

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

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

**DEFENDANT STOTTLEMYRE’S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**JUDGMENT AND ORDER DISMISSING CASE**

Plaintiffs, eleven individuals (eight original plaintiffs and three intervening plaintiffs) who have been convicted of crimes that make them subject to the registration and notification requirements of Missouri’s Sex Offender Registration Act (SORA; also known as Megan’s Law), §§ 589.400 to 589.425, RSMo, challenge the constitutionality of that Act under several provisions of the Missouri Constitution. The defendants are Thomas Phillips, the Sheriff of Jackson County, Michael Sanders, the Prosecutor of Jackson County, and Roger Stottlemyre, the Superintendent of the Missouri State Highway Patrol. They are all individuals with statutory duties under SORA. On November 24, 2003, this Court took evidence and, thereafter, received written arguments on plaintiffs motions for class certification and for a preliminary injunction prohibiting the enforcement of SORA. This Court denied both motions and set the case for a hearing on the merits. At a hearing on August 5, 2004, the parties presented additional evidence by means of a stipulation of facts and have now also

presented additional briefing. Upon review of all the evidence and consideration of all the arguments presented, this Court concludes that SORA is constitutionally valid. The Court enters judgment in favor of defendants and dismisses the plaintiffs' petition.

### **THE SEX OFFENDER REGISTRATION ACT**

Initially, a brief examination of SORA is in order. Each person who has been convicted of, been found guilty of, or pled guilty to committing or attempting to commit a felony sex offense under Chapter 566, RSMo, any offense under Chapter 566 where the victim was a minor, or of certain other enumerated offenses against minors, including kidnapping, felonious restraint, promoting prostitution, and abuse of a child, is required to register with the chief law enforcement officer of the county in which the person resides.<sup>1</sup> § 589.400. There is no exception to the registration requirement for persons who have received a suspended imposition of sentence or a suspended execution of sentence following their conviction of, a finding of guilt of, or a plea of guilty to, an offense enumerated in § 589.400. *See* § 589.400. This registration requirement is a lifetime obligation unless the offense requiring registration is reversed, vacated, or set aside, or the registrant is pardoned. § 589.400.3.

Each registrant must provide information including name, address, place of employment, name of any college being attended, the crime requiring registration, the date, place, and brief description of the crime, the age and gender of the victim, fingerprints, and

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<sup>1</sup>Only those whose convictions, findings of guilt, or pleas occurred after July 1, 1979, are covered by SORA. Certain other classes of people are also required to register as well. For a full listing of who is subject to registration, see § 589.400.1.

a photograph. § 589.407. The chief law enforcement officer of each county is to forward the completed offender registration form to the Missouri State Highway Patrol and the Patrol is to enter that information into the Missouri Uniform Law Enforcement System (MULES), where it will be available to members of the criminal justice system and other entities as provided by law. § 589.410. Registrants must report annually in person to the county law enforcement agency to verify the information they have provided. § 589.414.6. Registrants are also required to update their registration if they change their address, place of employment, college enrollment, or name. § 589.414. These updates required by such changes must be done within seven days in some cases and within ten days in others. *Id.* Registrants reporting changes in address to a different county must do so in person. § 589.414.1 and 589.414.2. Additionally, registrants who are predatory or persistent sexual offenders, whose victim was less than 18 years old, or who have pled or been found guilty of failing to register or submitting false information when registering must report in person every 90 days to the county law enforcement agency. § 589.414.5.

The chief law enforcement officer of each county is to maintain a complete list of the names, addresses, and crimes of each registrant in the county. Any person may request that list from the chief law enforcement officer. § 589.417.2. The other information in the registry is not within the public record and is to be available only to courts, prosecutors, and law enforcement agencies. § 589.417.1.

Any person who is required to register under SORA and does not meet all its requirements is guilty of a class A misdemeanor, unless the person has been convicted of an

unclassified felony under Chapter 566, a class A or B felony, or any felony involving a child under 14, in which case the person is guilty of a class D felony. § 589.425.1. Any person who commits a second or subsequent violation of the reporting requirements is guilty of a class D felony, unless the person has been convicted of an unclassified felony under Chapter 566, a class A or B felony, or any felony involving a child under 14, in which case the person is guilty of a class C felony. § 589.425.2.

### **FINDINGS OF FACT**

1. The eleven plaintiffs have all been convicted of offenses requiring their registration under SORA and they are all currently registered. Stipulation of Fact (Stip.), at ¶ 7.

2. Defendant Thomas Phillips is the Sheriff of Jackson County and is the chief law enforcement officer of Jackson County for purposes of registration under SORA. Stip., at ¶ 9.

3. Defendant Michael Sanders is the Jackson County Prosecutor. Stip., at ¶ 9.

4. Defendant Roger D. Stottlemire is the Superintendent of the Missouri State Highway Patrol. Stip., at ¶ 10.

5. Defendant Stottlemire states that the apparent intent of SORA is to provide information to law enforcement officers to assist them in investigating future crimes and to provide information to members of the public so they may take steps to protect themselves and their children. Defendant Stottlemire also states that there may be other reasons for the enactment of SORA. Stip., at ¶ 11; Preliminary Injunction Hearing Transcript (Tr.) 7-8.

6. Defendants Phillips and Sanders state that their interests in SORA are to enforce the laws of the State of Missouri. Stip., at ¶ 13; Tr. 7.

