

2
No. WD68066

**IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

JANE DOE I, et al.,

Respondents,

v.

THOMAS PHILLIPS, et al.,

Appellants.

**Appeal from the Jackson County Circuit Court
The Honorable Jon R. Gray, Circuit Judge**

BRIEF OF APPELLANT KEATHLEY

**JEREMIAH W. (JAY) NIXON
Attorney General**

**MICHAEL PRITCHETT
Assistant Attorney General
Missouri Bar No. 33848**

**Post Office Box 899
Jefferson City, MO 65102
(573) 751-3321 (Telephone)
(573) 751-9456 (Fax)**

**ATTORNEYS FOR APPELLANT
KEATHLEY**

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

JURISDICTIONAL STATEMENT..... 6

STATEMENT OF FACTS..... 7

 Course of Proceedings..... 7

 Statutory Framework..... 8

 Facts 12

POINTS RELIED ON 13

STANDARD OF REVIEW..... 16

SUMMARY OF THE ARGUMENT 17

ARGUMENT

 I. Continued dissemination of information and photographs obtained from persons who registered as sex offenders, but who now no longer must register due to the decision in *Doe v. Phillips*, is not inconsistent with the Missouri Constitution’s ban on retrospective laws in that such continued dissemination imposes no duty or obligation on the part of persons who are no longer required to register under *Doe*..... 19

 Background..... 20

 Analysis 21

II.	Continued dissemination of information and photographs available from sources other than previous registrations of persons who no longer must register as sex offenders due to the decision in <i>Doe v. Phillips</i> is not inconsistent with the Missouri Constitution’s ban on retrospective laws in that such dissemination not only imposes no new duty or obligation on the part of such persons, but the <i>Doe</i> decision itself approved publication of true information about sex offenders regardless of their conviction date.....	26
III.	Requiring sex offender registration of, and permitting dissemination of registration material about, persons who must register because of out-of-state offenses, regardless of the date of their convictions, is not inconsistent with Missouri’s ban on retrospective laws in that persons who have committed registrable offenses in other jurisdictions voluntarily accept Missouri’s registration obligation by moving to Missouri and, in the case of persons who must register in Missouri because they have been required to register by another jurisdiction, their registration obligation in Missouri is not a new duty or obligation but only the continuation of a pre-existing obligation	30
	Background	31
	Analysis	32

IV. The injunction entered by the trial court is ambiguous and should be modified to explicitly reflect that names and offenses of pre-1995 offenders may remain on the sex offender registry 36

CONCLUSION 38

CERTIFICATE OF SERVICE AND OF COMPLIANCE..... 39

APPENDIX 40

TABLE OF AUTHORITIES

Cases

<i>City of Bridgeton v. City of St. Louis</i> , 18 S.W.3d 107 (Mo.App. E.D. 2000)	36
<i>Doe v. Phillips</i> , 194 S.W.3d 833 (Mo. banc 2006)	<i>passim</i>
<i>Herron v. Sisk</i> , 625 S.W.2d 909 (Mo.App. W.D. 1981)	24
<i>Jerry-Russell Bliss, Inc., v. Hazardous Waste Mgt. Comm'n</i> , 702 S.W.2d 77 (Mo. banc 1985)	22
<i>L.B. v. State Com'n. of Psychologists</i> , 912 S.W.2d 611 (Mo.App. W.D. 1995)	16
<i>Metmor Financial, Inc. v. Landoll Corp.</i> , 976 S.W.2d 454 (Mo.App. W.D. 1998)	24
<i>Miller v Mitchell</i> , 25 S.W.3d 658 (Mo.App. W.D. 2000)	32
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976)	16
<i>R.W. v. Sanders</i> , 168 S.W.3d 65 (Mo. banc 2005)	20
<i>Randolph v. Rodgers</i> , 170 F.3d 850 (8th Cir. 1999)	24
<i>Squaw Creek Drainage Dist. v. Turney</i> , 235 Mo. 80, 138 S.W. 12 (1911)	21
<i>State v. Cook</i> , 700 N.E.2d 570 (Ohio 1998), <i>cert. denied</i> , 119 S. Ct. 1122 (1999)	34
<i>Systematic Business Services, Inc. v. Bratten</i> , 162 S.W.3d 41 (Mo.App. W.D. 2005)	16
<i>Weaver v. Graham</i> , 450 U.S. 24 (1981)	32

Constitutional Provisions and Statutes

Mo. Const. art. I, § 13	17, 19, 21, 26, 30
Mo. Const. art. V, § 3	6

§ 43.650, RSMo.....	11
§§ 477.050 to 477.070, RSMo.....	6
§§ 589.400 to 589.425, RSMo.....	<i>passim</i>
Chapter 566, RSMo	9, 11, 31

Other Authorities

Mo. R. Civ. P. 52.13	8
16B Am. Jur. 2d <i>Constitutional Law</i> § 695 (1998)	34
42 Am. Jur. 2d <i>Injunctions</i> § 10 (2000).....	24

JURISDICTIONAL STATEMENT

The plaintiffs are individuals convicted of sex offenses before the effective date of Missouri's Sex Offender Registration Act (SORA), §§ 589.400 to 589.425, RSMo, who are no longer required to register following the Missouri Supreme Court's earlier decision in this case. *Doe v. Phillips*, 194 S.W.3d 833, 849-53 (Mo. banc 2006). Defendant Keathley is the Superintendent of the Missouri State Highway Patrol. Defendant Keathley appeals from the judgment of the Jackson County Circuit Court permanently enjoining him and his successors from publishing or otherwise disseminating photographs and identifying information of plaintiffs and others registered under SORA whose convictions occurred before January 1, 1995. The circuit court entered this judgment on January 8, 2007, and its amended judgment on January 16, 2007. Defendant Keathley filed his notice of appeal on February 16, 2007.

