

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

JANE DOE I, et al.,)	
)	
Plaintiff,)	
)	
v.)	Case No. CV499-264CC
)	
THOMAS PHILLIPS, et al.)	
)	
Defendants.)	

**DEFENDANT STOTTLEMYRE’S RESPONSE TO PLAINTIFFS’
MOTION FOR CLASS CERTIFICATION**

Defendant Stottlemire, through counsel, responds to Plaintiffs’ Motion for Class Certification as follows:

A class may be certified only if all of the following factors are present:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Mo.R.Civ.P. 52.08(a). One of the requirements of Mo.R.Civ.P. 52.08(b) must also be present before a class may be certified. Further, there must be some necessity for class certification. A class is not needed where declaratory and injunctive relief only are sought and such relief, if entered, will benefit all members of a possible class. *Ihrke v. Northern*

States Power Co., 459 F.2d 566, 572 (8th Cir. 1972), *vacated as moot*, 93 S. Ct. 66 (1972); *Women’s Health Center v. Webster*, 670 F. Supp. 845, 852 (E.D. Mo. 1987), *aff’d*, 871 F.2d 1377 (8th Cir. 1989); *Perez-Funez v. District Director*, 611 F. Supp. 990, 995 (C.D. Cal. 1984).¹

PROPOSED PLAINTIFF CLASS

No Necessity for Class Certification. Plaintiffs here argue that Missouri’s Sexual Offender Registration Law, §§ 589.400 to 589.425 (SORA; also known as Megan’s Law), is unconstitutional. They request declaratory and injunctive relief. If this Court does ultimately agree with plaintiffs that SORA is unconstitutional, and does enjoin enforcement of SORA’s provisions, that will be a generally applicable decision that will benefit all SORA registrants who share the characteristics of plaintiffs. If SORA obligations cannot be imposed on plaintiffs, then neither can they be imposed on others like plaintiffs. Class certification would add nothing to such relief and is thus unnecessary. *See McArthur v. Firestone*, 690 F. Supp. 1018, 1019 (S.D. Fla. 1988); *Vietnam Veterans Against the War v. Benecke*, 63 F.R.D. 675, 681-82 (W.D. Mo. 1974) (no need for certification of class in challenge to constitutionality of city ordinance in that, “[i]f the ordinance is adjudged to be unconstitutional in a single action by an individual, it will lose all vitality.”).

As noted particularly in *Ihrke*: “The determination of the constitutional question can be made by the Court . . . regardless of whether this action is treated as an individual action

¹Defendant Stottlemire agrees with plaintiffs that Missouri courts may use federal decisions relating to class actions in interpreting Rule 52.08. *See Plaintiffs’ Suggestions in Support of Plaintiffs’ Motion for Class Certification*, at p. 2 (footnote 1).

or as a class action. No useful purpose would be served by permitting this case to proceed as a class action.” 459 F.2d at 572. Similarly, determination of the statutory question at issue here can be made by this Court and declaratory or injunctive relief, if entered, would benefit all regardless of whether or not this case proceeds as a class action. Thus, there is also no useful purpose in this case proceeding as a class action. *See also Women’s Health Center*, 670 F. Supp. at 852; *Perez-Funez*, 611 F. Supp. at 995.

Missouri precedent supports this position. In *Rodgers v. Richmond Memory Gardens, Inc.*, 896 S.W.2d 64, 66 (Mo. App., W.D. 1995), the court emphasized that “[t]here is no requirement that a court must necessarily certify an action as a class action. The term ‘may’ is used in Rule 52.08.” The court, finding that “it appears that by allowing the case to proceed without class certification, the interests of all . . . interested persons were protected as well as they could have been by a class action,” held that the trial court did not abuse its discretion in denying the motion to certify a class. *Id.* at 67. Similarly, in this case, the protection of the interests of all interested parties does not require certification of a plaintiff class. If SORA is found to be unconstitutional and its enforcement is enjoined, SORA will be unenforceable and all persons to whom SORA applies will be relieved of its requirements, regardless of whether a class has been certified.

Even if this Court concludes that lack of need for a class is not dispositive here, the plaintiff class proposed does not meet all the requirements of Rule 52.08.

