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

JANE DOE I, ***et al.***	)	
	)	
Plaintiffs,	)	
v.	)	**Case No. 03-CV-219085**
	)	**Division No. 18**
THOMAS PHILLIPS, ***et al.***	)	
	)	
Defendants.	)	

SUGGESTIONS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Thomas Phillips and Michael Sanders, for their Suggestions in Opposition to Plaintiffs' Motion for Preliminary Injunction, state as follows:

I. Introduction

Plaintiffs filed a petition on July 10, 2003, challenging the constitutionality of the Missouri Sex Offender Registration Act ("SORA") under the Missouri Constitution. On September 13, 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. 42 U.S.C. § 14071 ("the Wetterling Act"). To receive federal law enforcement funding, the Wetterling Act required that states adopt a sex offender registration law. *Id.* By 1996, every state had done so. *Smith v. Doe*, 123 S. Ct. 1140, 1145; 155 L.Ed. 2d 164, 174 (2003). The State of Missouri enacted SORA in 1994 with an effective date of January 1, 1995. Mo. Rev. Stat. § 566.600.

Plaintiffs challenge the constitutionality of the Missouri SORA by alleging that SORA violates their right to substantive due process, open courts and jury trial as well as equal

protection. They further allege that SORA is a bill of attainder and a special law. They now seek a preliminary injunction as to its enforcement.

II. The Test for the Issuance of a Preliminary Injunction

In determining whether to grant a request for a preliminary injunction, courts consider:

> '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 (Mo. 1996) (quoting *Pottgen v. Missouri State High School Activities Assoc.*, 40 F.3d 926, 928 (8th Cir. 1994); *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). Of these, "[n]o single factor in itself is dispositive; rather, each factor must be considered to determine whether the balance of equities weighs toward granting the injunction." *United Industries Corporation v. The Clorox Company*, 140 F.3d 1175,1179 (8th Cir. 1998). In addition, "the burden on the movant is heavy, in particular where . . . 'granting the preliminary injunction will give [the movant] substantially the relief it would obtain after a trial on the merits.'" *United Industries*, 140 F.3d at 1179 (citing *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993) (quoting *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991)). To understand how the equities balance, the court in *Dataphase* provided this guidance:

> [i]f the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less. . . . [However,] the absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction.

640 F.2d at 113-14. Moreover, "irreparable harm cannot be presumed where . . . [appellant] has not established any prospect of success upon the merits. *United Industries*, 140 F.3d at 1184.

A. Probability of Success on the Merits

Plaintiffs attack SORA on a constitutional basis. It must be noted, however, that "[s]tatutes are presumed to be constitutional, and the party attacking the constitutionality of a statute 'bears an extremely heavy burden.'" *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 773 (Mo. 2003) (citing *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999)). A court will "not invalidate a statute 'unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied' therein." *Id.*

1. Substantive Due Process

The Missouri Constitution guarantees its citizens that they will not "be deprived of life, liberty, or property, without due process of law." Mo. Const., Art. I, § 10. Substantive due process "protects 'fundamental' rights, that is, those 'implicit in the concept of ordered liberty.'" *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. 1995). A state that "disadvantages a suspect class or impinges a fundamental right" triggers strict judicial scrutiny and must be "necessary to accomplish a compelling state interest." *Woodson v. Woodson*, 92 S.W.3d 780, 784 (Mo. 2003). "Fundamental rights are 'created only by the constitution.'" *Groose*, 908 S.W.2d at 135. However, a "statute that neither burdens a suspect class nor impinges a fundamental right need only be rationally related to a legitimate state interest." *Id.* To establish a violation of substantive due process, a plaintiff must prove that "the government action complained of is 'truly irrational', that is 'something more than . . . arbitrary, capricious, or in

violation of state law.'" *Frison v. City of Pagedale*, 897 S.W.2d 129, 132 (Mo. Ct. App. E.D. 1995) (quoting *Anderson v. Douglas County*, 4F.3d 574, 577 (8th Cir. 1993); *Roy v. Missouri Department of Corrections*, 23 S.W.3d 738, 746 (Mo. Ct. App. W.D. 2000) (quoting *Frison)*. In addition, "where the right exists only by state law, it is not protected by *substantive* due process and 'may constitutionally be rescinded so long as the elements of *procedural* due process are observed.'" *Cavallaro*, 908 S.W.2d at 135-36.

