

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

JANE DOE I, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 03-CV-219085
)	
THOMAS PHILLIPS, et al.,)	Division No. 4
)	
Defendants.)	

**PLAINTIFFS' POST-HEARING BRIEF
IN SUPPORT OF PETITION FOR DECLARATORY RELIEF**

INTRODUCTION

This case does not ask the question: May Missouri constitutionally enact an offenders registration law? It may. SORA provides important benefits to law enforcement and the public. It assists law enforcement in the investigation of crimes and it arms the public with knowledge that may be used to protect individuals and families. This case does not seek to eliminate the means by which to achieve those legitimate purposes of the Act. Instead, this case asks the question: Has Missouri enacted an offenders registration law that properly respects the boundaries set by the Missouri Constitution. It has not.

While Missouri law in many instances parallels federal law, Missouri has its own due process and equal protection clauses and Missouri courts may limn individual rights differently than federal courts. Missouri constitutional law respecting individual rights is not constrained by federal interpretation of federal constitutional provisions. There is no question that Missouri state courts are free to interpret the Missouri Constitution differently

than federal courts interpret the U.S. Constitution. As the Missouri Supreme Court has stated, “Provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions.” *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. 1996). *See also State v. Brown*, 708 S.W.2d 140, 147-48 and n.1 (Mo. 1986) (J. Welliver, concurring in part and dissenting in part) (noting a “reemergence of state constitutional law” and state courts’ recognition that “federal constitution only provides the minimum level of protection, leaving state courts free to interpret their own state constitutions to provide greater protection to individual liberty”).

The U.S. Supreme Court has long proclaimed the same. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (“Our reasoning . . . does not limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”); *Cooper v. California*, 386 U.S. 58, 62 (“Our holding, of course, does not affect the State’s power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so”). Indeed, given that the federal constitution is merely a floor below which state constitutions may not fall, the Missouri Supreme Court has construed provisions of the Missouri Constitution, including Missouri's due process clause, to be more protective than their federal counterparts.

The Missouri Supreme Court has held, for example, that Article I, Section 2, which proclaims that all individuals have “natural rights to life, liberty and the pursuit of happiness,” and Article I, Section 10, which prohibits the deprivation of life, liberty, and happiness without due process, require that Missouri afford more protection of paternal rights

than is recognized by the U.S. Supreme Court under the federal due process and equal protection clauses. *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. 1978) (“we are disinclined to so dilute these important rights . . . the Missouri Constitution, art. I, §§ 2 and 10, requires” a different standard for determining a father’s parental rights than that set forth by the U.S. Supreme Court). *See also Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. banc 1974), *cert. denied sub nom. Reynolds v. Paster*, 419 U.S. 1111 (1975) (Missouri’s establishment clause is more restrictive than the federal Establishment Clause).

The right to life, liberty and the pursuit of happiness is expressed not only in Missouri's due process clause, but also as a “natural right” of all persons in Article I, Section 2. That section also provides that “to give security to these [natural rights] is the principal office of government, and that when government does not confer this security, it fails in its chief design.” In contrast, the federal constitution does not include such an explicit statement of these rights. This presence of different and more explicit expression of rights in the Missouri Constitution gives rise to more protection of those rights in the Missouri Constitution than the federal constitution. *See, e.g., Right to Choose v. Byrne*, 91 N.J. 287, 299-310 (N.J. 1982) (state constitutional provision guaranteeing right to life, liberty and happiness affords more protection to the right to choose than is afforded by the United States Constitution).

Even if the relevant provisions of the Missouri Constitution were deemed practically identical with their federal counterparts, this Court would be free, as the abovementioned U.S. Supreme Court cases make clear, to interpret Missouri constitutional provisions more expansively, based on the historical origins, purpose, and development of those state

constitutional provisions. *See also, e.g., Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 14-15 (Tenn. 2000) (fact that state and federal constitutional provisions are “practically synonymous” does not necessarily mean that their scope is coextensive); *Craig v. Stafford Const., Inc.*, 827 A.2d 793, 799-800 (Conn.App. 2003) (Connecticut’s free speech jurisprudence under its state constitution is not constrained by federal jurisprudence under the First Amendment to U.S. Constitution); *State v. Miller*, 549 N.W.2d 235, 239 (Wisc. 1996) (although First Amendment and art. I, § 18, serve same underlying purposes and are based on same precepts, Wisconsin’s analysis of freedom of conscience as guaranteed by Wisconsin Constitution not constrained by boundaries of protection United States Supreme Court set for federal provision); *Klinger v. Kepano*, 635 P.2d 938, 945 (Hawai’i 1981) (Hawai’i Supreme Court not constrained in its interpretation of state constitution to adopt federal interpretations of similar provisions of the United States Constitution and has not hesitated to provide greater protections under state constitution than those afforded under analogous federal provisions); *Frase v. Barnhart*, 840 A.2d 114, 135-36 (Md. 2003) (Cathell, J., concurring)); *Town of Islip v. Caviglia*, 532 N.Y.S.2d 783, 790 (N.Y.A.D. 2 Dept. 1988).