7. As of November 21, 2003, there were 9,212 persons registered in the Missouri Highway Patrol SORA database. Tr. 7-8.

8. The SORA database does not set out whether or not a person is registered due to a plea of guilty resulting in a suspended imposition of sentence. Tr. 8.

9. The testimony of Dr. Roy Lacoursiere, a forensic psychiatrist, was presented to the Court at the hearing on the preliminary injunction via deposition. Preliminary Injunction Hearing Exhibits (Exs.) 9 and 11. Dr. Lacoursiere testified to the following:

a) Sex offenders are more likely to commit additional offenses than a member of the general public. Ex. 11, at pp. 8-9.

b) Child molesters are more likely to reoffend commit additional offenses than a member of the general public. Ex. 11, at p. 9.

c) Some professional studies have shown recidivism rates by sex offenders of over 50% after 15 to 20 years. The reoffenses in these studies were new sexual offenses. Ex. 11, at pp. 10-11.

d) Bureau of Justice statistics show that 41% of those convicted of non-rape sexual assaults had a reoffense of some kind after three years. Ex. 11, at p. 11.

e) The studies noted are based on subsequent convictions. The recidivism rates are therefore conservative because sex offenses are often unreported and, to have a conviction, the offender must be apprehended. Ex. 11, at pp. 11-12.

f) Sex offenses are more often than not unreported. Ex. 11, at p. 11-12.

g) The recidivism rate of sex offenders remains significant for many years.

Ex. 11, at pp. 16-17.

h) A person convicted of any sex offense is significantly more likely to commit a sex offense than is a member of the public. Ex. 11, at p. 17.

i) No test or protocol is available that guarantees that a sex offender will not commit another sex offense. Ex. 11, at pp. 27-29.

j) Even if an evaluation of a sex offender resulted in a conclusion that he or she was very unlikely to reoffend, that sex offender (excluding the aged and bedridden) would still be a higher risk for a future sex offense than would be a member of the public.

Ex. 11, at pp. 27-29.

10. A Congressional report, H. Rep. No. 392, 103d Congress (1993), notes that “[e]vidence suggests that child sex offenders are generally serial offenders. Indeed one recent study concluded the ‘behavior is highly repetitive, to the point of compulsion,’ and found that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child.” (Citing “Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs,” 2 J. Interpersonal Violence 3 (1987).) Ex. 22, 3d page.

11. Another Congressional report, H. Rep. 256, 105th Congress (1997), notes:

Sexual offenders frequently target the most vulnerable members of our communities. Nearly two-thirds of State prisoners serving time for rape and sexual assault victimized children. Almost one-third of these victims were less than 11-years-old. Yet, not only do these violent criminals victimize the women and children upon which they prey, but they also victimize society as

a whole. Americans have a depleted sense of trust and security because of these individuals.

... Sex offenders have a high likelihood of reoffending[. I]n fact, they are nine times more likely to repeat their crimes than any other class of criminal.<sup>2</sup>

Ex. 23, 5th page.

12. SORA registration provides a valuable tool to law enforcement officers to assist them in investigating crimes. Stip., at ¶ 17.

13. Public access to SORA registries provides information to members of the public to help them to take steps to protect themselves and their children. Stip., at ¶ 18.

14. Jane Doe III (Ms. S) testified that she was told that her truthful answer to a question on an employment application that she must register under SORA would effect the hiring decision. Ms. S testified that she was not hired. Tr. 20.

15. John Doe VIII (Mr S) testified that he did experience some initial adverse reaction in his former neighborhood when the information came out that he must register under SORA, but that his neighbors got over it. He also testified that he had no problems in his current neighborhood. He also testified that he is the general manager of a company and

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<sup>2</sup>Although the facts noted in these reports may not have been presented directly as evidence before the Court, the report of the information in the Congressional reports is a fact. The mere report of this information in Congressional reports is a relevant fact in this case in which SORA is being challenged as unconstitutional. Because this Court concludes that no suspect class of fundamental right is implicated by SORA, its analysis of some of the constitutional challenges involves a rational basis review. In examining laws under a rational basis review, a court will uphold a law if any basis may reasonably be conceived to justify it. *Batek v. Curators of Univ. of Mo.*, 920 S.W.2d 895, 899 (Mo. banc 1996). The information regarding sexual offenders reported in the Congressional reports is relevant to the inquiry into whether any basis may be reasonably conceived to justify SORA.

that he is concerned about the reaction of customers if they find out he must register. Tr. 30-31, 32.

16. Had Jane Doe II been called to testify, she would have testified that she had been terminated from her job with the Kansas City Department of Health because she declined to answer on her job application whether she had pled guilty to or been convicted of a felony. Her failure to answer the question came to light after an unknown person found out Jane Doe II's name was on a sex offender registration list and anonymously reported that to her supervisor. Stip., at ¶ 26(c).

17. Had John Doe VI been called to testify, he would have testified that, when members of his church learned of he had been convicted of sodomy from a sex offender registration list, they confronted him and demanded that he sign a "contract" regarding his behavior. Because of this incident, he and his wife have chosen to attend another church. Stip., at ¶ 26(h).