Commonality. The claims of the members of the proposed plaintiff class do not share sufficiently common questions of law and fact to permit certification of a class. While

not all questions of law or fact present in a case must be identical, “the use of the plural ‘questions’ suggests that more than one issue of law or fact must be common to members of the class.” *Stewart v. Winter*, 87 F.R.D. 760, 769 (N.D. Miss. 1980) (quoting 7 C. Wright & A. Miller, Federal Practice and Procedure § 1763), *aff’d* 669 F.2d 328 (5th Cir.1982).

The proposed class includes offenders who have one prior sex offense and those with multiple prior sex offenses. It includes those on parole and those who have been released from further supervision. It will also include offenders who have lived within the law for years and those who have repeatedly violated parole or committed additional crimes. The once offending and subsequently law abiding group will have a much stronger interest in focusing the challenge to SORA on the argument that some sex offenders are less dangerous than others and that, regardless of the obviously dangerous class members, they at least should have an opportunity to show they have rehabilitated themselves and thereby avoid SORA’s requirements.

The plaintiffs seeking to be class representatives here do place themselves in this allegedly low risk category. *See* Petition for Declaratory Relief, at ¶ 27. Their interest could lead them to urge that registration and notification may be appropriate for those with multiple offenses but that offenders like themselves possess observable characteristics that indicate they may not be dangerous and that they at least should have the opportunity to show they are not a risk to society and, for that reason, should not be subject to SORA’s requirements.

Because the members of the requested class will have interests in pursuing different questions of fact and law, a certification of a class is not appropriate.

Typicality. The claims of the prospective class representatives are not typical of the claims of the prospective class members. As just discussed, the prospective class representatives place themselves among the offenders who they contend are not dangerous, or should at least have the opportunity to prove they are not. Although they purport to be able to advocate for all who are, or will be, required to register under SORA, they have already made allegations that attempt to contrast themselves favorably to other registrants. Certification of a class is inappropriate because the requirement of typicality is not present.

Adequacy of Class Representation. Careful attention must be paid to the Rule 52.08(a)(4) requirement that the representative parties will fairly and adequately protect the interests of the class. *See Bishop v. Committee in Professional Ethics and Conduct*, 686 F.2d 1278, 1288 (8th Cir. 1982) (interpreting comparable provision of Fed.R.Civ.P. 23). The United States Supreme Court “has repeatedly held [that] a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as other class members.” *East Texas Motor Freight Sys., Inc., v. Rodriguez*, 97 S. Ct. 1891, 1896 (1977) (quoting *Schlessinger v. Reservists Committee to Stop the War*, 94 S. Ct. 2925, 2929 (1974)). *See also Bishop*, 686 F.2d at 1289. “The two areas of inquiry with respect to this prerequisite are: 1) whether the class representatives have common interests with the members of the class, and 2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.” *Ellis v. O’Hara*, 105 F.R.D. 556, 563 (E.D. Mo. 1985) (citing 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1765, at pp. 619-20 (1972)).

The plaintiffs seeking to be named class representatives do not share common interests with all other members of the proposed class. As discussed above, the plaintiffs here have already alleged that they are different from many other members of the proposed class because they are not as dangerous. This position will give plaintiffs here an incentive to pursue their own separate interests at the expense of the interests of other members of the proposed class who have multiple offenses and a poor record for abiding by the law when they are not in prison. Because of divergent interests, the proposed class representatives cannot be expected to vigorously prosecute the interests of all class members. For this reason too, class certification should not be granted here.

PROPOSED DEFENDANT CLASSES

Plaintiffs also request certification of two defendant classes, one for all county prosecutors and one for all county sheriffs. The prerequisites for a defendant class are the same as those for a plaintiff class. *Ellis*, 105 F.R.D. at 563. In *Ellis*, plaintiffs asked for certification of a defendant class of “all juvenile officers, guardians ad litem appointed by juvenile courts, school officials, Division of Family Services employees, and local law enforcement officers” who exercised powers under statutes related to home schooling. *Id.* The court found that the typicality requirement was not met because the officials to be included were responsible for performing their duties only within limited jurisdictions. *Id.* at 563-64. The same is true here. The various members of the proposed classes also perform their duties only within limited jurisdictions. This consideration is of even greater weight where, as here, the various members of the proposed classes (sheriffs and prosecutors) are

vested with considerable discretion within their jurisdictions with respect to fulfilling their duties.