Jackson County lies within the territorial jurisdiction of the Missouri Court of Appeals, Western District. §§ 477.050 to 477.070, RSMo. This appeal does not involve the validity of a treaty or statute of the United States, or any statute or provision of the Missouri Constitution, the title to any office of this state, the construction of a revenue law, or the imposition of the death penalty. The appeal, therefore, is within the general appellate jurisdiction of the Missouri Court of Appeals, Western District. Mo. Const. art. V, § 3 (as amended).

STATEMENT OF FACTS

Course of Proceedings. Eight individuals who had been convicted of crimes that required them to register under the terms of Missouri's Sex Offender Registration Act (SORA; also known as Megan's Law), §§ 589.400 to 589.425, RSMo, filed their Petition for Declaratory Relief against Jackson County Sheriff Thomas Phillips, Jackson County Prosecutor Michael Sanders, and Missouri State Highway Patrol Superintendent Roger D. Stottlemire in Jackson County Circuit Court on July 10, 2003. Legal File (LF) 14, 16-18. They sought a declaration that SORA is unconstitutional under the Missouri Constitution as violative of substantive due process, equal protection, the open courts guarantee, the right to a jury trial, and the prohibitions on ex post facto laws, retrospective laws, bills of attainder, and special laws. LF 22-27. Three additional individuals intervened as plaintiffs effective August 5, 2005. LF 52-54. Following a hearing and briefing, the circuit court, on January 6, 2005, upheld SORA in all respects and entered judgment in favor of the defendants. LF 7-8. Plaintiffs appealed.

On June 30, 2006, the Missouri Supreme Court upheld SORA from all but one of the numerous constitutional challenges raised. *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006); LF 231-52. The Court did conclude that application of SORA's registration requirements to persons who were convicted or pled guilty to sex offenses prior to January 1, 1995 (SORA's effective date) would constitute a violation of the Missouri Constitution's prohibition on retrospective laws. 194 S.W.3d. at 852-53; LF 251-52.

On remand to the Jackson County Circuit Court, those plaintiffs whose convictions predated January 1, 1995 (all but Jane Doe III), asked the circuit court to enjoin defendants from using and publishing the photographs obtained from them when they had been registering under SORA. LF 253-54. On January 8, 2007, after additional briefing, the court entered a judgment granting a permanent injunction prohibiting defendant James F. Keathley, defendant Stottlemire's successor as Superintendent of the Missouri State Highway Patrol,¹ and his successors "from publishing the photographs of plaintiffs on websites on the Internet or otherwise disseminating such photographs to the public of the plaintiffs, except Jane Doe III" and directing defendant Keathley to immediately "cease and desist from publishing photographs and identifying information of persons registered under SORA whose convictions predated January 1, 1985." LF 265-67. On January 16, 2007, the court entered an amended order and judgment correcting the reference to January 1, 1985, to January 1, 1995. LF 271-73. Defendant Keathley's motions to amend these judgments were denied on January 30, 2007 and February 14, 2007. LF 297-300.

Defendant Keathley filed his notice of appeal on February 16, 2007. LF 301.

Statutory Framework. Under SORA, each person who, since July 1, 1979, has been convicted of, been found guilty of, or pled guilty to committing or attempting to

¹Because Superintendent Stottlemire was sued in his official capacity (LF 14), Superintendent Keathley also succeeded Superintendent Stottlemire, by operation of Mo. R. Civ. P. 52.13(d), as a defendant in this case.

commit certain identified offenses, is required to register with the chief law enforcement officer of the county in which the person resides. § 589.400. Under the Supreme Court's earlier decision in this case, the operative date is now set at the effective date of SORA, January 1, 1995. *Doe*, 194 S.W.3d at 852-53; LF 251-52. The offenses requiring registration are felony sex offenses under Chapter 566, RSMo, any offense under Chapter 566 where the victim was a minor, and certain other enumerated offenses, including kidnapping (except when the victim is a child and the offender is the parent or guardian of the child), felonious restraint (except when the victim is a child and the offender is the parent or guardian of the child), sexual contact with a nursing home resident, promoting prostitution, promoting child pornography, and incest. Others who must register include persons who have been committed as criminal sexual psychopaths; have been found not guilty as a result of mental disease or defect of any of the enumerated offenses; have been convicted of, been found guilty of, or pled guilty to committing or attempting to commit an offense in another jurisdiction of an offense which, if committed in Missouri, would be a violation of Chapter 566 or a felony conviction of certain other enumerated offenses; or are required to register as sex offenders under the law of other states, federal law, or military law. § 589.400.1

This registration requirement is a lifetime obligation unless the offense requiring registration is reversed, vacated, or set aside; the registrant is pardoned; or, applicable in certain circumstances, the registrant has successfully petitioned a court for removal from the registry. § 589.400.3 & .7 to .9.