In the instant case, plaintiffs allege that SORA infringes on their liberty interest, right to privacy, freedom from unwanted publicity, and right to travel. To establish a substantive due process claim, plaintiffs must allege the infringement of a fundamental right. It is unclear which fundamental right is implicated by the SORA's imposition of significant affirmative obligations and severe stigma. Assuming that plaintiffs' liberty interest is infringed by the affirmative obligations imposed by SORA's registration requirements, SORA calls for three types of information: (1) details regarding the sex offense giving rise to the applicability of SORA; (2) the sex offender's location information, including home, employment and institution of higher education if enrolled therein; and (3) the sex offender's personal characteristics; e.g., Social Security number, photograph and fingerprints. Mo. Rev. Stat. § 589.407. This is no more onerous than other duties required of citizens of this state and this country as to certain rights and benefits of citizenship. Voter, motor vehicle, and firearm registration are required for those who wish to vote, or own a motor vehicle or firearm, respectively. Wage earners are required to file both federal and state income tax returns. Requiring offenders to register every ninety days is similar to the self-employed submitting estimated quarterly tax forms. Sex offenders' obligations under SORA are no more onerous than these civic duties and some would say less onerous than

filing income tax returns. SORA does not infringe the liberty interest of sex offenders.

Plaintiffs also allege that "[l]ife changes trigger duties under SORA." This is true. Sex offenders are directed to update the registration information if it changes. Registration would be useless if the information was inaccurate.

Plaintiffs allege that SORA "imposes a severe stigma on those to whom it applies," causing registrants adverse consequences as a result of others discovering they committed a sex offense. Again, it is unclear as to which fundamental right the allegation of stigma refers. If a fundamental right applies to the imposition of a stigma, this issue may be addressed as follows:

> Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record.

Smith v. Doe, 123 S.Ct. 1140, 1152, 155 L.Ed. 2d 164, 182 (2003). Plaintiffs compare these consequences to "shaming punishments that were used earlier in our history," citing Justice Souter's concurring opinion in *Smith v. Doe*. However, the majority in *Smith v. Doe* found "[a]ny initial resemblance to early punishments . . . misleading" in that the "purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." 123 S.Ct. at 1150; 155 L.Ed. 2d at 180-81.

Plaintiffs also compare SORA's registration requirements to conditions of supervised release or parole. Assuming that plaintiffs implicate a violation of their liberty interest and thus have triggered a substantive due process analysis, the Supreme Court in *Smith v. Doe* rejected this comparison because "[p]robation and supervised release entail a series of mandatory conditions" while "offenders subject to the Alaska statute are free to move where they wish and

to live and work as other citizens, with no supervision." 123 S.Ct. at 1152; 155 L.Ed. 2d at 182. Such is the case under Missouri's SORA. Other than appearing annually or quarterly to register, sex offenders in Missouri may move freely, even out of state; work where they wish; attend any school; or engage in any other activity. SORA does not infringe the liberty interests of sex offenders in Missouri.

Plaintiffs also complain about the selection of conviction information making a statement resulting in "harsh[] consequences." However, the selection of information, i.e., limiting it to sex offenses, demonstrates that SORA is narrowly drawn to achieve the compelling state interest of protecting children from sex offenders. Plaintiffs attempt to contradict this conclusion based on SORA's application to all sex offenders for life, without regard to their propensity to commit another sex offense. However, one cannot conclusively determine which sex offenders will commit another sex offense.[1] Therefore, accurate classification as to the likelihood of committing another sex offense is impossible. Such an attempt would be misleading in some cases, leading to misplaced trust and tragic consequences.

