffs have shown that SORA violates substantive due process and must be declared unconstitutional and, therefore, that preliminary injunctive relief prohibiting further registration of offenders and dissemination of the specified information about Plaintiffs and other registrants and potential registrants is warranted.

II. Count II: Ex Post Facto Law/Retrospective Application of Statutes Under Article I, Section 13 of the Missouri Constitution

Missouri's Constitution forbids both *ex post facto* laws and forbids laws which are applied retrospectively. *Fults v. Missouri Board of Probation and Parole*, 857 S.W.2d 388, 390 (Mo.App. W.D. 1993). Article I, Section 13 provides "[t]hat no *ex post facto* law, nor

⁹At a minimum, to satisfy due process, the statute needs to have levels of registration classification and a judicial safety-valve such as the Connecticut statute employs.

law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.” MO. CONST. art. I, § 13. While the “*ex post facto* clause is aimed at laws that are retroactive and that either alter the definition of crimes or increase the punishment for criminal acts already committed,” *Cavallaro*, 908 S.W.2d at 136 (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, (1995); *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)), unconstitutional retrospective laws are generally civil in nature. *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo.App. W.D. 1989). The Court concludes that SORA, whether considered to be criminal or civil, violates the Missouri Constitution’s prohibition on *ex post facto* and retrospective laws.

A. If criminal, SORA is an unconstitutional *ex post facto* law

The Court concludes that SORA is an *ex post facto* law in violation of Missouri’s constitution because it is retroactive in that it alters the consequences attached to a crime for which Plaintiffs have already been sentenced. Indeed, by its express terms, 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. But to prevail, Plaintiffs must also demonstrate that SORA either alters the definition of crimes or increases the punishment for criminal acts already committed. *Cavallaro*, 908 S.W.2d at 136. The Court concludes that SORA increases the punishment for criminal acts already committed. “Two elements are necessary for a law to be *ex post facto*: it 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) (citing *Miller v. Florida*, 482 U.S. 423, 430 (1987)); *Fults*, 857 S.W.2d at 390.

“The *ex post facto* provision prohibits any law that . . . imposes an additional punishment to that in effect at the time the act was committed.” *Cooper*, 866 S.W.2d at 137-38.

“The crucial question thus becomes, [are Plaintiffs] disadvantaged by the application of the law to [them]?” *State v. Lawhorn*, 762 S.W.2d 820, 824 (Mo. 1988). Here, not only has the Missouri Supreme Court recognized that registration is punitive¹⁰, but the disadvantage is obvious because SORA is punitive in effect. Absent SORA, none of the Plaintiffs would have been subjected to the initial registration requirements, nor would they have had to report in person annually or every ninety days to verify the registration information for the rest of their lives. Absent SORA, none of the Plaintiffs would have had to comply with the reporting requirements resulting from a change in address, enrollment or employment status with any institution of higher education, or name. Nor, absent SORA, would any of the Plaintiffs have suffered the public dissemination of their names, addresses, and crimes in the fashion facilitated by SORA.

The hearing testimony supports the conclusion that SORA is stigmatizing and disadvantages individuals subject to its requirements. Ms. S., who, while living in Texas, was given a suspended imposition of sentence and probation for the offense of permitting injury to a child when a spanking her ex-husband administered to her four-year-old daughter resulted in three bruises, testified about the effect of registration on her attempts to gain employment closer to home. She testified that the application of a potential employer asked her to state whether she was required to register under any law. When she asked whether an affirmative response would affect her chances, she was told that “unfortunately, yes, it

¹⁰*State v Larson*, 79 S.W.3d 891, 894 (Mo. banc 2002).

would.” TR. at 16:20-17:3; 20:5-20. She did not get the job. *Id.* at 20:12-13. The offense of permitting injury to a child was not even considered a sex offense under Texas law. *Id.* at 21:19-22:6.