Each registrant must provide information including name, address, social security number, telephone number, motor vehicle details, 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 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. Every six months, registrants must report 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. Updates required by such changes must be done within ten days in some cases and within seven days in others. *Id.* Registrants reporting changes in residence to a different county must do so in person in both counties. § 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. § 589.417.2. Any person may request that list from the chief law enforcement officer. *Id.* Publicly

available information regarding registrants – name, aliases, date of birth, physical description, address, workplace, school address, photographs, motor vehicle descriptions, nature and date of offenses, date of release from confinement, and registration compliance status – is to be maintained by the Highway Patrol, subject to appropriation, on a publicly accessible web page on the internet. § 43.650, RSMo. Each county may also maintain a website with the same information the Highway Patrol website contains. § 589.402.

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 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. Any person who commits a third or subsequent violation of the reporting requirements is guilty of a felony punishable by a sentence of between ten and thirty years, without possibility of a suspended sentence and a mandatory prison term of at least two years. § 589.425.3.

Facts. The eleven plaintiffs have all been convicted of offenses that required them to register under the terms of SORA. LF 62-63 (Stipulation of Fact (Stip.) ¶ 7). At the time of the circuit court's initial judgment upholding SORA in all respects, all the

plaintiffs were registered under SORA. *Id.* All but Jane Doe III were convicted of their registrable offenses before January 1, 1995. LF 65-69.

A person convicted of any sex offense is significantly more likely to commit a sex offense than is a member of the public. LF 178 (Depo. p. 17). Professional studies have shown that recidivism rates of sex offenders are very high, with one study showing a recidivism rate of 52 %. LF 176 (Depo. pp. 10-11). The studies noted by defendant's expert generally define a subsequent offense as one for which the subject was convicted. LF 176 (Depo. pp. 11-12). The recidivism rates of sex offenders are therefore conservative because sex offenses are often unreported. LF 176 (Depo. pp. 11-12).

SORA registration provides a valuable tool to law enforcement officers to assist them in investigating crimes. LF 64 (Stip. ¶ 17). Public access to SORA registries provides information to members of the public to help them to take steps to protect themselves and their children. LF 64 (Stip. ¶ 18).

POINTS RELIED ON

I.

The trial court erred in permanently enjoining defendant Keathley and his successors from continuing to disseminate photographs and identifying information obtained from the previous registrations of persons registered under Missouri's Sex Offender Registration Act (§§ 589.400 to 589.425, RSMo) whose convictions or guilty pleas predate January 1, 1995, and who now no longer must register due to the decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), because such dissemination is not inconsistent with the Missouri Constitution's prohibition on laws that apply retrospectively (Mo. Const. art. I, § 13) in that such continued dissemination of photographs and information imposes no duty or obligation on the part of persons who no longer must register due to the *Doe* decision.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006);

Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S.W. 12 (1911)

Metmor Financial, Inc. v. Landoll Corp., 976 S.W.2d 454 (Mo. App. W.D. 1998);

Randolph v. Rodgers, 170 F.3d 850, 857 (8th Cir. 1999).

II.

The trial court erred in permanently enjoining defendant Keathley and his successors from disseminating photographs and identifying information of persons who were convicted or pled guilty to sex offenses prior to January 1, 1995, and who now no

longer must register under Missouri's Sex Offender Registration Act (§§ 589.400 to 589.425, RSMo) due to the decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), with regard to photographs and information obtained from sources other than previous registration of these persons under that Act because dissemination of photographs and identifying information not obtained from previous registrations is not inconsistent with the Missouri Constitution's prohibition on laws that apply retrospectively (Mo. Const. art. I, § 13) in that such dissemination not only imposes no new duty or obligation on the part of persons who no longer must register due to the *Doe* decision, but the *Doe* decision itself approved publication of true information concerning sex offenders regardless of the conviction date.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006).

III.

The trial court erred in not expressly limiting its judgment permanently enjoining defendant Keathley and his successors from disseminating photographs and identifying information of persons who were convicted or pled guilty to sex offenses prior to January 1, 1995, and who now no longer must register under Missouri's Sex Offender Registration Act (§§ 589.400 to 589.425, RSMo) due to the decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), to persons whose convictions occurred in Missouri because requiring registration of persons who must register under the Act due to their pre-1995 offenses in other states or under federal or military law is not inconsistent with

Missouri's prohibition on laws that apply retrospectively (Mo. Const. art I, § 13) in that persons who have committed offenses in other jurisdictions that require registration in Missouri voluntarily accept Missouri's registration obligation by moving to Missouri and, in the case of persons who must register under the Act because they have been required to register by another jurisdiction, their registration obligation in Missouri is not a new duty or obligation but only the continuation of a pre-existing obligation.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006);

Weaver v. Graham, 450 U.S. 24 (1981);

Miller v. Mitchell, 25 S.W.3d 658 (Mo. App. W.D. 2000);

§ 589.400.1, RSMo.