The U.S. Supreme Court addressed a similar issue when ruling on the constitutionality of a law barring convicted felons from practicing medicine:

> Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application . . . ."

Hawker v. New York, 170 U.S. 189, 197 (1898). In this case, the Missouri legislature made a rule of universal application, requiring all sex offenders to register, thus avoiding the problem of

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[1] *See* Exhibit A, excerpt from deposition of Roy LaCoursiere, M.D., page 55, line 13 - page 57, line 3.

faulty determinations of who will commit another sex offense.

Even if the registration information required by SORA infringes on the fundamental right of privacy, thus triggering strict judicial scrutiny, SORA does not violate substantive due process if the State has a compelling interest in its enactment. The intent of the Missouri legislature in enacting SORA "was to protect children from violence at the hands of sex offenders." *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). Such an interest is compelling. Therefore, SORA does not violate plaintiffs' substantive due process rights, even if a fundamental interest of plaintiffs was infringed.

2. *Ex Post Facto* Clause/Retrospective Application of Statutes

An *Ex Post Facto* analysis applies only to criminal laws. *State v. Thomaston*, 726 S.W.2d 448, 459 (Mo. Ct. App. W.D. 1987). Based on two characteristics, SORA is a criminal law. First, the Missouri legislature codified SORA in title 38, Crimes and Punishment. Second, a violation of SORA is designated as a misdemeanor or felony. Mo. Rev. Stat. § 589.425. Felonies and misdemeanors are classified as crimes. Mo. Rev. Stat. § 556.016. Therefore, SORA is a criminal law.

The Missouri Constitution forbids the enactment of *Ex Post Facto* laws. Missouri Const. Art. I, § 13. Missouri courts have applied federal law to *Ex Post Facto* claims under both the United States and Missouri constitutions. *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133 (Mo. 1995); *Missouri v. Lawhorn*, 762 S.W.2d 820 (Mo. 1988); *State v. Thompson*, 42 S.W. 949 (Mo. 1897). As a result, federal law is applicable in this case.

An *Ex Post Facto* law is one that "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then

prescribed . . . ." *Cummings v. Missouri*, 71 U.S. 277, 325-26 (1866). The key to determining if SORA is an *Ex Post Facto* law is whether it inflicts punishment for a past act. *See Austin v. United States*, 509 U.S. 602, 610 (1993). "[M]ere 'disadvantage' to an offender" is not enough to implicate the *Ex Post Facto* clause . *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 136 (Mo. 1995) (citing *California Dept. of Corrections v. Morales*, 131 L. Ed. 2d 588, 115 S. Ct. 1597, 1601-02 (1995)). Therefore, the question in this case is whether the registration and notification requirements under SORA impose additional punishment for the prior conviction of a sex offense.

The U.S. Supreme Court ruled on this issue in *Smith v. Doe* in regard to Alaska's sex offender registration act. 123 S.Ct. 1140, 155 L.Ed. 2d 164 (2003). The Court found that it was nonpunitive and its retroactive application did not violate the *Ex Post Facto* Clause. *Id.* Without a significant distinction between Missouri's and Alaska's sex offender registration acts, this ruling necessitates the same finding in this case.

Plaintiff cites *State v. Larson* as evidence that registration as a sex offender is punitive. 79 S.W.3d 891 (Mo. 2002). However, the court in *State v. Larson* also cited participation in a program of treatment, education and rehabilitation as well as the report of the offense to the National Crime Information Center as "punitive, collateral consequences" of pleading guilty. 79 S.W.3d at 894. Neither can be considered punitive as defined under the *Ex Post Facto* clause. Nor was the Court determining whether SORA or any other law violated the *Ex Post Facto* clause. Rather, the Court was considering whether a sex offender could withdraw his guilty plea when he received a suspended imposition of sentence. Taken in context, the statement in *Larson* cannot stand for the proposition that SORA is punitive in fact.