Mr. S. testified that he was charged with sodomy and inappropriate touching as the result of the 1993 allegation of his then eight-year-old stepdaughter’s babysitter that he had touched the girl’s genitals, with no penetration, while in the process of touching the girl’s buttocks. TR. at 24:4-25:16. The babysitter was being investigated for engaging in a hairdressing business when she was supposed to be providing day care and the babysitter attributed the investigation to Mr. S.’s wife. The next thing Mr. S. knew, he was charged. TR. at 25:17-26:4; 33:12-34:3. Although he initially pleaded not guilty, to save the estimated \$35,000 attorney fee that would be required for a trial and to save his stepdaughter from having to undergo a difficult cross-examination by his own attorney, Mr. S. changed his plea to guilty with the understanding that he would be given a suspended imposition of sentence. His decision was influenced by the explanation of his own counsel and the prosecutor that if he successfully completed the three year probationary period, “there would be no record of [it] ever happening . . .” TR. at 26:5-28:2. After living with her grandparents for two years, the stepdaughter returned to Mr. S.’s home through a reunification process, with the approval of his sentencing judge, where she has remained. TR. at 28:9-29:4. Mr. S. now is general manager of an \$8 million manufacturing concern with 83 employees. He believes that people who do not know him well, but learn of his being subject to SORA’s registration requirement, without knowing the details of the alleged offense, may lump him into a class of people who are dangerous and fears that his job would be in jeopardy should any major

customers of his employer learn that he is subject to SORA's reporting requirement. TR. at 29:25-31:16. Mr. S also testified that in the neighborhood where he was living when he first had to register, someone in the neighborhood obtained a copy of the list and saw his name. He was confronted by the neighbors and had to explain why he was on the list. He testified that it took "a period of years" for the neighbors to settle down a bit, but that he no longer lives in that neighborhood. TR. at 32:11-18. The above demonstrates that, as the Court has already held, the stigmatizing effect is substantial, real and, further, disadvantages individuals subject to SORA's requirements.

B. If civil, SORA is an unconstitutional retrospective law

Alternatively, even if SORA is ultimately determined to be a civil rather than a criminal law, the Court finds that it is unconstitutional because it is retrospective in application. Under Missouri law, an unconstitutional retrospective law is one that imposes a new obligation, duty, or disability with respect to a past transaction or that takes away or impairs a vested or substantial right. *Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 856 (Mo. banc 1998); *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338 (Mo. banc 1993). A retrospective law relates back to a previous transaction and gives it a different effect from that which it had under the law when it occurred and changes the legal effect of those transactions. *Gonzalez v. Labor and Industrial Relations Comm'n*, 661 S.W.2d 54 (Mo.App. W.D. 1983). Unconstitutional retrospective laws are generally civil in nature. *Webster*, 779 S.W.2d at 28. For the following reasons, the Court concludes that the Missouri constitutional prohibition against retrospective laws is applicable to this case.

First, the Court finds that SORA imposes a new obligation with respect to a past transaction. The statute creates a new obligation to register if an offender has previously been convicted of an enumerated sex offense. The registration requirement relates to a past transaction in that the statute applies to “any person who, since July 1, 1979, has been or is hereafter convicted of, been found guilty of, or pled guilty to,” an enumerated sex offense, or who, “since July 1, 1979, has been committed as a criminal sexual psychopath, or who, “since July 1, 1979, has been found not guilty as a result of mental disease or defect” of any of the enumerated offenses. § 589.400.1 (1)-(5). All of the named plaintiffs were convicted of or pled guilty to an enumerated sex offense prior to the enactment of SORA in 1994. For three of the named plaintiffs, the acts underlying the offenses, their convictions, service of the sentence or probation, and discharges from parole or probation all occurred prior to the enactment of the Missouri sex offender registration statute. These convictions constitute past transactions for purposes of the retrospective analysis.

The Court finds that Plaintiffs’ original transgressions trigger the obligation to register under and comply with SORA. These obligations are significant and substantial. Plaintiffs’ transgressions occurred before the enactment of SORA. Therefore, the enforcement of the registration requirement on them and others whose convictions, pleas, or other qualifying events predate SORA’s enactment is retrospective and is violative of the Missouri Constitution.

