

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.)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action, the Doe Plaintiffs challenge MO. REV. STAT. §§ 589.44 *et seq.*, Missouri’s Sexual Offender Registration Act (“SORA”) on state constitutional grounds and seek to enjoin Defendants from enforcing SORA. Plaintiffs moved, pursuant to Rule 52.08 of the Missouri Rules of Civil Procedure, to prosecute the above-captioned proceeding as a class action. Plaintiffs Jane Doe I and II and John Doe I-VI also seek an order naming them as class representatives of the proposed plaintiff class (hereinafter, the “Doe Class” or “Plaintiff Class”), denominating Defendant Michael Sanders as class representative of a proposed defendant class of Missouri County Prosecutors (“MCP Class”), and naming Thomas Phillips as class representative of a proposed defendant class of Missouri County Sheriffs (“MCS Class”). Additionally, Plaintiffs have moved for a preliminary injunction prohibiting enforcement of SORA.

On November 24, 2003, the Court received evidence and heard argument on Plaintiffs’ motions for class certification and a preliminary injunction. After weighing the

evidence and consideration of the arguments, the Court now sustains both motions based on the following findings of fact and conclusions of law.

SORA and the Parties

Missouri first enacted SORA in 1994. As amended in 2002, SORA requires that specified sex offenders register “within ten days of conviction, release from incarceration, or placement upon probation” with the chief law enforcement official of the county in which that person resides. § 589.400.2. Failure to comply with all the requirements of §§ 589.400 to 589.425 is a class A misdemeanor and a second or subsequent violation is a class D felony. § 589.425. SORA contains no express indication of legislative purpose or intention or objective within its text. It is codified in Title 38, Crimes and Punishment, of the Missouri Revised Statutes, Chapter 589, Crime Prevention and Control Programs and Services.¹ As of November 21, 2003, there were 9,212 persons registered under SORA in Missouri. Tr. at 8 (citing Parties’ Stipulation).

SORA applies to those individuals who, since July 1, 1979:

(1) have been or are thereafter convicted of, been found guilty of, or pled guilty to committing, or attempting to commit, a felony offense of Chapter 566 or any offense of Chapter 566 in which the victim is a minor²;

(2) have been or are thereafter convicted of, been found guilty of, or pled guilty to committing, or attempting to commit one or more of the following offenses: kidnaping, pursuant to MO. REV. STAT. § 565.110; felonious restraint; promoting prostitution in the first, second, or third degree; incest; abuse of a child, pursuant to MO. REV. STAT. § 568.060; use of a child in a sexual performance; promoting sexual

¹Chapter 589, Crime Prevention and Control Programs and Services, also contains provisions concerning Sexual Assault Prevention, Motor Vehicle Theft, Missouri Crime Prevention Information Center, and the Interstate Compact for Adult Offender Supervision.

²Minor is defined as a person under the age of eighteen years. § 589.400.1(2).

performance by a child; and committed or attempted to commit the offense against a victim who is a minor;

(3) have been committed to the department of mental health as a criminal sexual psychopath;

(4) have been found not guilty as a result of mental disease or defect of any offense listed in § 589.400.1(1) or (2);

(5) have been convicted of, been found guilty of, or pled guilty to or *nolo contendere* in any other state or under federal jurisdiction to committing, or attempting to commit, an offense which, if committed in Missouri, would be a violation of Chapter 566 or a felony violation of the offenses listed in § 589.400.1(2) or who has been or is required to register in another state or under federal or military law; and,

(6) has been or is required to register in another state or under federal or military law and who works or attends school or training on a full or part-time (more than fourteen days in a twelve-month period) basis in Missouri.

§ 589.400.1(1)-(6).

Registrants must complete a form which includes, but is not limited to a statement, signed by the registrant, giving his or her name, address, Social Security number, phone number, place of employment, enrollment within any institution of higher education, the crime requiring registration, whether the registrant was sentenced as a persistent or predatory offender pursuant to MO. REV. STAT. § 558.018, the date, place, and a brief description of the crime, the date and place of conviction or plea regarding the crime, the age and gender of the victim at the time of the offense, whether the registrant successfully completed the Missouri sexual offender program, and the fingerprints and photograph of the registrant. § 589.407; Exhibits 1, 2. While much of the information collected is available only to courts, prosecutors, and law enforcement agencies, any person may request a list of the names, addresses, and crimes for which offenders are registered from a county's chief law

enforcement official. § 589.417.