SUBSTANTIVE DUE PROCESS

Substantive due process protects certain liberties that may not be restrained even if basic procedural steps are taken. There are some persons required by SORA to register who are not dangerous to others¹ and are not at risk to offend (“at risk”) in the future. Many of those persons can be identified.

¹STIPULATION, August 5, 2004, at ¶ 19.

Registration imposes some degree of burden upon those required to register. Registration causes some registrants to lose their employment.² Others find their ability to worship in church or associate with neighbors limited.³ Some are harassed. All endure some degree of humiliation and loss of privacy. For those at risk to re-offend or who are dangerous, the State has a legitimate interest in imposing those burdens. For those the State knows or can know present no risk to others, such burdens are not justified by any legitimate state interest.

While Missouri may draw lines among those who must register and those who need not, it may not draw such lines so arbitrarily as to deprive some of their fundamental liberty interests without a rational basis for the deprivation. Missouri has no interest in knowing that some persons are not dangerous or at risk, knows how to identify them, but fails to do so.

In further support of their substantive due process claim, Plaintiffs herein incorporate by reference as if fully set forth here the evidence and arguments advanced in support of their motion for preliminary injunction on substantive due process grounds. *See* SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at 1-9, 10-17.

EQUAL PROTECTION

Missouri's SORA imposes the same burdens of registration, without any severity distinction, upon sets of persons defined by opposing characteristics. STIPULATION, August 5, 2004, at ¶ 23. Its burdens fall alike on the dangerous and the not-dangerous; upon those at risk to re-offend and those at no risk to re-offend; upon those without any criminal history of

²STIPULATION, August 5, 2004, at ¶ 26b.

³STIPULATION, August 5, 2004, at ¶ 26h.

conviction for any offense (by virtue of statute) and those with multiple convictions.

Missouri's SORA also imposes the burdens of registration on some but not others with no rational basis for the difference. It requires registration for someone who is alleged to have bruised his son with a belt, but has no conviction for such an offense (John Doe VII⁴), yet does not require registration for someone who has committed armed robbery, *e.g.*, *State v. Wiggley*, 998 S.W.2d 107 (Mo.App. E.D. 1999), or someone guilty of assault in the first degree who has attempted to kill or knowingly caused serious physical injury to another person, *e.g.*, *State v. Johnson*, 770 S.W.2d 263 (Mo.App. W.D. 1989).

SORA even extends to some persons who did not plead guilty and never received a final judgment of guilt. STIPULATION, August 5, 2004, at ¶ 24. Among the more than 9,000⁵ persons required to register under SORA, but not among the eleven plaintiffs and intervenors, there are persons accused of a SORA-enumerated offense who pled not guilty and had a bench trial, were found guilty, and sentenced to a suspended imposition of sentence. *See, e.g.*, *D.J. v. Phillips, et al.*, Case No. 03-CV-224000, Sixteenth Circuit Court of Jackson County, Missouri (Div. 2). Since an SIS is not a final conviction, it is not appealable. These persons were thus prevented from obtaining a final judgment as to guilt or innocence but are still required by SORA to register and bear all the burdens of registration.

Missouri has no interest in creating artificial divisions that advance no articulable interests of the State among various classifications of persons and imposing the burdens of SORA registration upon some, but not other, classifications.

⁴STIPULATION, August 5, 2004, ¶ 26j.

⁵Tr. 8 (citing STOTTLEMYRE STIPULATION, November 24, 2003).

Plaintiffs incorporate the evidence and arguments submitted in support of their motion for preliminary injunction in support of their equal protection claim as if fully set forth herein. *See* SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at 1-9, 24-28.

EX POST FACTO LAW/RETROSPECTIVE APPLICATION/RIGHT TO JURY TRIAL

Many of the plaintiffs and intervenors⁶ 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. They kept their end of the bargain by completing probation. Missouri did not. Years after the fact, Missouri now uses the criminal history record of the guilty plea to impose the new and additional burdens of registration, burdens not contemplated by these plaintiffs at the time of the original bargain. Missouri seeks to undo the bargain by applying the SORA burdens retrospectively while denying Plaintiffs the right to undo the bargain and obtain the return of the consideration, a jury trial, foregone in the original bargain.

The burdens of SORA registration are real and for Missouri to impose them, years after the fact and without a trial, upon persons with no criminal history record of conviction violates the Missouri constitution.