Second, the Court concludes that SORA takes away or impairs a vested or substantial right. As explained, *supra* at 12-13, Missouri law restores most of the rights and privileges of citizenship to those who have completed their sentences or have been discharged from

probation or parole. Thus, upon their discharges, Plaintiffs were again cloaked with the substantial rights guaranteed to all citizens by both the United States and Missouri Constitutions including the liberty interest discussed, *supra*, their right to privacy and to be free from unwarranted publicity, *Beiderman's of Springfield, Inc., v. Wright*, 322 S.W.2d 892 (Mo. 1959), and the right to travel, *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969). The Court concludes that, as applied to Plaintiffs, SORA impairs these substantial rights. In addition to depriving Plaintiffs of the liberty interest discussed earlier, the Court finds that SORA affirmatively requires Plaintiffs to disclose their convictions to the public and suffer the dissemination of that information in a manner which impairs the right to privacy and to be free from unwarranted publicity. Similarly, the Court concludes that the requirement that Plaintiffs register and update his or her registration every 90 days for the remainder of their lives significantly impairs their right to travel. Plaintiffs have more than a mere expectation that their rights to liberty, privacy, and travel will not be invaded by the state as long as they continue to remain law-abiding citizens. The Court concludes that enforcement of the registration requirement as to Plaintiffs is retrospective because it impairs substantial rights and therefore, violates Article I, section 13 of the Missouri Constitution.

A law may not impair a vested or substantial right. *Corvera Abatement Technologies*, 973 S.W.2d at 856. Application of SORA to Plaintiffs who have been released from parole or probation also impairs a vested right. A vested right has been defined as “a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.” *Fisher v. Reorganized School District No. R-V of Grundy County*, 567 S.W.2d 647 (Mo. banc 1978);

Doe, 862 S.W.2d at 338. A vested right must be more than a mere expectation of the anticipated continuance of the existing law. *Id.* Moreover, the word “vested” means fixed, accrued, settled or absolute. *Robbins v. Robbins*, 463 S.W.2d 876, 879 (Mo. 1971). As a general proposition, after offenders complete their sentences, they are released from further obligation by the Board of Probation and Parole. These releases are unconditional and absolute. Many offenders and some of the plaintiffs to whom SORA applies have already fulfilled their duties to the State. Furthermore, MO. REV. STAT. § 217.730 authorizes the Board of Probation and Parole to issue a final order of discharge to an offender when he or she has performed the obligations set forth by the state upon the Board’s finding that such final release is compatible with the best interests of society. Accordingly, the Court finds that Plaintiffs have a vested right to insist that the State abide by the previously issued discharges.

However, in applying SORA to Plaintiffs and other offenders who were granted a discharge from further obligation to the State, the State essentially revokes the discharge by imposing a new and continuing registration requirement upon them. By virtue of the discharge given to these individuals, the State has already released them from any further obligations with respect to the aforementioned criminal judgment. “The grant of discharge from parole is a gift that, once accepted, cannot be recalled.” *In re Eddinger*, 211 N.W. 54 (Mich. 1969). The Court finds that imposition of SORA on Plaintiffs and other who were granted a discharge by the Missouri Board of Probation and Parole renders that discharge meaningless.

Therefore, the Court concludes that SORA is an impermissible retrospective law as to

Plaintiffs who were granted a discharge from further obligation to the State since the conduct triggering the new registration requirement is based on criminal convictions that occurred before the enactment of the registration requirement. As to these Plaintiffs, the statute is impermissibly retrospective and violates Article I, section 13 of the Missouri Constitution. Cumulatively, these factors weigh heavily in favor of a finding that the law impairs a vested or substantive right and, hence, the conclusion that SORA violates the retrospective clause of the Missouri Constitution.

III. Count IV: Equal Protection Under Article I, Section 2 of the Missouri Constitution

Plaintiffs claim that SORA violates the Missouri Constitution's guarantee of equal protection weighs in favor of issuing a preliminary injunction. Missouri's Constitution specifies:

[t]hat all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government . . .

Art. I § 2.