The court in *Ellis* also concluded that a defendant class is improper unless each named plaintiff has a claim against each member of the proposed defendant class. *Id.* at 564. It is patently obvious that the proposed plaintiff class representatives here do not have a claim against each member of the proposed defendant class. SORA requires registration only in the county of the offender's residence. § 589.400.2. The proposed plaintiff class representatives thus each have a claim against only the prosecutor and sheriff of the county in which they live.

Further, through no deficiency of their own, the individually named defendant prosecutor and sheriff will not be adequate representatives of the proposed defendant classes. Some courts have held that closer scrutiny is necessary in determining the adequacy of the representation of a defendant class. 7A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1770, at p. 398 (1986). "There is little doubt that a defendant class requires closer scrutiny of Rule 23 [the federal complement of Rule 52.08] tests to assure fairness to absent members based on long-standing due process protections. . . . As a result, due process considerations put greater limits on the use of defendant classes than plaintiff classes." *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1105 (10th Cir. 2001) (quoting 1 *Newberg on Class Actions* § 4.47 (3d ed. 1992)). Missouri courts agree that defendant classes "present special due process concerns and require the court to be more diligent in assuring that the class is adequately and fairly represented." *City of Excelsior Springs v. Elms Redev. Corp.*,

18 S.W.3d 53, 60 (Mo. App., W.D. 2000). Plaintiffs state that “there is no reason to doubt that Phillips and Fry will not defend the claims made against them and the [sheriff] and [prosecutor] Classes.” Suggestions in Support of Plaintiffs’ Motion for Class Certification, at p. 10. While there may be no reason to doubt this, it is plaintiffs’ burden to prove it, *Bishop*, 686 F.2d at 1288, and the one paragraph they devote to this adequacy of representation of the proposed defendant classes fails to meet this burden.

There is, in particular, no showing that either Phillips or Fry agrees to serving as a class representative. This is reason enough to deny certification of the proposed defendant classes here. *See Mudd v. Busse*, 68 F.R.D. 522, 529 (N.D. Ind. 1975) (denial of certification of defendant class where there was no showing of ability or willingness of individually named defendant to bear the financial burden required to adequately litigate the class action). Phillips and Sanders, in fact, have expressly stated that “their representation [of the defendant classes] would impose an administrative and financial burden on Jackson County on behalf of the remaining 114 counties in the state.” Response of Defendants Phillips and Fry to Plaintiffs’ Motion for Class Certification, at p. 2.

There has also been no showing that Phillips and Fry’s current counsel agrees to serve as class counsel. Additionally, if both a sheriffs’ class and a prosecutors’ class are certified, it would likely not be proper for them to share the same class counsel. Thus, at least one of the classes will be without representation.

Defendants Phillips and Fry suggest, alternatively, that “the attorney general is the proper party to defend SORA on behalf of the defendant classes.” Response of Defendants

Phillips and Fry to Plaintiffs’ Motion for Class Certification, at p. 3. The attorney general has entered an appearance in this case as the representative of defendant Stottlemire, Superintendent of the State Highway Patrol, and intends to defend SORA – on behalf of defendant Stottlemire and the state of Missouri. That is not, however, the equivalent of the attorney general being the appropriate class representative, or class counsel, of a class or classes of county officials. It is county officials that have responsibility to enforce SORA at the local level. It is the various county sheriffs and prosecutors that must exercise their discretion in deciding the application of SORA in borderline cases. It is their responsibility to determine the level of resources to devote to enforcement. County prosecutors and sheriffs have their own independent interests here that should be pursued by their own independent counsel.

Moreover, the attorney general has no authority to represent county officials, via class action or otherwise. *See* § 27.060, RSMo (attorney general to institute suits “in the name of the state” and may defend suits “in which the state’s interests are involved”); §§ 105.711 and 105.716, RSMo (attorney general to defend actions covered by the State Legal Expense Fund, i.e., those brought against the state, its agencies, officers or employees of the state or its agencies, and certain others that do not include county prosecutors and sheriffs).

But, as noted above, there is no necessity to certify any class in this case. The attorney general, as the representative of Superintendent Stottlemire, is defending the constitutionality of SORA. If SORA is found to be unconstitutional and its enforcement is enjoined, SORA

will be unenforceable and all persons to whom that statute applies will be relieved of its requirements, regardless of whether any class has been certified.

WHEREFORE, Defendant Stottlemire prays this Court to deny Plaintiffs' Motion for Class Certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this _____ day of August, 2003, to:

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