### **CONCLUSIONS OF LAW**

Plaintiffs pray for a declaration that SORA is unconstitutional and for a permanent injunction that prohibits SORA's enforcement. Injunctive relief does not issue as a matter of right, but as an exercise of judicial discretion. *J.H. Fichman Co. v. City of Kansas City*, 800 S.W.2d 24, 28 (Mo. App. W.D. 1990). An injunction is a harsh remedy to be used sparingly and only in clear cases. *Id.* An injunction should not issue against great public interest. *Id.* As this Court noted in its order of June 4, 2004, when considering a motion for a preliminary injunction, a court is to weigh the movant's probability of success on the

merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. *State ex rel. Director of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996) (citing *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). The moving party has the burden to provide evidence as to each factor. *Gabbert*, 925 S.W.2d at 840. The court then must consider these factors and balance the equities to determine if "justice requires the court to intervene to preserve the status quo until the merit are determined." *Dataphase*, 640 F.2d at 113. "The standard for issuing a permanent injunction is substantially the same as that applied to a request for preliminary injunctive relief, except that the plaintiff must prove actual success on the merits rather than the likelihood of success on the merits." 42 Am. Jur. 2d Injunctions § 10 (2000).

Plaintiffs' claims here are not legally valid. They cannot establish actual success on the merits. Therefore plaintiffs' claim for injunctive relief will be denied. For the same reason, plaintiffs' claims for declaratory relief will also be denied.

**Count I - Substantive Due Process under Missouri Constitution.** The Missouri Constitution does provide substantive due process protections. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003). In analyzing substantive due process claims, a court must first determine whether the government action interferes with fundamental rights or burdens a suspect class. *Id.*; *Casualty Reciprocal Exchange v. Missouri Employers Mut. Ins. Co.*, 956 S.W.2d 249, 256 (Mo. banc 1997). If a law interferes with a fundamental right or

burdens a suspect class, then it must be narrowly tailored to serve a compelling state interest. *Deaton v. State*, 705 S.W.2d 70, 73 (Mo. App. E.D. 1985). Plaintiffs here do not assert a burden on any suspect class. They do assert interference with their fundamental rights.

Fundamental rights derive only from the United States Constitution. *Batek v. Curators of Univ. of Missouri*, 920 S.W.2d 895, 898 (Mo. banc 1996); *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995). Fundamental rights include the rights to free speech, to vote, to freedom of interstate travel, as well as other basic liberties. *Casualty Reciprocal Exchange*, 956 S.W.2d at 256. Plaintiffs here suggest that SORA interferes with their fundamental rights to personal freedom, to travel, to privacy and freedom from unwanted publicity.

*Rights to personal freedom and to travel.* Even assuming that a right to personal freedom is sufficiently specific to constitute a fundamental right protected by substantive due process, SORA does not interfere with the personal freedom of those who must register under the law. *In re: W.M.*, 851 A.2d 431, 450 (D.C. Ct. App. 2004). As the court in *W.M.* noted, “[r]egistrants [under the D.C. sex offender registration act] are not prevented, for example, from changing their personal appearance, or from residing, working, attending school, or traveling wherever, whenever and with whomever they wish. They remain able to go about their daily lives and exercise their rights unimpeded.” *Id.* The same is true of Missouri’s SORA.

Neither does SORA interfere with anyone’s right to travel. SORA does not impede registrants from living where they want, from working where they want, or from moving

about, either temporarily or permanently, when they want. SORA does not impose any restrictions on anyone's ability to come and go when and where they please.

Further, a state law implicates the right to travel only when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right. *Attorney General v. Soto-Lopez*, 106 S. Ct. 2317, 2321 (1986). Minor restrictions on a person's right to travel do not deny his or her fundamental right to travel. *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 298 (1991). Missouri's SORA does not restrict a registrant's right to travel at all. It is possible that negative reaction from private citizens toward registrants will voluntarily restrict his or her own travel. But any such negative reaction flows from the registrant's own misconduct and only tangentially from the law. *Lanni v. Engler*, 994 F. Supp. 849, 855 (E.D. Mich. 1998)

Reporting requirements under sex offender registration laws have specifically been found by courts in other states not to burden a registrant's right to travel. *Cutshall v. Sundquist*, 193 F.3d 466, 478 (6th Cir. 1999); *State v. Wigglesworth*, 63 P.3d 1185, 1190 (Or. Ct. App. 2003); *Ex Parte Robinson*, 80 S.W.3d 709, 715-16 (Tex. Ct. App. 2002); *State v. Martin*, 17 P.3d 72, 75 (Alaska 2001). Neither does SORA burden the right to travel.

The obligations of SORA do not amount to an interference with fundamental rights that will trigger substantive due process protections. Providing the information required under SORA is no more onerous than any number of other common activities of every day life, such as filling out credit applications, warranty cards, or even sweepstakes entries. The

submission of fingerprints and photographs is no more onerous than what many go through when applying for or obtaining employment. Regular reporting to the sheriff's department is not onerous in that its purpose is simply to verify the information already reported. Regular appearances are already a common part of modern life, such as for example licensing of automobiles. Because the SORA requirements are not any more burdensome than other obligations that people face every day, they do not interfere with any right of personal freedom or right to travel.

*Right to privacy and freedom from unwanted publicity.* The right to privacy encompasses only personal information and not information readily available to the public. *State v. Williams*, 728 N.E.2d 342, 356 (Ohio 2000) (citing *Whalen v. Roe* 97 S. Ct. 869, 876 (1977)). Plaintiffs' right to privacy is not implicated by SORA because it does not disclose information that is not already public. Registrants' names, addresses, telephone numbers, employers, and crimes are already a matter of public record. Courts have routinely upheld sex offender registration laws against right to privacy challenges. *E.g.*, *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1191 (1998); *Corbin v. Chitwood*, 145 F. Supp. 2d 92, 101 (D. Me. 2001); *Akella v. Michigan Dep't of State Police*, 67 F. Supp. 2d 716, 728-29 (E.D. Mich. 1999); *Martinez v. Commonwealth*, 72 S.W.3d 581, 585 (Ky. 2002); *People v. Malchow*, 739 N.E.2d 433, 441 (Ill. 2000); *Williams*, 728 N.E.2d at 356; *In re: W.M.*, 851 A.2d 431, 450-51 (D.C. Ct. App. 2004); *In re Wentworth*, 651 N.W.2d 773, 778 (Mich. App. 2002).