Again, plaintiffs cite the burden imposed by SORA as evidence that SORA is punitive. As discussed in § II.A.1, *supra*, registration requirements are no more demanding than other incidents of citizenship. They represent no more than a "mere disadvantage" for the plaintiffs and, therefore, are not a violation of the *Ex Post Facto* clause. Plaintiffs also cite the consequences of the public dissemination of their names, addresses and crimes as SORA provides. However, others may discover their prosecution for a sex offense through other means, as the prosecution was a public proceeding and a matter of public record and was likely reported in the media. It is dissemination, however, that ensures the protection of Missouri children by helping parents and those acting in a parental capacity determine with whom to trust their children.

3. Retrospective Law

The Missouri Constitution prohibits any law "retrospective in its operation." Art. I, § 13. The "term *retrospective* refers exclusively to laws related to civil rights and remedies." *Thomaston*, 726 S.W.2d at 459. As outlined in § II.A.2. *supra*, SORA is a criminal law. Therefore, it cannot be "retrospective in its operation." Even if SORA was deemed a civil law, however, it is not retrospective.

A retrospective law is one which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Thomaston*, 726 S.W.2d at 459 (quoting Blacks Law Dictionary 1184 (5th ed. 1979)). A "vested right" is "more than merely an expectation grounded in anticipation that the existing law will continue." *Dial v. Lathrop R-II School District*, 871 S.W.2d 444, 447 (Mo. 1994) (citing *Fisher v. Reorganized School Dist.*, 567

S.W.2d 647, 647 (Mo. banc 1978). Rather, it "must have become a legal or equitable title to the present or future enjoyment of property or a demand, or a legal exemption from a demand of another." *Id.*

However, a law may be *retroactive*; i.e., "look[] or act[] backward from its effective date." *Id.* at 459-60. The court in *Thomaston* drew the distinction between retrospective and retroactive operation:

> [A] law is retrospective and thus not retroactive if it affects the substantive or vested rights of a party and by contrast if a law is procedural only and does not affect the substantive rights of a party it is *retroactive* but not *retrospective.*

726 S.W.2d at 460 (citing *State ex rel. Lawyers Title Insurance Corp. v. Elrod*, 636 S.W.2d 396, 397-98 (Mo. Ct. App. 1982)).

In the instant case, SORA sets forth a procedure for the registration and dissemination of information as to the identity and whereabouts of sex offenders. It does not substantially prejudice sex offenders, any more than filing taxes does. Moreover, dissemination does not create a new fact about the sex offender–it merely reports it. Sex offenders are not deprived of any vested rights in that they have not been stripped of any "legal or equitable title to the present or future enjoyment of property or a demand," nor have they been robbed of "a legal exemption from a demand of another." Plaintiffs name the rights to travel and privacy and to be free from unwarranted publicity as vested rights that SORA has impaired. As to freedom from unwarranted publicity, plaintiffs cite *Biederman's of Springfield, Inc. v. Wright* in support. However, the court in *Biederman's* included the right to be free from unwarranted publicity in the definition of the right to privacy. 322 S.W.2d 892, 895 (Mo. 1959). Therefore, it is not a right separate from the right to privacy. As a result, defendants will address only the rights to

privacy and travel.

Regarding the right to privacy, the U.S. Supreme Court noted in *Smith v. Doe that* the "consequences [resulting from the public availability of the information] flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Smith v. Doe*, 123 S.Ct. at 1152, 155 L.Ed. 2d at 182. Moreover, sex offenders, as is true of other criminal defendants, are prosecuted publicly, the proceedings of which may be reported by the media. Plaintiffs are objecting to the public disclosure of a public fact, not of private matters.

As to the right to travel, a "state law implicates the right to travel 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 of New York v. Soto-Lopez, et al.*, 476 U.S. 898, 905, 106 S.Ct. 2317, 2321 (1986) (citations omitted). SORA does not deter travel. Sex offenders in Missouri may travel at will, without asking for or receiving permission.