IV.

The trial court erred in not more specifically defining what classes of information the injunction applies to because the order to stop publicly disseminating photographs and identifying information of persons registered under Missouri's Sex Offender Registration Act (§§ 589.400 to 589.425, RSMo) whose convictions occurred before January 1, 1995, is ambiguous in that it does not state that "all" information obtained from these offenders is subject to the injunction.

City of Bridgeton v. City of St. Louis, 18 S.W.3d 107 (Mo. App. E.D. 2000).

STANDARD OF REVIEW

In this case the defendants appeal the grant of a permanent injunction. This Court has set out the standard of review in such a case as follows:

An action seeking an injunction is an action in equity. The standard of review in a court-tried action in equity is that of a judge tried case: the trial court's judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *L.B. v. State Comm. of Psychologists*, 912 S.W.2d 611, 616 (Mo.App. W.D.1995).

Systematic Business Services, Inc. v. Bratten, 162 S.W.3d 41, 46 (Mo. App. W.D. 2005).

SUMMARY OF THE ARGUMENT

Continued public dissemination by law enforcement authorities of information and photographs provided by persons who have registered as sex offenders under Missouri's Sex Offender Registration Act, but who no longer are required to register under *Doe v. Phillips*, 194 S.W.3d 833, 852-53 (Mo. banc 2006), because their convictions occurred before the effective date of that Act is not inconsistent with the Missouri Constitution's bar on retrospective laws (Mo. Const. art. I, § 13). Public dissemination of this material imposes no new duty, obligation, or disability upon these persons who no longer must register. Further, the Missouri Supreme Court's *Doe* decision specifically held that publication of true information about sex offenders is not inconsistent with the prohibition of laws that operate retrospectively.

Even if this Court concludes that continued public dissemination of information and photographs provided at past registrations by persons no longer required to register should no longer be permitted, the same cannot be said about public dissemination of material relating to sex offenders that is available from other sources. Publication of sex offender material available from other sources is neither the continuation of any aspect of any SORA registration that, under the *Doe* decision, should not have been required in the first place, nor an imposition of any duty, obligation, or disability on the part of persons who no longer must register due to the *Doe* Decision.

Even if it is appropriate to bar publication of information and photographs of sex offenders who were convicted in Missouri before the effective date of SORA, such a bar

should not be applied to out-of-state sex offenders who move to Missouri. Regardless of the date of the out-of-state convictions of persons who have moved to Missouri after SORA's effective date, these persons are voluntarily submitting themselves to the operation of SORA. The requirement that they register in Missouri arises from their post-SORA move to Missouri. And, with regard to persons required to register because they have been required to register in other jurisdictions, the requirement that they register in Missouri is not a new obligation barred by the Missouri Constitution, but rather, the continuation of a pre-existing obligation.

Finally, if the circuit court's injunction is upheld, defendant seeks clarification as to the specific classes of information that are not to be disseminated. Because the injunction does not prohibit dissemination of "all" information obtained from the registrations of pre-1995 offenders, defendant interprets it to permit retention in the sex offender registry of the names and offenses of pre-1995 offenders. Defendant requests modification of the injunction to explicitly reflect that such names and offenses may be retained on the registry.

ARGUMENT

I.

The trial court erred in permanently enjoining defendant Keathley and his successors from continuing to disseminate photographs and identifying information obtained from the previous registrations of persons registered under Missouri's Sex Offender Registration Act (§§ 589.400 to 589.425, RSMo) whose convictions or guilty pleas predate January 1, 1995, and who now no longer must register due to the decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), because such dissemination is not inconsistent with the Missouri Constitution's prohibition on laws that apply retrospectively (Mo. Const. art. I, § 13) in that such continued dissemination of photographs and information imposes no duty or obligation on the part of persons who no longer must register due to the *Doe* decision.

Continued dissemination by law enforcement authorities of information and photographs supplied by persons who have registered as sex offenders under Missouri's Sex Offender Registration Act (SORA, also known as Megan's Law), §§ 589.400 to 589.425, RSMo, but who no longer are required to register because their convictions occurred before the effective date of SORA, is not violative of the Missouri Constitution's prohibition on laws that apply retrospectively (Mo. Const. art. I, § 13). The continued publication of such information and photographs imposes no new obligation, duty, or disability upon the persons who have already provided this material but who are now no longer required to register. Further, the Supreme Court's decision in

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006), which concluded that persons convicted of registrable offenses before January 1, 1995, are not be required to register due to the constitutional bar on retrospective laws, specifically held that publication of true information about the Does would not be inconsistent with that prohibition. *Id.* at 852.