Even active dissemination of sex offender information by the government does not infringe the right to privacy. “Active distribution, as opposed to keeping open the doors to government information, is a distinction without significant meaning. The information at issue is a public record, and its characteristic as such does not change depending upon how the public gains access to it.” *Williams*, 728 N.E.2d at 356.

There is also no violation of the right to privacy due to the compilation of information under SORA that would not otherwise be collected in one place for public dissemination. *See A.A. v. New Jersey*, 341 F.3d 206, 213 (3d Cir. 2003) (rejecting breach of privacy argument based on the state’s compilation in a sex offender registry of information, such as names, addresses, ages, and descriptive characteristics, that is available to the public, but in scattered locations); *In re: W.M.*, 851 A.2d at 450-51.

With regard to a right to be free from unwanted publicity, it does not appear that any such right has ever been found to exist under the Missouri Constitution, much less found to be fundamental. Besides, to whatever extent a registrant becomes notorious, that notoriety will result from his or her crime, not from SORA. As the United States Supreme Court noted in *Smith v. Doe*, 123 S. Ct. 1140, 1150 (2003), in discussing the publication of sex offender information on the internet: “Widespread public access is necessary for the efficacy of the [sex offender registration and notification] scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.”

*SORA rationally related to legitimate government interests.* Because SORA neither burdens a suspect class nor impinges on a fundamental right, it need only be “rationally related to a legitimate state purpose.”<sup>3</sup> *Casualty Reciprocal Exchange*, 956 S.W.3d at 257.

Although SORA contains no express statement of purpose, its patent intent is to provide information to law enforcement officers to assist them in investigating future crimes and to provide information to members of the public so they can take steps to protect themselves and their children. *See, e.g., Stip.*, at ¶ 11; *J.S. v. Beaird* 28 S.W.3d 875, 876 (Mo. banc 2000) (finding the “obvious legislative intent” behind SORA to be the “protect[ion] of children at the hands of sex offenders”); *Moore v. Avoyelles Correctional Center*, 253 F.3d 870, 872-73 (5th Cir. 2001) (finding sex offender notification law’s intent of alerting the community to the presence of sex offenders and of assisting the community to protect itself under the guidance of law enforcement); *Russell v. Gregoire*, 124 F.3d 1079, 1090-91 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1191 (1998); *Doe v. Pataki*, 120 F.3d 1263, 1277 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1066 (1998). These purposes behind SORA are a legitimate ones.

SORA is also rationally related to these legitimate purposes. A registry of offenders will assist law enforcement officers in their investigations of crimes. Public notification that convicted sex offenders are living in the community will also assist citizens in taking whatever precautions they think necessary when they or their children are around registrants.

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<sup>3</sup>Even if strict scrutiny did apply, SORA would still be constitutional because it is narrowly tailored to meet a compelling state interest. *See State v. Mount*, 78 P.3d 829, 842 (Mont. 2003).

Plaintiffs admit that SORA registration provides both a valuable tool for law enforcement officers and information to members of the public that will help them to take steps to protect themselves and their children. Stip., at ¶ 17 and 18. Courts in other jurisdictions have routinely concluded that sex offender registration and notification statutes are rationally related to legitimate state interests. *See, e.g., Cutshall v. Sundquist*, 193 F.3d 466, 482 (6th Cir. 1999); *In re: W.M.*, 851 A.2d 431, 451 (D.C. Ct. App. 2004); *In re Ronnie A.*, 585 S.E.2d 311, 312 (S.C. 2003); *In re M.A.H.*, 20 S.W.3d 860, 865-65 (Tex. Ct. App. 2000); *Boutin v. LeFleur*, 591 N.W.2d 711, 718 (Minn 1999). *See also Smith v. Doe*, 123 S. Ct. 1140, 1152-54 (2003) (finding Alaska’s comparable sex offender registration law reasonable means to meet legitimate state purpose in an *ex post facto* inquiry).

Plaintiffs contend that, at a minimum, SORA must have levels of registration classification (presumably with varied levels of registration duties and of public notification based on severity of offense) and a judicial safety-valve (presumably to permit individualized judicial review of an offender’s dangerousness and need to be included in the registry). The Alaska statutes approved in *Smith*, however, have no judicial safety-valve provision and no levels registration classification that restrict the amount of information available to the public based on level of offense. Alaska Stat. §§ 12.63.010 to 12.63.100 and 18.65.087. Similarly, this Court does not find that Missouri’s SORA must have a judicial review provision or varying levels of public notification based on level of offense to be constitutionally valid. The Alaska statutes do limit registration to 15 years for those convicted of a single, non-aggravated, sex offense, Alaska Stat. § 12.63.020(a)(2), but this Court does not conclude that

this time limit for registration for certain offenders was necessary to the decisions upholding the constitutionality of the Alaska sex offender registration statutes. This Court also specifically concludes that Missouri's lifetime registration requirements are rationally related to legitimate state interests. As Dr. Lacoursiere testified, the recidivism rate of sex offenders remains significant for many years. Ex. 11, at pp. 16-17. Some professional studies have shown recidivism rates by sex offenders of over 50% after 15 to 20 years. Ex. 11, at pp. 10-11.