Nor does SORA have impeding travel as its primary objective. Its primary objective is to know the identity and whereabouts of sex offenders in the state of Missouri. Although some are required to register quarterly,[2] this requirement does not impair travel. If offenders are scheduled to be out of town during the period within which they must register, they may do so early, rather

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[2] Reporting is required every ninety days for offenders registered as predatory or persistent sexual offenders; offenders whose victim was less than eighteen years of age at the time of the offense; and any offender who has failed to register or submitted false registration information. Mo. Rev. Stat. § 589.414.5. Missouri's interest in verifying the location of these offenders is understood as those most likely to commit another sex offense, prey on children and/or those who have proved unreliable in the past in regard to registration requirements.

that waiting for the ninety-day period to expire. Mo. Rev. Stat. § 589.414.5. Moreover, the annual registration requirement directs that sex offenders "report annually in person in the month of their birth." Mo. Rev. Stat. § 589.414.6. Having a month to register does not impair travel.

SORA also does not penalize a sex offender for traveling. No rights are taken from sex offenders if they travel, as was ruled unconstitutional in *Dunn, Governor of Tennessee v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995 (1972) (ruling that durational residency requirements for voting violated the Equal Protection clause). No consequences result from plaintiffs' exercise of their right to travel.

Because SORA does not affect substantive rights, it is a law that is *retroactive*, but not *retrospective,* in operation. It merely provides a procedural mechanism for sex offenders to report their whereabouts and for law enforcement to report that information to the public upon request.

Even in cases where a law is retrospective in operation, it is constitutional "if such intent is clearly manifested by the Missouri General Assembly." *Id.* In the instant case, the Missouri General Assembly included within SORA's coverage those who meet certain conditions "since July 1, 1979" when SORA was enacted in 1994. Mo. Rev. Stat. §§ 556.600 (1994) and 589.400 (2002). As a result, its intent is clear that SORA should "look backward." As such, SORA may operate retrospectively.

4. Equal Protection

The Equal Protection clause of the Missouri Constitution provides "that all persons are created equal and are entitled to equal rights and opportunity under the law." Art. 1, § 2. In determining the constitutionality of a statute under the Equal Protection clause, a two-part

analysis is applied. *Etling*, 92 S.W.3d at 774. First, a court must:

> determine whether the classification 'operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.' If so, the classification is subject to strict scrutiny and th[e] Court must determine whether it is necessary to accomplish a compelling state interest. If not, review is limited to determining whether the classification is rationally related to a legitimate state interest.

Id. (quoting *Marriage of Kohring*, 999 S.W.2d 228, 231-232 (Mo. banc 1999)). Suspect classes are those that "'command extraordinary protection from the majoritarian political process' for historical reasons," such as race, national origin or illegitimacy. *Etling*, 92 S.W.3d at 774 (quoting *Riche v. Director of Revenue*, 987 S.W.2d 331, 336 (Mo. banc 1999). Again, fundamental rights are basic liberties, such as "the rights to free speech, to vote, [and] to freedom of interstate travel." *Id.* If neither a suspect class or fundamental right is involved, "a court will strike down the challenged legislation only if the classification 'rests on grounds wholly irrelevant to the achievement of the state's objective.'" *Id.* at 775. A state is "'not required to convince the courts of the correctness of [its] legislative judgments.'" *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. 1991) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981)). A court may not "question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. 1991) (quoting *Winston v. Reorganized School District R-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982)). Instead, the challenger must prove that the classification "could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* In cases where a "question of legislative judgment remains at least debatable, the issue settles on the side

of validity." *Mahoney*, 807 S.W.2d at 513 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)).

Plaintiffs maintain 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." Defendants are unclear as to how SORA restricts plaintiffs' freedom as plaintiffs are free to move, change employment, attend school or engage in any other activity. Plaintiffs also allege that SORA infringes their fundamental rights of privacy and travel. As outlined in § II.A.3. herein, neither right is infringed.