Background

The Missouri Supreme Court has upheld SORA in all respects challenged by the plaintiffs in this case but one. *Doe v. Phillips*, 194 S.W.3d 833, 841-49 (Mo. banc 2006). *See also R.W. v. Sanders*, 168 S.W.3d 65 (Mo. banc 2005) (also upholding SORA). The Court in *Doe* did rule that SORA could not be applied to require registration by persons convicted of sex offenses before SORA's effective date of January 1, 1995, because applying it to persons convicted before the effective date of the law was inconsistent with the Missouri Constitution's prohibition on laws that operate retrospectively. 194 S.W.3d at 852-53. The Court emphasized, however, that its "ruling applies only to the registration requirements. All other provisions of Megan's Law remain in effect as to these and all other persons subject to it." *Id.* Then the Court remanded the case.

Now, following remand, the plaintiffs (those convicted before January 1, 1995) assert that, because they should not have been required to register, the information they provided during the time they were registering should never have been obtained by law enforcement authorities. Because this information should never have been obtained, these plaintiffs continue, the law enforcement authorities should be prohibited from using

this information now. The circuit court agreed, concluding that continued public dissemination of the registration material provided by plaintiffs constituted the continuation of an aspect of the plaintiffs' registrations that was held unconstitutional and, thereby, also amounted to an unlawful retrospective application of SORA. The court entered judgment permanently enjoining defendant Keathley and his successors as Superintendent of the Missouri State Highway Patrol "from publishing the photographs of plaintiffs on websites on the Internet or otherwise disseminating such photographs to the public of the plaintiffs, except Jane Doe III [whose guilty plea occurred after January 1, 1995]" and directing defendant Keathley to immediately "cease and desist from publishing photographs and identifying information of persons registered under SORA whose convictions predated January 1, 1995." LF 265-67, 271-73.

Analysis

The Missouri Constitution, art. I, § 13, provides that "no . . . law . . . retrospective in operation, . . . can be enacted." "A retrospective law is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired." *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (1911), quoted with approval in *Doe v. Phillips*, 194 S.W.3d at 850. "A statute is not retrospective or retroactive, however, 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), quoted with approval in *Doe v. Phillips*, 194 S.W.3d at 851.

In concluding that application of SORA’s registration requirements to persons convicted of sex offenses before that Act’s effective date is inconsistent with the prohibition on laws retrospective in operation, the Missouri Supreme Court reasoned in *Doe* that requiring registration by such offenders constitutes “an affirmative obligation on them to register [and that this] obligation to *register* by its nature imposes a new duty or obligation.” 194 S.W.3d at 852 (emphasis in original). But in applying its analysis regarding the prohibition on laws that apply retrospectively, the Court specifically contrasted the obligation to register under SORA with the publication of information that occurs under SORA. The Court expressly “reject[ed] the claim that publication of true information about the Does affects a past transaction to their substantial detriment by imposing a new obligation, adding a new duty or attaching a new disability in respect to transactions or considerations already past. . . . The *publication* of this information merely looks back at antecedent actions” 194 S.W.3d at 852 (emphasis in original).

Thus, it is only SORA’s imposition of a new duty to register by persons who were convicted of registrable crimes before 1995 that caused the constitutional problem that the Court found with SORA. On the other hand, nothing about continued public dissemination of information and photographs provided at past registrations by persons who are now no longer required to register involves any duty or obligation on their part.

Even though law enforcement authorities have obtained such information and photographs by means of a registration process that has now been found to have been improperly imposed on persons convicted before 1995, that registration process is now past. The information and photographs are in the public record and the dissemination of this material requires no new act on the part of those with pre-1995 convictions. Because continued publication of the information and photographs provided by plaintiffs when they were registering under SORA does not obligate them in any way, this continued public access does not raise the same concerns that led the Supreme Court to determine that the continuing duty to register under SORA, as applied to these plaintiffs, was constitutionally prohibited.

In fact, the Supreme Court's express rejection of the claim that publication of true information about the Does affects a past transaction to their substantial detriment (194 S.W.3d at 852), implies that the Court would conclude that continued dissemination of information and photographs obtained from persons who are no longer required to register does not run afoul of the prohibition on retrospective laws. *See also id.* at 838 ("even as to those Does who may not be required to fulfill the affirmative duties imposed directly on them by Megan's Law, Missouri's constitutional prohibition on laws retrospective in their operation does not prohibit others from publishing information about them in the manner permitted by Megan's Law."). The *Doe* decision plainly shows the Court's intent that material held by law enforcement agencies, including the Highway Patrol, may be made publicly available without violation of the Missouri Constitution.

The Court drew no distinction between dissemination of information obtained during registration of offenders who would no longer have to register due to its decision and information otherwise in the possession of the law enforcement agencies. From the Court's drawing of no such distinction, it appears that the Court would permit continued public dissemination of information and photographs obtained at past registrations of persons who are no longer required to register.