When presented with an equal protection claim, a court must determine whether the classification burdens a "suspect class" or impinges upon a "fundamental right"; in either event, strict judicial scrutiny is required. Either determination triggers strict judicial scrutiny of whether the statute is necessary to accomplish a compelling state interest. If no such right or category is present, then the statute will be upheld and a classification sustained if the classification is rationally related to a legitimate state interest. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991).

Here, Plaintiffs maintain that SORA impinges upon their fundamental rights. A fundamental right, under equal protection analysis, is a right “explicitly or implicitly guaranteed by the Constitution.” *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1996) (quoting *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33-34, (1972)). They include the rights to free speech, to vote, freedom of interstate travel, the right to personal privacy and other basic liberties. *Id.* See also *Blaske*, 821 S.W.2d at 829 (fundamental rights “include such things as . . . freedom of the press, freedom of religion, . . . and the right to procreate). And, the Court has already held that Plaintiffs have established that they have a fundamental liberty right to be free from restriction on their personal freedom once their sentences have been served and/or they have successfully completed their probation or parole as well as fundamental and constitutional rights to privacy and freedom from unwanted publicity and to travel.

The Court finds that SORA also impinges upon those fundamental rights in ways that offend the equal protection guarantee of the Missouri Constitution. Sex offenders are required to register under SORA with no regard for a given offender’s propensity for recidivism or for the danger the offender presents to the public or society. *See supra* at ¶¶ 9-11. This is so even though there are some offenders who are not likely to re-offend with another sexual offense and even though it is possible to determine which offenders are likely and which are not likely to re-offend after having once committed an offense. LACOURSIERE DISCOVERY DEPOSITION, September 5, 2002, at 21:22-22:15. Thus, the State knows that it is requiring some offenders to register who are almost certainly not going to re-offend and it knows how to distinguish at least some of the not-likely-to-re-offend from the rest. Other

persons convicted of violent crimes such as murdering an adult or battery upon an adult, no matter how they are found guilty of the offense, their recidivism, and no matter what current risk they may present to society are not treated similarly to sex offenders in that they are not required to register. All persons similarly situated – that is, those presenting an equal risk to society – are not treated similarly. Thus, the Court concludes that SORA is impermissibly biased against one subclass of offenders.

SORA also requires that dissimilar groups be treated similarly. This is so because individuals are required to register regardless of whether they were found guilty by a jury or pled guilty. SORA also requires registration of persons given suspended imposition of sentence¹¹ (SIS) or suspended execution of sentence (SES) even though an SIS¹² does not result in a final judgment of conviction from which an appeal will lie. This is particularly egregious in the case of an individual who does not believe that the charges against him or her are valid, but the State does, and so, agrees to plead guilty to a suspended imposition of sentence believing that at the end of the probationary period, he or she would not have a

¹¹The Highway Patrol’s Sex Offender Registration database does not indicate that registrants are registered as a result of an offense that was adjudicated by suspended imposition of sentence. TR. at 8 (STOTTLEMYRE STIP. at ¶ 2).

¹²The Court believes that in requiring registration by those who receive a suspended imposition of sentence and permitting the public dissemination of that information, SORA conflicts with the

obvious legislative purpose of the sentencing alternative of suspended imposition of sentence 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, R.S.Mo. 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. § 619.121 R.S.Mo., Supp. 1991. *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993).

conviction on his or her record.¹³ Thus, there may even be individuals who are actually innocent of charges, who might have been found not guilty at a trial, but who pled guilty either to avoid the embarrassment of a trial or because he or she thought the suspended imposition of sentence would result in avoiding the consequences of a guilty plea or conviction, but who are nonetheless required to register under SORA.