In addition to their claims of infringement of fundamental rights, plaintiffs allege that sex offenders are a suspect class either within the class of sex offenders or as compared with classes of other types of offenders. Either class fails to "command extraordinary protection from the majoritarian political process" for historical reasons. As outlined in § II.A.1., *supra*, a legislature may invoke a rule of universal application. In this case, it has done so based on the need to protect Missouri's children. Plaintiffs advance the argument that those murdering an adult or committing a battery upon an adult are similarly situated, yet are not treated similarly. However, these offenders pose no increased risk to children, as do sex offenders. Because plaintiffs provide no evidence to the contrary, they fail to carry their burden of proof as challengers of SORA's constitutionality.

In regard to plaintiffs' claim that offenders within the class of sex offenders are dissimilar, plaintiffs focus on those receiving a suspended imposition of sentence ("SIS") or a suspended execution of sentence ("SES"). SORA's focus, however, is on those who are "convicted of, been found guilty of, or plead guilty to committing, or attempting to commit"

certain enumerated offenses. Mo. Rev. Stat. § 589.400.1. The ultimate disposition of those who plead guilty to a sex offense is irrelevant to the application of SORA. The Legislature rationally assumed that those who plead guilty committed the sex offense to which they plead.

The class of sex offenders is not a suspect class nor does SORA infringe upon a fundamental right. As a result, it need only be relevant to the achievement of the state's objective. The purpose of SORA is the protection of children from sex offenders. *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). To assist caretakers and parents in accomplishing this purpose, the Legislature sought to publish upon request the names and locations of known sex offenders. To assist law enforcement in the quick apprehension of sex offenders, the Legislature sought to know the names and locations of known sex offenders. Such actions are rational and relevant to SORA's purpose. As such, the judgment of the Missouri legislature may not be questioned.

Even if SORA involved a suspect class or infringed a fundamental right, the protection of children is a compelling state interest. Moreover, SORA is narrowly drawn to achieve that purpose. Only known sex offenders are required to register, and a list of such sex offenders are disseminated only upon request. Armed with this information, parents and caretakers know with whom they cannot trust their children. Plaintiffs fail to identify a less restrictive means or one that is more carefully tailored to achieve this purpose. Under either level of scrutiny, SORA does not violate the Equal Protection clause of the Missouri Constitution.

5. Bill of Attainder

The Missouri Constitution prohibits the General Assembly from enacting a bill of attainder. Art. 1, § 30. A bill of attainder "singles out a 'specifically designated person or group' . . . and inflicts punishment on that person or group." *State ex rel. Bunker Resource Recycling*

and Reclamation, Inc., 782 S.W.2d 381, 386 (Mo. 1990) (citing *Selective Service System v. Minnesota Public Interest Research Group, et al.*, 468 U.S. 841, 104 S.Ct. 3348, 3352, 82 L.Ed. 2d 632 (1984)). Specificity as to a person or group "does not automatically offend the Bill of Attainder Clause" if there is "a reasonable, nonpunitive basis for limiting the act . . . ." *Id.* at 386-87 (citing *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 2806, 53 L.Ed. 2d 867 (1977)). Further, "legislation which is intended to prevent future dangerous acts, rather than to punish past action, by members of a group of class of persons, is not unconstitutional as a bill of attainder." *King v. Swenson*, 423 S.W.2d 699, 704 (Mo. 1968) (overruled on other grounds) (citing *American Communications Ass'n v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 691[25], 94 L.Ed. 925 (1950)).

If the law satisfies the specificity requirement, "[t]he question becomes whether the legislation imposes a constitutionally forbidden punishment." *Id.* at 387. To answer that question, a court must determine:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment, (2) whether the statute, viewed in 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.

Id.

In the instant case, SORA requires that sex offenders register. Protecting children from violence at the hands of sex offenders, the purpose of SORA, is a reasonable, nonpunitive basis for limiting registration to sex offenders and the dissemination of information to sex offenses only. As a result, SORA does not violate the Bill of Attainder clause.