After initial registration, all registrants are required to *annually* report *in person* in the month of their birth to the county law enforcement agency to verify the information given in their § 589.407 statement. § 589.414.6. If working or attending school or training out of state, Missouri registrants are required to report to the chief law enforcement officer in the area of the state where they work or attend school or training and register in that state. § 589.414.7. If an offender is registered as a predatory or persistent sexual offender, if the victim was less than eighteen years of age at the time of the offense, or if the offender is found guilty of failing to register or submitting false information when registering, he or she must report *in person* to the county law enforcement agency *every ninety days* to verify the information given in their § 589.407 statement. § 589.414.5(1)-(3).

Additional reporting requirements can be triggered by various changes of circumstance. If a registrant changes residence or address within the county, *within ten days*, he or she must inform the county's chief law enforcement officer *in writing* of the new address, and if the phone number is changed, the new phone number. § 589.414.1; Exhibit 3. If a registrant changes residence or address to a different county, *within ten days*, he or she must appear *in person* and inform both the chief law enforcement official with whom the registrant last registered *and* the chief law enforcement official of the county of the new address or residence and, if the phone number is changed, the new phone number. § 589.414.2. If the registrant becomes the resident of another state, he or she shall appear *in person within ten days* and inform both the chief law enforcement official with whom he or she was last registered and the chief law enforcement official of the area in the new state of

residence or address of the new address. *Id.* Chief law enforcement officials of the previous county of residence are to inform the Missouri State Highway Patrol of intrastate changes of residence; interstate residence changes of registrants are to be reported by the Missouri State Highway Patrol to responsible officials in the new state. *Id.* Any registrant who changes “his or her enrollment or employment status with any institution of higher education within this state by either beginning or ending such enrollment or employment” shall report that change to “the chief law enforcement officer” *within seven days*, but the statute does not specify whether such report is to be made in writing or in person. § 589.414.3. Similarly, although there is no specification as to whether the report is to be made in writing or in person, any registrant who changes his or her name shall report that change to “the chief law enforcement officer” *within seven days* after the change is made. § 589.414.4.

Missouri’s SORA imposes lifetime registration requirements with all its provisions unless all offenses requiring registration are reversed, vacated or set aside or unless the registrant is pardoned of the offenses requiring registration. § 589.400.3.

Missouri imposes these burdensome requirements even though Missouri’s official who administers the registration data acknowledges that some unknown number of registrants will never re-offend. Defendant Stottlemire’s expert on sexual offenders, Ray Lacoursiere, M.D., testified at deposition that there are some offenders not likely ever to offend again and that there are evaluations which can be employed to determine who at least some of them are. Lacoursiere Discovery Deposition, September 5, 2002 at 21:22-22:15. Missouri’s SORA sweeps together in this burdensome registration process some unknown number of offenders highly *likely* to re-offend with another unknown number highly *unlikely* to re-offend, without

making any effort whatsoever to distinguish between the two. Furthermore, Missouri also sweeps into the registration list persons who committed or at least pled to charges that are not commonly recognized as sex offenses (*see* Tr. at 21:19-22 (Ms. S); at 36:11-12, 36:9-16 (Mr. B)) and they are not among “sex offenders” likely to re-offend. These non-sex offenders are required, nonetheless, to register and bear for life all the burdens of sex offender registrants.

All of the plaintiffs are convicted sex offenders, living in the State of Missouri, and required by SORA to register in their counties of residence; some must register every ninety days.

Defendant Thomas Phillips is the present Sheriff of Jackson County, Missouri and is its chief law enforcement officer. As is the case for all other chief law enforcement officers of all 115 Missouri counties, Phillips must register individuals subject to SORA’s requirements. § 589.400.2. Within three days of receipt of a registration form, he must forward it to the Missouri State Highway Patrol. § 589.410. He is to forward a copy of each registration form to local law enforcement authorities if so requested. § 589.400.2. He must receive written and in person changes in residence to registration information and shall inform the Missouri State Highway Patrol of those changes. § 589.414. He is to be informed of changes in enrollment or employment status and of registrants’ name changes. *Id.* He is to receive in person reports every ninety days of persons who are registered as predatory or persistent sexual offenders, of persons who committed a crime where the victim was less than eighteen years of age, and of persons who pled guilty or were found guilty of failing to register or submitting false information. *Id.* He must receive the annual, in person reports of registrants, verifying the information in their § 589.407 statements. *Id.* He is charged with

maintaining, for all offenders registered in Jackson County, a complete list of the names, addresses and crimes for which offenders are registered and provide it to any person who requests it. § 589.417.2.