Thus, since SORA impinges on fundamental rights, the Court applies strict scrutiny review to determine whether the infringement is necessary to accomplish a compelling state interest and whether the State used the least restrictive means to accomplish that compelling state interest. *Missourians for Tax Justice Education Project*, 959 S.W.2d 100, 103 (Mo. 1998); *State ex rel. Coker-Garcia v. Blunt*, 849 S.W.2d 81, 85 (Mo.App. W.D. 1993). As observed, SORA expresses no purpose whatsoever and while Defendants have asserted that SORA assists in law enforcement and in protecting the public, Defendants have not convinced the Court that SORA is narrowly tailored or uses the least restrictive means to accomplish that result. The burden is on the defendants to do so. *Coker-Garcia*, 849 S.W.2d at 85 (quoting *McCarthy v. Kirkpatrick*, 420 F.Supp. 366, 374-75 (W.D.Mo. 1976); and citing *Labor's Educ. and Political Club-Indep. v. Danforth*, 561 S.W.2d 339, 348 (Mo. banc 1977); *Witte v. Director of Revenue*, 829 S.W.2d 436, 439 (Mo. 1992) (quoting *Gumbhir v. Kansas State Board of Pharmacy*, 231 Kan. 507, 646 P.2d 1078, 1089 (1982), *cert. denied*, 459 U.S. 1103 (1983)).

¹³For example, an individual who receives a suspended imposition of sentence is not “convicted” for the purposes of MO. REV. STAT. § 491.050, which confers an absolute right to impeach the credibility of any witness with his or her prior criminal convictions. *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. 1995); *Yale*, 846 S.W.2d at 195-96.

The Court finds that neither the requirement to register nor the dissemination of information is based on any present danger to society or on the degree of risk the offender presents to the public. SORA applies to those who present no danger along with those who do present such a danger, yet it fails to require registration and dissemination of information from other persons convicted of violent crimes who do present a risk to society. Its requirements are applied to registrants for the remainder of their lives, but others who are violent and dangerous are not required to register and suffer neither the restrictions nor the stigma and other consequences of registration and dissemination borne by registrants. There is no opportunity to escape the dictates of SORA's in person reporting requirements regardless of the registrant's health or other restrictions on ability to comply. Thus, even assuming a compelling state interest, there can be no showing that SORA employs the least restrictive means or is carefully tailored to minimize the infringement on Plaintiffs' fundamental liberties and rights. Accordingly, the Court concludes that Plaintiffs have demonstrated a probability of success on the merits as to their claim that SORA violates their right to equal protection as guaranteed by the Missouri Constitution and a preliminary injunction is warranted.

IV. Count V: Bill of Attainder Under Article I, Section 30 of the Missouri Constitution

Article I, Section 30 of the Missouri Constitution prohibits bills of attainder in providing that "no person can be attainted of treason or felony by the general assembly." The prohibition against bills of attainder "was intended not as a narrow, technical prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply – trial by legislature." *State ex*

rel. Bunker Resource Recycling & Reclamation, Inc., 782 S.W.2d 381, 386 (Mo. banc. 1990) (citing *United States v. Brown*, 381 U.S. 437, 442 (1965)). Bills of attainder are “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” *Id.* at 385 (quoting *United States v. Lovett*, 328 U.S. 303, 315 (1965)).

Two elements identify a legislative act as a bill of attainder. The first is that the statute singles out a “specifically designated person or group,” and the second element is that the act inflicts punishment on that person or group. *Id.* at 386 (citing *Selective Service System v. Minnesota Public Interest Research Group, et al.*, 468 U.S. 841, 846 (1984)). The Court finds that SORA meets both of these elements.

The specificity element is met by a statute which singles out an individual or group, whether the individual or group is called by name or described in terms of past conduct which, because it is past conduct, operates only as a designation of particular persons. *Id.* at 387. The Court finds that SORA meets the specificity requirement in that it singles out a group which is described in terms of past conduct that operates as a designation of particular persons, that is, persons convicted of or who have pled guilty to specified sex offenses. The group is described in terms of the past conduct of those who comprise the group. Legislation is not held to be directed at specific persons if the class is such that the affected persons can escape regulation merely by altering the course of present activities or bringing themselves into compliance with the law. *Id.* But the Court concludes that with SORA, the opposite is true. As the Court has found, no affected person can escape SORA’s requirements merely by altering the course of his or her present activities. Nor can anyone required by SORA to

register and suffer public dissemination of registration data escape the law's requirements by bringing themselves into compliance with the law. *See supra* at ¶ 11 (citing STIP. ¶¶ 21, 25).