Because SORA's requirements are rationally related to legitimate state interests, plaintiffs it does not deprive plaintiffs of any substantive due process rights.

**Count II - Ex Post Facto/Retrospective Application of Laws under the Missouri Constitution.** The Missouri Constitution, art. I, § 13, provides that “no ex post facto law, nor law . . . retrospective in operation, . . . can be enacted.

*SORA is not a prohibited ex post facto law.* In *Smith v. Doe*, 123 S. Ct. 1140, 1154 (2003), the United States Constitution held that Alaska's sex offender registration law did not violate the *ex post facto* clause of the United States Constitution. Missouri's SORA is substantially similar to Alaska's. *See id.* at 1145-46. Therefore, SORA also would not violate the *ex post facto* clause of the United States Constitution. “The Missouri Constitutional provision against *ex post facto* laws is more limited than the more general provision of the United States Constitution.” *State ex rel. Nixon v. Taylor*, 25 S.W.3d 566, 568 (Mo. App. W.D. 2000). Because SORA would not violate the federal prohibition on *ex*

*post facto* laws, it also does not violate the more limited *ex post facto* prohibition of the Missouri Constitution.

*SORA is not a prohibited retrospective law.* The constitutional prohibition on retrospective laws applies when the law at issue impairs some vested right or affects past transactions to the substantial prejudice of a person. *La-Z-Boy Chair Co. v. Director of Economic Dev.*, 983 S.W.2d 523, 525 (Mo. banc 1999). A vested right is one guaranteed by “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 Dist. No. R-V*, 567 S.W.2d 647, 649 (Mo. banc 1978) (quoting *People ex rel. Eitel v. Lindheimer*, 21 N.E.2d 318, 321 (Ill. 1939)). But a vested right is something more than a mere expectation based on a supposed continuation of past law. *Fisher*, 567 S.W.2d at 649. Additionally, a “statute is not retrospective or retroactive . . . because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation.” *Jerry-Russell Bliss, Inc., v. Hazardous Waste Mgt. Comm’n*, 702 S.W.2d 77, 81 (Mo. banc 1985).

SORA applies to plaintiffs because of their past convictions of sex offenses. This application, however, neither deprives them of any vested right nor imposes upon them any new obligation based on a past event to their substantial prejudice. All they are required to do is provide certain information to the sheriff and then report to the sheriff periodically thereafter. They are not harmed in any way. They are denied no income or employment.

They are deprived of no benefit otherwise available to them. They are not prevented from moving about or from changing their domicile. SORA simply fixes the status of persons to whom it applies based on their past criminal record. A statute may use antecedent facts to establish the status of those to whom it applies. *Jerry-Russell Bliss*, 702 S.W.2d at 81; *State ex rel. Sweezer v. Green*, 232 S.W.2d 897, 901 (Mo. banc 1950) (upholding application of Missouri's criminal sexual psychopath law, which permitted civil commitment of those found to be criminal sexual psychopaths, to a person whose alleged sexual offenses occurred before the effective date of the law), *disapproved with regard to an unrelated issue*, *State v. Kirtley*, 327 S.W.2d 166, 168 (Mo. banc 1959); *Barbieri v. Morris*, 315 S.W.2d 711, 714-15 (Mo. 1958) (upholding suspension of driver's license on grounds that driver was "habitual violator of traffic laws" despite three of the four traffic violations upon which the suspension was based occurring before effective date of law under which suspension was imposed).

SORA is analogous to the federal statute governing possession of firearms by felons. 18 U.S.C. §922(g). This statute provides that it is unlawful for any person who has been convicted of a crime punishable by imprisonment for a term of more than one year to possess any firearm or ammunition that has traveled in interstate commerce. Section 922(g) has been unsuccessfully challenged as retrospective and ex post facto by individuals prosecuted under it based on underlying offenses that occurred before the enactment of the statute. *E.g.*, *United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000) (citing cases). In *National Ass'n of Government Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1575-76 (N.D. Ga. 1997), *aff'd*, 155 F.3d 1276 (11th Cir.1998), plaintiffs who were barred from carrying

firearms after the enactment of §922(g) for convictions that occurred before the prohibition, also challenged the constitutionality of §922(g) on the ground that it was impermissibly retrospective and therefore an ex post facto law. The court held that §922(g) was not retrospective, quoting the following from *United States v. Brady*, 26 F.3d 282, 291 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 246 (1994):

Regardless of the date of [defendant's] prior conviction, the crime of being a felon in possession of a firearm was not committed until after the effective date of the statute. . . . [B]y [the date of defendant's conviction under § 922(g)(1), defendant] had more than adequate notice that it was illegal for him to possess a firearm because of his status as a convicted felon, and he could have conformed his conduct to the requirements of the law.

968 F. Supp. at 1576. The conduct regulated by § 922(g) is thus forward looking, based on the status of the offender, and not retrospective. It is the future gun possession that is prohibited. SORA is also forward looking. SORA applies if the offender has been convicted of certain predicate offenses, yet the conduct regulated all occurs after the enactment of the statute. Offenders are required to register and can be convicted of the crime of not registering, but they have ample notice of their obligations and time to fulfill them. The obligation to register and the consequence of not doing so are transactions controlled by the statute, not the underlying offense.

Because SORA governs only those actions that occur after its enactment, and not before, SORA is not a retrospective law.