As to whether SORA creates a constitutionally forbidden punishment, the court must first

consider if the challenged statute falls within the historical meaning of legislative punishment. The U.S. Supreme Court has already ruled that the effects of Alaska's sex offender registration act did not resemble historical punishments. *Smith v. Doe*, 123 S.Ct. at 1150, 155 L.Ed. 2d at 180 (stating that "[a]ny initial resemblance to early punishments is, however, misleading"). SORA is similar to the Alaska law in material respects. Regarding registration, if completing a form constitutes punishment in the historical sense, income tax returns could be so regarded as well. Nor does notification fall within historic legislative punishments. In contrast to historical "shaming" punishments, "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id.*, 123 S.Ct. at 1150; 155 L.Ed. 2d at 181. SORA does not fall within the historical meaning of legislative punishment and fails to meet the first element to fall within the definition of a constitutionally forbidden punishment.

As to the second element, SORA advances a nonpunitive legislative purpose, the protection of children from sex offenders. The burdens SORA imposes are necessary to accomplish this purpose. Therefore, SORA fails to meet the second element of a constitutionally forbidden punishment.

Regarding the third element, the legislature did not disclose a purpose, but the Missouri Supreme Court has ruled that its purpose was to protect children from violence at the hands of sex offenders. *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). The Legislature's placement of SORA within Chapter 589, "Crime Prevention and Control Programs and Services," supports this ruling. Thus, SORA fails to meet the third element to be considered a constitutionally forbidden punishment.

SORA does not violate the Bill of Attainder clause of the Missouri Constitution. First, it

does not satisfy the specificity element. SORA, although specifically applying to sex offenders, has a nonpunitive, reasonable basis for doing so. Further, by attempting to prevent future dangerous acts, it is not unconstitutional, despite its specificity. Second, SORA does not satisfy the punishment element in that SORA's effects do not resemble historical judgment and it accomplishes the legislative purpose of protecting children from sex offenders. Thus, plaintiffs will not succeed on the merits of this claim.

6. Special Law

The Missouri Constitution prohibits the passage of "any local or special law where a general law can be made applicable." Art.1, § 40 (30). A statute is a special law if "members of a stated class are omitted from the statute's coverage whose relationship to the subject matter cannot by reason be distinguished from that of those included." *State ex rel. Bunker Resource Recycling and Reclamation, Inc.*, 782 S.W.2d at 385. However, "[e]ven a facially special statute does not violate the constitutional prohibition if some characteristic of the excluded class provides a reasonable basis for its exclusion." *Id.* The party challenging the constitutionality of the statute bears "the burden of showing that it is essentially arbitrary and unreasonable." *Id.* The legislature is entitled to define the class. *Blaske*, 821 S.W.2d at 832. However, it must have "a rational basis for establishing the limits of the class as it did." *Id.* What makes a law special is not "what a law includes . . . but what it excludes." *Collector of Revenue v. Parcels of Land*, 517 S.W.2d 49, 53 (Mo. 1974). In other words, special laws do "not embrace all of the class to which they are naturally related. *Id.* As a result, a rational basis test applies, the same as that in an equal protection analysis where no fundamental right or suspect class is involved. *Savannah R-III School District v. Public School Retirement System of Missouri*, 950 S.W.2d 854, 859 (Mo.

1997). A law is not special if it is open-ended; i.e., if other members can join the class. *Zimmerman v. State Tax Commission of Missouri*, 916 S.W.2d 208, 208 (Mo. 1996) (ruling that a statute applying only to first class charter counties is open-ended in that other counties may join); *see also Parcels of Land*, 517 S.W.2d at 53 (ruling that a statute applying to only one member at the time of enactment is not a special law if other members may later join after satisfying the stated criteria); *cf. State ex rel. City of Blue Springs*, 853 S.W.2d 918, 920-21 (Mo. 1993) (finding that a statute based on population at a specific time before the enactment of the law may be a special law).