As to the second element – that punishment be inflicted on a group – “the deprivation of any rights, civil or political, previously enjoyed, may be punishment” and “legislation which inflicts a deprivation on named or described persons or groups constitutes a bill of attainder whether its aim is retributive, punishing past acts or preventive . . . discouraging future conduct.” *Crain v. City of Mountain Home, Arkansas*, 611 F.2d 726, 728 (8th Cir. 1978) (citing *Brown*, 381 U.S. at 448, 458). The Court finds that SORA deprives sex offenders, including those never given a judgment of conviction, of a previously enjoyed right to be free of registration and identification once their sentence, parole, or probation was completed. The question is whether there is constitutionally forbidden punishment, a determination informed by the answers to three inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in a 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. *Bunker Resource Recycling*, 782 S.W.2d at 387.

Sex offender registration and dissemination of registration information were only first enacted beginning in the 1940's, suggesting that registration and public notification of registration data may not fall within the historical meaning of legislative punishment. However, as the Court has already concluded, *supra* at 15, registration and notification resembles the “shaming punishments” of the colonial era and earlier days which were intended to inflict public disgrace, and which label, humiliate, and lead to ostracization of a

registrant. As was often historically the case, the labeling of SORA is permanent, and as with those historical punishments, the aim is to make all registrants suffer permanent stigmas since the requirements are lifelong, and to disable them from living normally in the community. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991).

Whether the statute, viewed in light of the severity of the burdens it imposes, reasonably advances a nonpunitive legislative purpose requires analysis using a functional approach in which the Court must determine if a nonpunitive legislative purpose is advanced by the law. *Bunker Resource Recycling*, 782 S.W.2d at 387. Generally, legislation intended to prevent future danger, rather than to punish past action, is not an unconstitutional bill of attainder. However, if the function of the statute does not advance the intended purpose and the statute operates only as a punishment of specific persons or a class, the act is a bill of attainder. *Id.* Here, Defendants have argued that SORA assists in investigating crimes and helps the public protect itself, but even a nonpunitive purpose does not establish the legitimacy of a law creating a class subject to a legislatively imposed punishment. *Bunker Resource Recycling*, 782 S.W.2d at 386. And the Court has already concluded, *supra* at 16-17, that the purpose of protecting the public is not furthered by SORA's non-discriminating listing of all offenders regardless of tendency to recidivism, severity of offense, and current dangerousness.

Finally, as to whether the legislative history discloses an intent to punish, there is no legislative history. TR. at 7 (citing STOTTLEMYRE STIP. at ¶ 1). However, in *Bunker Resource Recycling* there was also no legislative history and the court concluded that both

the specificity and punishment elements necessary to establish the statute as a bill of attainder had nonetheless been satisfied. *Id.* at 388. Here, too, even in the absence of legislative history disclosing an intent to punish, this Court finds that both the specificity and punishment elements necessary to establish that SORA is a bill of attainder have been satisfied. Accordingly, the Court concludes that SORA is an unconstitutional bill of attainder and Plaintiffs are entitled to judgment in their favor on Count V.

V. Count VI: Special Law Under Article III, Section 40(30) of the Missouri Constitution

Section 40(30) of Article III of the Missouri Constitution provides that the Missouri General Assembly shall not pass any local or special law “where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.”

When the challenge is that the law is an unconstitutional special law, the Court must answer two questions. First, is whether the law is a special or local law. Second, if the law is a special or local law, is whether the vice that is sought to be corrected is so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result. *Treadway v. State of Missouri*, 998 S.W.2d 508, 511 (Mo. banc 1999) (quoting *School Dist. of Riverview Gardens, et al. v. St. Louis County*, 816 S.W.2d 219, 221 (Mo. banc 1991)).