Plaintiffs also refer the Court to the evidence and argument submitted in support of their motion for preliminary injunction and hereby incorporate same as if fully set forth here. *See* SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at 1-9, 17-24.

⁶Jane Doe I, Jane Doe II, Jane Doe III, John Doe VII, John Doe VIII all received a suspended imposition of sentence.

BILLS OF ATTAINDER

SORA also runs afoul of the Missouri constitution's prohibition on bills of attainder. SORA is a legislative act which applies to easily ascertainable members of a group in a way that inflicts punishment on them. It singles out a specifically designated person or group and inflicts punishment on that group. *State ex rel Bunker Resource Recycling & Reclamation, Inc.*, 782 S.W.2d 381, 386 (Mo. banc 1990). SORA singles out a group which is described in terms of past conduct – those convicted of or who have pled guilty to specified sex offenses. No person within this group can escape SORA's registration requirements by altering the course of his or her present activities, nor can bringing oneself into compliance with the law aid one in escaping its registration requirements in the future. STIPULATION, August 5, 2004, at ¶¶ 21, 25. And, the registration – a form of labeling or shaming – *is* punishment: (1) because SORA's registration requirement falls within the historical meaning of punishment; (2) because although SORA may assist in investigation of crimes and public self-protection, the non-punitive purposes are not served by the non-discriminating listing of all offenders regardless of tendency to recidivism, severity of offense, or current dangerousness; and, (3) because even though there is no legislative history which discloses punitive intent⁷, this element is not always necessary where the specificity and punishment elements are nonetheless satisfied. *Bunker Resource Recycling*, 782 S.W.2d at 388. Plaintiffs hereby incorporate the arguments and evidence submitted in support of their motion for preliminary injunction on the basis that SORA constitutes a prohibited bill of attainder as though fully set forth here. *See* SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at 29-

⁷Tr. at 7 (citing STOTTLEMYRE STIPULATION, November 24, 2003).

32.

SPECIAL LAW

SORA is an unconstitutional special law, violating Section 40(30) of the Missouri Constitution. SORA is a special law because it includes less than all who are similarly situated in that it excludes or omits many violent offenders who are at equal risk of re-offending or who present an equal danger to society to those included within the registration requirement. The defendants have not shown that the classification here is made on any reasonable basis. Violent offenders who present a high risk of re-offense or who present a danger to society are excluded from the registration requirement. Furthermore, the classification created by SARA is closed-ended because the status of those within the class required to register can never change – registration is lifelong. STIPULATION, August 5, 2004, at ¶¶ 21, 22. There is no rational relationship between a lifelong registration requirement that does not include in its ambit violent non-sex offenders who are dangerous and present a risk to society and the potentially legitimate legislative purposes of crime investigation and public self-protection. SORA also violates the special law prohibition because there are other general laws that could be used to serve legitimate purposes that SORA arguably serves. For these reasons, and for those reasons set forth in support of Plaintiffs’ motion for preliminary injunction⁸, hereby incorporated as if fully set forth, the Court should declare SORA an unconstitutional special law.

⁸See SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at 32-35

CONCLUSION

Missouri has legitimate interests in preventing crime and fostering public self-protection. But legitimate interests are not only a justification for legislation; more importantly, they define the boundaries of the impingement upon Missouri constitutional rights that may be suffered in furtherance of those interests. Missouri's SORA exceeds the boundaries that its legitimate interests prescribes, vitiating Missouri constitutional guarantees of due process and equal protection and violating constitutional prohibitions against *ex post facto* and retroactive laws, bills of attainder, and special laws. It is the particular province of Missouri courts to determine whether SORA meets Missouri constitutional requirements. For the reasons above and for those reasons set forth in Plaintiffs' Suggestions in Support of Motion for Preliminary Injunction, this Court should declare SORA unconstitutional.

Respectfully submitted,

ARTHUR BENSON & ASSOCIATES

By _____
Arthur A. Benson II Mo. Bar #21107
Jamie Kathryn Lansford Mo. Bar #31133
4006 Central Avenue (Courier Zip: 64111)
P.O. Box 119007
Kansas City, Missouri 64171-9007
(816) 531-6565
(816) 531-6688 (telefacsimile)
abenson@bensonlaw.com
jlansford@bensonlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via First Class U.S. Mail, postage prepaid, this _____ day of August, 2004, on counsel listed below:

Ms. Lisa Gentleman
Deputy Jackson County Counselor
2nd Floor, Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106
(816) 881-3355
(816) 881-3398 (telefacsimile)
kkedigh@jacksongov.org

Mr. Michael Pritchett
Assistant Attorney General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
(573) 751-9456 (telefacsimile)
mike.pritchett@mail.ago.state.mo.us

Attorney for Plaintiffs