An injunction may be entered only to protect substantial rights. *Herron v. Sisk*, 625 S.W.2d 909, 911 (Mo.App. W.D. 1981). Or, stated from the perspective of the other side, a permanent injunction should not interfere with legitimate and proper action of the party against whom the injunction is sought. *Metmor Financial, Inc. v. Landoll Corp.*, 976 S.W.2d 454, 463 (Mo.App. W.D. 1998). *See also Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999) (to obtain a permanent injunction, the movant must establish that he or she is entitled to a judgment on the merits); 42 Am. Jur. 2d Injunctions § 10 (2000) (same). Plaintiffs here are not entitled to a judgment in their favor with regard to continued use of the information and photographs they have previously supplied as part of the registration process. As shown above, defendant Keathley is entitled to continue to publish this material. Because the injunction entered by the circuit court interferes with the defendant's legitimate authority, it was improperly entered.

In entering its injunction barring defendant Keathley from publishing photographs and identifying information of persons registered under SORA whose convictions predate January 1, 1995, the circuit court erroneously declared and applied the law. The

judgment should be reversed and the injunction vacated.

II.

The trial court erred in permanently enjoining defendant Keathley and his successors from disseminating photographs and identifying information of persons who were convicted or pled guilty to sex offenses prior to January 1, 1995, and who now no longer must register under Missouri's Sex Offender Registration Act (§§ 589.400 to 589.425, RSMo) due to the decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), with regard to photographs and information obtained from sources other than previous registration of these persons under that Act because dissemination of photographs and identifying information not obtained from previous registrations is not inconsistent with the Missouri Constitution's prohibition on laws that apply retrospectively (Mo. Const. art. I, § 13) in that such dissemination not only imposes no new duty or obligation on the part of persons who no longer must register due to the *Doe* decision, but the *Doe* decision itself approved publication of true information concerning sex offenders regardless of the conviction date.

Even if this Court affirms the injunction barring the Highway Patrol from disseminating information and photographs that were provided by persons who have registered under the Sex Offender Registration Act (SORA), §§ 589.400 to 589.425, RSMo, in the past, but who now are no longer required to register due to the decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), the injunction should still be reversed to the extent it forbids dissemination of photographs and identifying information in the

possession of the Highway Patrol from sources other than previous registrations of these persons who no longer must register.

The basis for the circuit court's order prohibiting dissemination of information and photographs of sex offenders convicted before 1995 is that such use "constitutes the continuation of an aspect of the plaintiffs' registration that was held unconstitutional." LF 266, 272. The court's injunction, however, prohibits dissemination of *any* photographs and identifying information of sex offenders whose convictions predate January 1, 1995. LF 266-67, 272-73 This order bars the Highway Patrol from disseminating such information that it has access to even through sources that are unrelated to the sex offender registration process (such sources could include court records, criminal investigation files, and the memories of persons with knowledge of the sex offenses). That goes beyond not just the constitutional problem found by the Supreme Court in its *Doe* decision – SORA's imposition of a new duty to register based on pre-SORA conduct (194 S.W.3d at 852) – but also beyond the concern the circuit court expressed in its orders entering the injunction – continuation of an aspect of the registrations that had been held unconstitutional.

Therefore, the injunction entered in this case, even if appropriate with regard to the specific information and photographs provided by persons who registered under SORA before it was determined that they could not be constitutionally required to register, is too broad. To the extent the injunction bars the publication of information and photographs of sex offenders (whatever the date of their convictions) that are openly

available to the Highway Patrol from other sources, it has no legal support under either *Doe* or the circuit court's own reasoning. As discussed in Point I, the Supreme Court in *Doe* expressly "reject[ed] the claim that publication of true information about the Does affects a past transaction to their substantial detriment by imposing a new obligation, adding a new duty or attaching a new disability in respect to transactions or considerations already past." 194 S.W.3d at 852. Because publication of true information about sex offenders adds no new obligation, duty, or disability based on the offenders' past conduct, such publication is not inconsistent with the Missouri Constitution's prohibition on laws that operate retrospectively. *Id.*

And even if, as the circuit court concluded, this Supreme Court ruling does not apply broadly enough to permit further publication of information and photographs obtained at the registrations of those persons who now, under *Doe*, are no longer required to register, it at least authorizes the publication of sex offense information available from other sources. Such material available from other sources does not derive from registrations that the *Doe* Court determined should not have been required. Thus, use of this material cannot amount to the continuation of any aspect of past registrations now determined to have been unconstitutional.

Because the publication of accurate information and photographs available to the Highway Patrol concerning sex offenders has been approved by the Supreme Court, at least with regard to such material openly available to the Patrol through sources other than SORA registrations of persons who should not have been required to register, the

injunction entered in this case constitutes an erroneous application of the law. Therefore, the judgment entering the injunction should be reversed at least to the extent it forbids dissemination of material available to the Patrol from these other sources.

III.

The trial court erred in not expressly limiting its judgment permanently enjoining defendant Keathley and his successors from disseminating photographs and identifying information of persons who were convicted or pled guilty to sex offenses prior to January 1, 1995, and who now no longer must register under Missouri's Sex Offender Registration Act (§§ 589.400 to 589.425, RSMo) due to the decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), to persons whose convictions occurred in Missouri because requiring registration of persons who must register under the Act due to their pre-1995 offenses in other states or under federal or military law is not inconsistent with Missouri's prohibition on laws that apply retrospectively (Mo. Const. art I, § 13) in that persons who have committed offenses in other jurisdictions that require registration in Missouri voluntarily accept Missouri's registration obligation by moving to Missouri and, additionally, in the case of persons who must register under the Act because they have been required to register by another jurisdiction, their registration obligation in Missouri is not a new duty or obligation but only the continuation of a pre-existing obligation.