Plaintiffs claim that SORA violates their rights to privacy and to travel and functionally revokes their discharge from parole, and thus acts retrospectively. But plaintiffs do not have a constitutional right to privacy with respect to prior convictions as applied to

sex offender registries. *See generally Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir.1999) (“The Constitution does not provide Cutshall with a right to keep his registry information private”), *cert. denied*, 120 S. Ct. 1554 (2000); *Russell v. Gregoire*, 124 F.3d 1079, 1090 (9th Cir.1997) (“Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.”), *cert. denied*, 118 S. Ct. 1191 (1998).

The SORA requirement that plaintiffs periodically update their registration information also does not impermissibly interfere with any right to travel. The requirement does not prevent them from going wherever in the world they want. Neither does it prevent them from moving to whatever location they desire. A requirement to appear in person at the sheriff's office every 90 days is far less burdensome to the right to travel than the economic requirement of most people to appear at their workplace on five days out of seven.

Neither does SORA effectively revoke plaintiffs' discharge from parole. Standard conditions of parole are much more invasive than duties under SORA. Although some of the plaintiffs may now have to report four times a year to the sheriff's office, they do not have to obtain permission to travel, are not required to work, are not barred from associating with whomever they please, and are not required to report to a parole officer whenever directed or to abide by any directive given by the parole officer. In contrast to parole restrictions, SORA's registration obligations are not different in kind from a driver's duty to appear at the local license bureau periodically to renew his or her driver's license, a property owner's duty to report his or her taxable personal property to the local tax assessor or collector, or a young

man's obligation to keep the Selective Service System updated as to his address. SORA requires plaintiffs to do no more than they are required to do by many other obligations of modern day life.

**Count III - Open Courts and Right to Jury Trial under the Missouri Constitution.** Plaintiffs' petition also asserts that SORA is unconstitutional under the Missouri Constitution's open courts provision and its guarantee of a right to a jury trial. The open courts ground has not been pursued by plaintiffs and will be considered abandoned. Even if this ground were preserved, it would be unavailing to plaintiffs. Plaintiffs' position with regard to the open courts provision, as asserted in the Petition, is that they are barred from going to court to challenge the application of SORA to them. But the open courts provision only prohibits laws that arbitrarily or unreasonably bar individuals from accessing courts in order to enforce recognized causes of action that the substantive law recognizes. *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000). The law, however, does not recognize the cause of action that the plaintiffs want to pursue.

Plaintiffs have also largely neglected their claim that SORA infringes their right to a jury trial. Plaintiffs' position with regard to the right to a jury trial, as asserted in the Petition, is that they are being exposed to penalties and/or conditions that exceed those imposed upon them when they were sentenced for their sex offenses. But, as discussed above, SORA requirements are not punishment. *Smith v. Doe*, 123 S. Ct. 1140, 1154 (2003). Even if the SORA requirements were punishment, there is no constitutional right to have a

jury assess punishment. *State v. Taylor*, 929 S.W.2d 209, 219 (Mo. banc 1996), *cert. denied*, 117 S. Ct. 1088 (1997).

Plaintiffs do mention their right to a jury trial briefly in their Post-Hearing Brief, at page 7. Plaintiffs contend that some of them “pled guilty upon promises by the State of Missouri that they would receive suspended impositions of sentences and thereby have no convictions on their records if they successfully completed probation,” that they did successfully complete probation, but that now the state seeks to add a new burden on them – SORA registration – while denying them “the right to undo the bargain and obtain the return of the consideration, a jury trial, foregone in the original bargain.” This claim, however, is different from the jury trial claim pled and is, for that reason, not properly before this Court. Even if it were, plaintiffs are entitled to no relief. SORA obligations are collateral, not direct, consequences of a guilty plea. *State v. Moore*, 86 P.3d 635, 643 (N.M. Ct. App. 2004). Therefore, a person’s lack of awareness of SORA obligations at the time of the plea does not render it involuntary or otherwise rise to the level of a constitutional violation. *Id.* In sum, an exemption from SORA’s requirements is not a part of the bargain reached with sex offenders pleading guilty in return for a suspended imposition of sentence.

**Count IV - Equal Protection under the Missouri Constitution.** The standard for analyzing equal protection claims is the same as that for analyzing substantive due process claims. *Casualty Reciprocal Exchange v. Missouri Employers Mut. Ins. Co.*, 956 S.W.2d 249, 256-57 (Mo. banc 1997). Thus, plaintiffs’ equal protection claim fails for the same reasons, discussed above, that their substantive due process claim failed.

Plaintiffs take particular issue with SORA because its obligations apply to all sex offenders without concern for the relative risk of individuals to commit offenses. But a state may reasonably place obligations on sex offenders as a class without any individual risk assessment. *People v. Malchow*, 714 N.E.2d 583, 590 (Ill. App. 1999), *aff'd*, 739 N.E.2d 433 (Ill. 2000) *See also Smith v. Doe*, 123 S. Ct. 1140, 1153 (2003) (same conclusion in an *ex post facto* analysis). This is especially so in light of Dr. Lacoursiere's testimony that a person convicted of any sex offense is significantly more likely to commit a sex offense than is a member of the public. Ex. 11, at p. 17. Because any sex offender is more likely to reoffend with a sex offense than others, it is reasonable to impose SORA obligations on all sex offenders without making individual risk determinations. Any sex offender is a larger risk than a non-sex offender.