Defendant Michael Sanders is the prosecutor for Jackson County, Missouri. He is charged by law with the responsibility of enforcing SORA in Jackson County. MO. REV. STAT. § 56.060 (except where such duties are performed by a county counselor, “[e]ach prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county”); § 56.450 (“The circuit attorney of the city of St. Louis shall manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction [and] shall appear for the state in all misdemeanor cases appealed from the circuit court of the city of St. Louis to the court of appeals.”).

Defendant Colonel Roger D. Stottlemire is the Superintendent of the Missouri State Highway Patrol (“MSHP”). The MSHP is a state agency created and operating under Chapter 43 of the Missouri Revised Statutes. § 43.020. The MSHP Superintendent has command of the patrol and is to perform all duties imposed on the superintendent. § 43.030. The MSHP Superintendent is required to collect, compile and keep available for the use of peace officers of the state the information deemed necessary for the detection of crime and identification of criminals. § 43.120.4. Pursuant to SORA, the MSHP is to develop the offender registration form which offenders subject to SORA must complete and which the chief law enforcement

officers of Missouri counties must send to MSHP within three days of registration. § 589.407. SORA requires that upon receipt of a completed registration form, MSHP must enter the information into the Missouri Uniform Law Enforcement System (“MULES”) where it is available to members of the criminal justice system and other entities upon inquiry. § 589.410. Whenever a registrant changes residence, the MSHP is provided with that information, § 589.414.2, and, presumably, given the dictate of § 589.410, updates that registrant’s information in MULES. When a registrant moves from Missouri to a new state, the MSHP must inform the responsible official in the new state of residence of the registrant’s move. § 589.414.2.

Motion for Preliminary Injunction

Plaintiffs ask the Court to issue a preliminary injunction prohibiting Defendants from engaging in any enforcement or implementation of SORA including registration, dissemination of information under, or enforcement for alleged violations until further order. Thus, the Court looks to the familiar standard for issuance of a preliminary injunction. “When considering a motion for a preliminary injunction, a court should weigh ‘the movant’s probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction’s issuance would inflict on other interested parties, and the public interest.’” *State ex rel Director of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996) (citing *Pottgen v. Missouri State High Sch. Activities Assoc.*, 40 F.3d 926, 928 (8th Cir. 1994); *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). These factors, which courts are instructed to consider in deciding a motion for preliminary injunction, “have come to be known as the

Dataphase factors.” *United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1178-79 (8th Cir. 1998). Although “[n]o single factor in itself is dispositive,” and “each factor must be considered to determine whether the balance of equities weighs toward granting the injunction,” *id.* at 1179, the movant must make some showing of probability of success on the merits before a preliminary injunction will be issued. *Gabbert*, 925 S.W.2d at 839 (citations omitted). The Court first considers the paramount factor – Plaintiffs’ probability of success on the merits as to each count of the petition – then will consider the other three factors.

I. PROBABILITY OF SUCCESS ON THE MERITS

A. Count I: Substantive Due Process Under Article I, Section 10 of the Missouri Constitution

To warrant injunctive relief, Plaintiffs maintain that they have demonstrated probability of success on the merits as to their claim that SORA unconstitutionally infringes on a fundamental liberty right, has no express purpose and, even if it had served a compelling interest, is not narrowly tailored to do so and, thus, denies Plaintiffs of substantive due process. This Court agrees.

Under the Missouri Constitution, “no person shall be deprived of life, liberty, or property without due process of law.” MO. CONST. art. I, § 10. Missouri’s due process clause provides heightened protection against governmental interference with certain fundamental rights and interests. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. 2003) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995)). When, as here, the challenged government action is legislative, due process protects fundamental rights and liberties that are “deeply rooted in this

Nation's history and traditions," and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720-21. The asserted interests must be carefully described. *Woodson*, 92 S.W.3d at 783 (citing *Glucksberg*, 521 U.S. at 721).