Even if this Court affirms the injunction barring the Highway Patrol from disseminating information and photographs that were provided by persons who now are no longer required to register under *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), because their convictions or guilty pleas occurred before January 1, 1995, the injunction should still be reversed as overly inclusive for another reason: it could be interpreted as

forbidding dissemination of information and photographs of offenders required to register for their pre-1995 out-of-state offenses, even though the ban on retrospective Missouri legislation does not apply to them.

Background

In *Doe*, the Supreme Court considered registration under the Sex Offender Registration Act (SORA), §§ 589.400 to 589.425, RSMo, only as prescribed by § 589.400.1(1) and (2), which require registration for specified offenses committed in Missouri. But registration is also required of Missouri residents who have been convicted of, or pled guilty to, committing or attempting to commit an offense in another state or country or under federal or military law that, if committed in Missouri, would be a violation of Chapter 566, RSMo, or a felony violation of any offense set out in § 589.400.1(2). § 589.400.1(5). This subdivision further mandates registration by Missouri residents who have been required to register as sex offenders in another state or under federal or military law. *Id.* In its *Doe* decision the Supreme Court did not consider out-of-state, federal, and military offenders and its reasoning does not apply to these offenders. The *Doe* opinion does not even mention § 589.400.1(5).²

The only constitutional problem the Supreme Court noted in its *Doe* decision was that application of SORA's registration requirements to persons convicted before the

² Although the conviction of John Doe II from the *Doe* case was from Kansas, *see* 194 S.W.3d at 848, that fact did not factor into the arguments of the parties or the decision of the Court.

Act's effective date constituted an impermissible retrospective application of law. The Court concluded that mandating registration of persons whose offenses occurred before SORA became effective amounted to the imposition of a new duty upon these persons based solely on their pre-SORA offenses. 194 S.W.3d at 852.

The apparent purpose of the Missouri Constitution's prohibition on laws that operate retrospectively is to ensure that citizens have fair notice of the consequences of their actions at the time of those actions. *Cf. Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the *ex post facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"); *Miller v. Mitchell*, 25 S.W.3d 658, 663 (Mo.App. W.D. 2000) (identifying similar purpose of constitutional prohibition on *ex post facto* laws, which are specifically defined as retrospective). The Court's conclusion in *Doe* that this constitutional provision bars application of SORA's registration requirements with respect to offenders convicted or pleading guilty before the Act became effective is easily understood in light of this purpose. Such pre-SORA offenders would not have had fair notice at the time they were convicted or pled guilty that a consequence of that conviction or plea would, some day, be an obligation to appear at their local Sheriff's Office to provide specified information about themselves, to update this information whenever it changed, and to confirm the information two to four times a year.

Analysis

A person moving into Missouri after SORA's effective date who has committed an

offense elsewhere that would be a registrable offense if it occurred here will be aware, regardless of the date of that out-of-state offense, that the effect of that offense is that registration will be required after the move to Missouri. By moving to Missouri, such offenders are voluntarily submitting themselves to the operation of SORA. Unlike the pre-1995 Missouri offenders considered by the Court in *Doe*, persons with pre-1995 out-of-state offenses who move to Missouri have fair notice of the consequences of the move and the ability to exercise an informed choice: they can move to Missouri and register, or they can avoid registration by not moving to Missouri. Though the duty to register is contingent on conduct occurring before the enactment of SORA, the duty actually arises from the post-SORA decision to move to Missouri and, thereby, become subject to Missouri law. Because there is fair notice of the registration requirement before out-of-state offenders move to Missouri, application of SORA to these out-of-state offenders is not an unconstitutional retrospective application of the law.

Neither is imposition of the duty to register upon persons moving to Missouri who have previously been required to register as sex offenders in other states, or under federal or military law, a new duty implicating the prohibition on laws that apply retrospectively. For these persons who have been required to register elsewhere, registration in Missouri is nothing more than the continuation of a previously existing obligation to register imposed by another jurisdiction. As a pre-existing obligation, the continued duty to register in Missouri is not inconsistent with the retrospective law bar.

Further, a large majority of the states do not have constitutional provisions

forbidding retrospective laws. 16B Am. Jur. 2d *Constitutional Law* § 695 (1998).³ Thus, it is permissible for most other states to require registration of sex offenders whose offenses occurred before the enactment of their sex offense registration laws.⁴ If sex offenders who have been required to register in other states because of offenses occurring before 1995 are able to move to Missouri without being required to register here, Missouri will become an attractive state for such offenders to relocate to. Missouri could well become a haven for sex offenders from other states. Persons who move away from states that have imposed registration requirements upon them should not be permitted to evade that requirement by moving here. Missouri's prohibition on retrospective laws does not prevent Missouri from blocking such evasion because application of SORA to persons with pre-1995 sex offenses from other states merely continues an already existing obligation.