A special law is one that includes less than all who are similarly situated. *Savannah R-II School Dist. v. Public School Retirement System of Missouri*, 950 S.W.2d 854, 858 (Mo. banc 1997); *Batek v. Curators of the Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996). The Court concludes that SORA is a special law because it includes less than all who

are similarly situated in that it excludes or omits many violent offenders who are at equal risk of re-offending or who present an equal danger to society to those included within its registration requirement. However, a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis. *Id.* “The party defending the facially special statute must demonstrate a ‘substantial justification for the special treatment.’” *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 65 (Mo. banc 1994) (citing *City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993)). Defendants have not shown that the classification here is made on any reasonable basis. Violent offenders who present a high risk of re-offense or who present a danger to society are excluded from requirement of registration. “The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes.” *Batek*, 920 S.W.2d at 899.

Furthermore, whether a statute is, on its face, a special law depends on whether the classification is open-ended. *Treadway*, 988 S.W.2d at 510 (citing *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997)). Classifications are open-ended if it is possible that the status of members of the class could change. *Harris*, 869 S.W.2d at 65. Here, the Court finds that the designation in SORA of the class required to register is closed-ended in that it is not possible that the status of the members could change. The registration requirement and dissemination of registration data is lifelong. The Court concludes that SORA’s classification of those who must register is arbitrary and without a rational relationship to a legislative purpose in that it does not apply to all persons similarly situated. Even if a law purports to be general, if the classification is unreasonable, unnatural, or arbitrary so that it

does not apply to all persons or things similarly situated, it is then, in fact, special despite its apparent purpose. *Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens*, 517 S.W.2d 49, 53 (Mo. 1974). “If in fact the act is by its terms or ‘in its practical operation, it can only apply to particular persons or things of a class, then it will be a special or local law, however carefully its character may be concealed by form of words.’” *Id.* (quoting *Dunne v. Kansas City Cable Co.*, 32 S.W. 641, 642, 131 Mo. 1, 5 (1895)).

Individuals are released from prison, parole, or probation who were convicted of violent crimes and who continue to be dangerous and present a risk to society, but they are not required to register as are sex offenders, who must register even if they are not dangerous or present no risk to society. These violent non-sex offenders who are dangerous and present a risk to society are similarly situated to violent sex offenders but are excluded from the requirements of SORA. Thus, the Court concludes, SORA is without a rational relationship to a legitimate legislative purpose in that it does not apply to all persons who are similarly situated because persons who are dangerous and present a risk to society. Additionally, the Court concludes SORA’s classification as to who must register is unreasonable, unnatural, and arbitrary.

Furthermore, as a special law, SORA is unconstitutional because there are many other general laws that could be used to serve purposes that SORA may be argued to serve, including, for example, but not limited to § 43.504 *et seq.*, Reportable crimes; § 558.016 *et seq.*, Extended terms for recidivism; § 559.010 *et seq.*, Sexual Assault Prevention Act; and § 589.303 *et seq.*, Records required – public–access–court ordered access.

Plaintiffs have demonstrated that SORA is an unconstitutional special law imposing registration requirements and dissemination of a registrant's name, address, and crime on less than all similarly situated violent and dangerous offenders; that, although Defendants have not demonstrated a substantial justification for the special treatment, there is no rational basis for SORA's classification; and, that there are many other general laws that could be used to serve the purposes Defendants have offered in SORA's defense. Accordingly, the Court concludes that Plaintiffs should have judgment in their favor on Count VI of their Petition challenging SORA as an unconstitutional special law.

In accordance with the foregoing findings and conclusions the Court finds in favor of Plaintiffs on all six counts of their Petition for Declaratory Relief and declares that SORA, as written, is unconstitutional in that it violates the Missouri Constitution's gu. In accordance with the Court's authority to enter such orders as are necessary to give effect to its declaratory judgment, the Court hereby ORDERS as follows:

1. There shall be no further registration under the statute as it is presently written;
2. The dissemination of information gained through the registration process shall cease; and,
3. Plaintiffs and Intervenors shall have their costs incurred in this cause.

Hon. Jon R. Gray, Circuit Judge

Dated: _____

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 August, 2004, on counsel listed below:

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