Plaintiffs also take issue with the application of SORA to sex offenders but not to other violent offenders, such as murderers. But it is reasonable for a state to place special requirements on sex offenders that do not apply to other offenders. *Mahfouz v. Lockhart*, 826 F.2d 791, 794 (8th Cir. 1987) ("state's decision to distinguish sex offenders as a group from other inmates and exclude them from the work release program is rationally related to the legitimate government purpose of preventing sex crimes and thus does not violate the equal protection clause"); *Gale v. Moore*, 763 F.2d 341, 343-44 (8th Cir. 1985) (no equal protection violation in different standard of parole for sexual offenders); *Doe v. Weld*, 954 F. Supp. 425, 436 (D. Mass 1996) ("treating juveniles who commit sex crimes differently from other juvenile offenders is rational: the legislature determined that sex offenders pose a

higher danger of recidivism than other offenders, and that disparate treatment is needed to promote public safety”); *State v. Radke*, 657 N.W.2d 66, 77 (Wis. 2003) (rejecting equal protection challenge to state law that placed greater burdens on sex offenders than other offenders).

Many courts have found that the existing evidence supports the conclusion that sex offenders pose a larger risk of recidivism than do other offenders. E.g., *Smith v. Doe*, 123 S. Ct. at 1153 (“risk of recidivism posed by sex offenders is ‘frightening and high’”) (quoting *McKune v. 20*, 122 S. Ct. 2017, 2025 (2002)); *Connecticut Dep’t of Pub. Safety v. Doe*, 123 S. Ct. 1161, 1163 (2003); *Cutshall v. Sundquist*, 193 F.3d 466, 476 (6th Cir.1999); *Radke*, 657 N.W.2d at 69. This has also been the conclusion of the United States Congress. See H. Rep. No. 392, 103d Congress (1993); H. Rep. 256, 105th Congress (1997). These conclusions are amply supported by empirical studies. Rapists have been found to have a recidivism rate of 49.4% to 63.8% and child molesters have been found to have a recidivism rate of 42% to 72%. Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 San Diego Law Review, 1057, 1072 (2000); Prentky, *Recidivism Rates Among Child Molester and Rapists: A Methodological Analysis*, 21 Law and Human Behavior 635 (1997); R. Karl Hanson, et al., *Long-Term Recidivism of Child Molesters*, 61 Consulting and Clinical Psychol. 646, 648 (1993); *Recidivism of Sex Offenders*, Center for Sex Offender Management (May 2001). These numbers may actually be higher since most sexual crimes go unreported. In 1996, the Bureau of Justice Statistics (BJS), U.S. Dept of Justice, found that 80% of sexual assaults go unreported. See also Groth, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime and Delinquency 450 (1982).

The impact of sex crimes and crimes against children on both the victim and society as a whole is devastating. *Doe v. Pataki*, 120 F.3d 1263, 1266 (2d Cir. 1997); H. Rep. 256 (Ex 23, 5th page). Due to the particular threat of sex offenders to reoffend and the severe impact of sex crimes and crimes against children, SORA's placement of obligations on sex offenders and those who have committed crimes against children, but not on other types of offenders, is not irrational. *See Cutshall v. Sundquist*, 193 F.3d 466, 482-83 (6th Cir. 1999).

Plaintiffs also take issue with the application of SORA requirements to even those who plead guilty and receive suspended sentences. But it is reasonable for SORA to require registration of offenders who received suspended sentences together with offenders whose sentences were not suspended. The only difference between sex offenders who receive suspended sentences and those whose sentences are not suspended is the nature of the sentence. The nature of a sex offender's sentence, however, bears no reasonable relationship to the offender's likelihood to reoffend.

Plaintiffs' point seems to be that a person receiving a suspended sentence is less likely to actually have committed a sex offense. Plaintiffs hypothesize the case of a person who chooses to plead guilty in return for a suspended imposition of sentence to avoid the embarrassment of trial or to obtain the benefit of removal of the conviction from his or her record at the end of a probationary period. But, if the reason for pleading guilty in return for a suspended imposition of sentence is the eventual removal of the conviction from the official record, that is no evidence at all of actual innocence. There is no reason to believe

that that person did not commit the charged sex offense. Therefore, that is not a reasonable basis for exempting that person from SORA's requirements.

It is also unreasonable to exempt the person who pled guilty in return for a suspended imposition of sentence to avoid the embarrassment of trial from SORA requirements. The actually guilty are just as likely to want to avoid the embarrassment of trial as the innocent. Besides a plea of guilt in any circumstances is an adequate basis for concluding the offender did commit the crime. A plea of guilt is an admission that the offender committed the crime. It is not reasonable to require the state to always assume that such an admission is motivated by anything other than the offender's actual guilt, or even to impose a burden on the state to look behind the plea of guilt for some more innocent motivation. In short, a plea of guilt to a sex crime is a quite reasonable basis on which to impose registration as a sex offender.

Application of SORA requirements to those receiving suspended impositions of sentence is little different than the situation at issue in *Boutin v. LeFleur*, 591 N.W.2d 711 (Minn. 1999), *cert. denied*, 120 S. Ct. 417 (1999). The plaintiff in that case, who pleaded guilty to a non-sex related claim, asserted that he should not be required to register as a predatory offender under Minnesota's sex offender registration law. The plaintiff had initially been charged with counts of assault and criminal sexual assault, and eventually pled guilty to assault only. *Id.* at 713. Minnesota's law requires registration of persons who are charged with a sex crime and thereafter is convicted of that offense or another offense arising out of the same circumstances. *Id.* at 714 (citing Minn. Stat. § 243.166). The court held that keeping a list of offenders who were convicted of sex offenses or of any offense arising out

of circumstances out of which charges of sex offenses were made was rationally related to a legitimate state interest. *Id.* at 718. Similarly, Missouri's maintenance of a list of those who have been sentenced for sex offenses, suspended or not, is rationally related to its interest in protecting the public and solving crimes.