³This article identifies eight states with constitutional prohibitions on retrospective or retroactive laws. 16B Am. Jur. 2d *Constitutional Law* § 695 n.27 (1998).

⁴ Even in Ohio, a state that does have a constitutional prohibition on retroactive laws, the state Supreme Court has determined that this prohibition does not bar application of Ohio's sex offender registration law to conduct occurring before the effective date of that law. *State v. Cook*, 700 N.E.2d 570, 576-79 (Ohio 1998), *cert. denied*, 119 S. Ct. 1122 (1999).

Because requiring sex offender registration of Missouri residents with pre-1995 sex offenses from other jurisdictions and of Missouri residents who have been required to register by the law of another jurisdiction does not impose any new obligation or duty based on past conduct, the circuit court should have expressly exempted such persons from the coverage of its injunction. To the extent the injunction can be interpreted to apply to these pre-1995 offenders from other jurisdictions, it is overbroad and constitutes an erroneous application of the law. Therefore the judgment entering the injunction should be reversed to this extent at least.

IV.

The trial court erred in not more specifically defining what classes of information the injunction applies to because the order to stop publicly disseminating photographs and identifying information of persons registered under Missouri’s Sex Offender Registration Act (§§ 589.400 to 589.425, RSMo) whose convictions occurred before January 1, 1995, is ambiguous in that it does not state that “all” information obtained from these offenders is subject to the injunction.

Defendant seeks clarification of the injunction so that it defines more specifically what classes of information the injunction applies to. “An injunction must clearly and specifically describe the acts and things enjoined so as not to be subject to misunderstanding and confusion by those against whom it is directed.” *City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 115 (Mo.App. E.D. 2000). The injunction permanently enjoins defendant Keathley and his successors at the Missouri State Highway Patrol “from publishing the photographs of plaintiffs on websites on the Internet or otherwise disseminating such photographs to the public of the plaintiffs, except Jane Doe III” and orders defendant Keathley to immediately “cease and desist from publishing photographs and identifying information of persons registered under SORA whose convictions predated January 1, 1995.” Court’s Order and Judgment of January 16, 2007 (LF 272-73).

Defendant interprets this to prohibit dissemination of photographs, home and work addresses, dates of birth, physical descriptions, vehicle descriptions, etc. But,

considering that the order does not state that “all” information obtained from pre-1995 offenders is subject to the injunction, defendant does not understand the injunction to require removal from the sex offender registry of all information regarding these offenders. Because defendant interprets the injunction as contemplating retention of at least some minimal amount of information, he has continued to include just the names of pre-1995 offenders and their offenses in the registry. This is consistent with the injunctive relief as requested by plaintiffs. The only remedy plaintiffs sought was to prohibit the publication of photographs of those convicted prior to January 1, 1995, that were obtained when they were registering. LF 253-60.

If this Court does not reverse the injunctive order in its entirety, defendant Keathley requests that the Court modify (or remand the case with instructions that the circuit court to modify) the injunction to explicitly reflect that names and offenses of pre-1995 offenders may remain on the sex offender registry.

CONCLUSION

For the foregoing reasons, defendant-appellant Keathley urges this Court to reverse the judgment of the Jackson County Circuit Court entered in favor of the plaintiffs-respondents, to vacate the injunction, and to remand this case with instructions to deny any relief other than a declaration that the plaintiffs-respondents who were convicted or pled guilty to offenses that require registration under Missouri's Sex Offender Registration Act, but did so before January 1, 1995, may not be constitutionally required to register under Missouri's Sex Offender Registration Act because of those offenses.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL PRITCHETT
Assistant Attorney General
Missouri Bar No. 33848

P.O. Box 899
Jefferson City, Missouri 65102
Telephone No. (573) 751-3321
Fax No. (573) 751-9456

ATTORNEYS FOR DEFENDANT
KEATHLEY

CERTIFICATE OF SERVICE

AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)

I hereby certify that one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, the 29th day of June, 2007, to:

Arthur A. Benson II
Jamie Kathryn Lansford
Arthur Benson & Associates
4006 Central Avenue
P.O. Box 119007
Kansas City, MO 64171-9007

Lisa N. Gentleman
Jackson County Counselor's Office
415 East 12th Street, 2d Floor
Kansas City, MO 64106

I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 7,955 words, excluding the cover, the certificates, the signature block, and the appendix.

I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses, and is virus-free.

Assistant Attorney General

APPENDIX

Judgment of the Circuit Court	A-1
Amended Judgment of the Circuit Court	A-4
Mo. Const. art I, § 13	A-7
§ 589.400, RSMo	A-8
§ 589.402, RSMo	A-11
§ 589.403, RSMo	A-13
§ 589.405, RSMo.....	A-14
§ 589.407, RSMo	A-15
§ 589.410, RSMo	A-17
§ 589.414, RSMo	A-18
§ 589.415, RSMo	A-20
§ 589.417, RSMo	A-21
§ 589.420, RSMo	A-22
§ 589.425, RSMo	A-23
§ 43.650, RSMo	A25