In the instant case, other members may join the class. Those who qualify as sex offenders under SORA in the future may join the class. As a result, SORA is open-ended and therefore not a special law. Even if SORA was considered a special law, it satisfies the rational basis test, as outlined under § II.A.4., *supra*. None of the laws mentioned by plaintiffs would serve the same purpose as SORA because none would list the current whereabouts of sex offenders, nor do those laws provide for the release of that information to the public.

B. Other *Dataphase* Factors

1. The Threat of Irreparable Harm to the Movants Absent the Injunction

Plaintiffs claim that once the information is disseminated, they will be irreparably harmed. If that is the case, they were irreparably harmed when they were prosecuted for the sex offense they committed. The prosecution was public and may have been reported in the media. The harm they fear has already been done. SORA merely repeats the initial notification.

2. The Balance between the Irreparable Harm to the Movants and the Injury to Other Interested Parties if the Injunction is Issued

If the injunction is issued, parents and caretakers will be unaware of who may be trusted with their children. This is particularly true if the case is certified as a class action, preventing the dissemination of information as to all sex offenders in the state of Missouri. As a result, the children in this state would be put at risk.

The harm to movants, the release of public information to the public, may cause some painful consequences; but, as the U.S. Supreme Court said in *Smith v. Doe*, the consequences flow from the fact of conviction, not from registration and dissemination provisions. 123 S.Ct at 1151; 155 L.Ed. 2d at 182.

The balance between placing the children of Missouri at risk versus the consequences to sex offenders of releasing public information to the public must weigh in favor of the children.

3. The Public Interest

"The purpose and the principal effect of notification are to inform the public for its own safety." *Smith v. Doe*, 123 S.Ct. at 1150; 155 L.Ed. 2d at 181. The citizens of Missouri have an interest in protecting their children from violence at the hands of sex offenders. This factor, too, weighs in favor of denying a preliminary injunction.

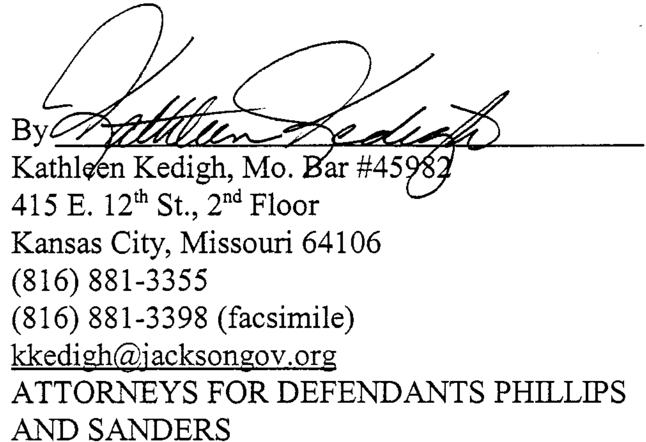
III. Conclusion

Plaintiffs fail to satisfy the *Dataphase* factors for the issuance of a preliminary injunction. Plaintiffs will not succeed on their merits as to any of their claims. The protection of children from violence at the hands of sex offenders outweighs the threat of harm to sex offenders in the form of the inconvenience posed by registration and the disclosure of public facts. Moreover, the public has an interest in protecting children. The potential harm to children is simply not worth the risk of providing the relief the plaintiffs seek in this case.

WHEREFORE, Defendants Phillips and Sanders request that this Court deny plaintiffs' Motion for Preliminary Injunction and for such other relief and the Court deems just and proper.

Respectfully submitted,

JACKSON COUNTY COUNSELOR'S OFFICE



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, via U.S. mail, postage prepaid, on this 20th day of November, 2003 to:

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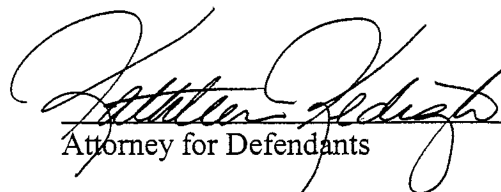

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