Plaintiffs also contend that applying SORA to persons who plead not guilty but who are then convicted of a sex offense and given a suspended imposition of sentence is improper because such a conviction is not appealable. But requiring registration in such cases is reasonable because the finding of guilt is ample evidence that the person is a sex offender from whose registration the public would benefit. Any inability to appeal a suspended imposition of sentence does not diminish this evidence. Besides, if a person in this situation desired the ability to appeal, a court presumably would alter the sentence at the offender's request to permit an appeal. In any event, plaintiffs here admit that none of them fall into this situation. Therefore, they have no standing to pursue this point.

**Count V - Bill of Attainder under Missouri Constitution.** One element of a bill of attainder is that it inflicts punishment. *State v. Graves*, 182 S.W.2d 46, 54 (Mo. 1944). SORA does not. *See Smith v. Doe*, 123 S. Ct. 1140, 1147-54 (2003) (finding that Alaska's substantially similar sex offender registration law does not inflict punishment).

Plaintiffs here focus on three factors in asserting that SORA inflicts punishment. These three factors are (1) whether the challenged statute falls within the historical meaning of punishment; (2) whether the statute, viewed in the light of the severity of burdens it imposes, can reasonably be said to advance a nonpunitive purpose; and (3) whether the

legislative record discloses an intent to punish. *Bunker Resource Recycling and Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 387 (Mo. banc 1990). The Court in *Smith* examined each of these factors in relation to Alaska’s sex offender registration law, and concluded that the law did not institute any punishment.

First, the Court in *Smith* compared the registration and notification obligations imposed by Alaska’s law to historical forms of punishment, and found these obligations not to be similar. *Id.* at 1149-51. The same is true of Missouri’s comparable registration and notification obligations.

Second, the Court in *Smith* examined the severity of the burden imposed by Alaska’s statute, including the duration of Alaska’s reporting requirements (in some cases offenders must report quarterly for their lifetimes, *see id.* at 1146) and wide dissemination of the information via the internet, and determined them not to be excessive in light of the purpose of the statute. *Id.* at 1153-54. Missouri’s SORA obligations are no different.

Third, the intent of Alaska’s law – protecting the public from sex offenders (123 S. Ct. at 1147) – is the same as the obvious intent of Missouri’s SORA. *See J.S. v. Beaird* 28 S.W.3d 875, 876 (Mo. banc 2000) (finding the “obvious legislative intent” behind SORA to be the “protect[ion] of children at the hands of sex offenders”). The Court in *Smith* found this intent to be civil and administrative, rather than punitive. 123 S. Ct. at 1149.

Because the obligations imposed by SORA are not punitive, SORA does not violate the Bill of Attainder clause. *See Bunker Resource*, 783 S.W.2d at 386-87.

**Count VI - Special Law under the Missouri Constitution.** ““In essence, the test for ‘special legislation’ under article III, sec. 40, of the Missouri Constitution, involves the same principles and considerations that are involved in determining whether the statute violates equal protection in a situation where neither a fundamental right nor suspect class is involved, i.e., where a rational basis test applies.”” *Fust v. Attorney General*, 947 S.W.2d 424, 432 (Mo. banc 1997) (quoting *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo. banc 1991)). A law does not run afoul of the special law prohibition as long as the legislature had a rational basis for establishing the boundaries of the class as it did. *Blaske*, 821 S.W.2d at 832. In this case, the legislature established a class of sex offenders, but excluded other offenders. As discussed above, given that sex offenders pose a particular threat of reoffending and that the impact of sex crimes and crimes against children are particularly severe, placing obligations on those who commit sex crimes and other crimes against children, but on not other types of offenders, is reasonable. *Cutshall v. Sundquist*, 193 F.3d 466, 482-83 (6th Cir. 1999); *Doe v. Weld*, 954 F. Supp. 425, 436 (D. Mass 1996); *State v. Radke*, 657 N.W.2d 66, 77 (Wis. 2003). Therefore, SORA is consistent with the Special Law provisions of the Missouri Constitution. *See also Snyder v. State*, 912 P.2d 1127, 1131-32 (Wyo. 1996) (upholding Wyoming sex offender registration law against challenge under the Wyoming Constitution’s comparable prohibition against special laws, Wyo. Const. art. 3, § 27).

**Summary.** SORA is a reasonable measure to further legitimate state interests and it is not inconsistent with any of the state constitutional provisions raised by plaintiffs.

Because SORA is constitutionally sound, plaintiffs' claims for injunctive and declaratory relief must be denied.

### **JUDGMENT**

Based upon an assessment of the evidence presented and the relevant legal authorities, this Court concludes that plaintiffs are unable to establish a valid claim and that defendants are entitled to judgment in their favor.

There fore, it is Ordered, Adjudged, and Decreed that Plaintiffs' prayers for injunctive and declaratory relief are denied.

It is further Ordered, Adjudged, and Decreed that this case is dismissed with prejudice.

SO ORDERED:

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Date

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JON R. GRAY, Circuit Judge

**Proposed Order**

Respectfully submitted by

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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, 2004, to:

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