Substantive due process protects "fundamental" rights "implicit in the concept of ordered liberty." *Cavallaro*, 908 S.W.2d at 135 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (rights and liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental"). Fundamental rights are "created only by the constitution." *Id.*, (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring), and citing *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995)). The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Glucksberg*, 521 U.S. at 719 (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Substantive due process protects such rights against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Under substantive due process analysis, a law which impinges upon a "fundamental right" is subject to the "strict scrutiny" test, which requires that the law be narrowly tailored to serve some compelling state interest. *Deaton v. State*, 705 S.W.2d 70, 73 (Mo.App. E.D. 1985) (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

The Court concludes that SORA infringes upon Plaintiffs' fundamental and constitutional liberty right to exercise personal choice and freedom as guaranteed by the Missouri Constitution, Article I, Section 10. Plaintiffs have a fundamental liberty interest, deeply rooted in history and tradition, in being free from restriction upon their personal

freedom once their sentences have been served and/or they have successfully completed their probation or parole. *United States v. Solerno*, 481 U.S. 739, 746 (1987) (while the liberty interest to be free from detention is fundamental, it can be overcome by clear and convincing evidence of a compelling government interest, which interest is determined after a hearing consistent with the Due Process Clause); at 755 (“In our society, liberty is the norm . . .”); *see also State ex rel. Oliver v. Hunt*, 247 S.W.2d 969 (Mo. banc 1952) (recognizing that a person who is fully discharged from parole by the state is restored to all rights and privileges of citizenship); MO. REV. STAT. § 561.016³. SORA also infringes upon Plaintiffs’

³Section 561.016 states in pertinent part:

1. No person shall suffer any *legal* disqualification or disability because of a finding of guilt or conviction of a crime or the sentence on his conviction, unless the disqualification or disability involves the deprivation of a right or privilege, which is

- (1) Necessarily incident to execution of the sentence of the court; or
- (2) Provided by the constitution or the code; or
- (3) Provided by a statute other than the code, when the conviction is of a crime defined by statute; or
- (4) Provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived. (emphasis added)

§ 561.016.1.

Not all disqualifications or disabilities that historically have resulted from conviction of a criminal felony statute are encompassed by section 561.016. The legislature has not expressed intent within the statute to make a protected class of convicted felons who have concluded the penalty for their miscreant activity. Significant in understanding the purpose of the statute is the included phrase “legal disqualification or disability.” The adjective “legal” qualifies the subject of the statute. The legislature intended that only “legal” disqualifications and disabilities be the subject of the statute. The statute expresses the intent of the General Assembly to remove much of the legal stigma resulting from conviction for a felony. Previously, many resulting legal disabilities had no rational relationship to the nature of the conviction. . . . Legal disqualifications or disabilities are those disqualifications and disabilities imposed by law that restrict the legal ability of a convicted person to

fundamental and constitutional right to privacy and freedom from unwanted publicity and their right to travel.

The Court finds that SORA adversely infringes upon Plaintiffs' fundamental liberty interest and imposes significant affirmative obligations and a severe stigma because SORA covers all sex offenders from the time of initial registration until death without relation to whether or not they are likely to repeat their offense, the gravity of their offense, or the current

participate in civil activities and to enjoy certain rights ascribed to citizenship. To reduce the several legal disqualifications and disabilities historically imposed on convicted felons and to articulate the identification of those not otherwise articulated and imposed by statute, the General Assembly has provided that convicted felons will not suffer from "legal disqualification or disability" as a result of their convictions, except as provided by state constitution, code, or statute. *Presley v. United States*, 851 F.2d 1052, 1053 (8th Cir. 1988); § 561.016. The legislature's grant of social reinstatement of convicted felons is not comprehensive, however. The General Assembly has continued to disqualify convicted felons by statute from enjoying several activities attendant to citizenship within our culture. For example, convicted felons are prohibited from holding public office, § 561.021.1, RSMo 2000, and from voting, § 561.026(1), RSMo 2000, while serving their sentence for the conviction. Upon conclusion of the imposed sentence, these rights are restored. §§ 561.021.2 and 561.026(1), RSMo 2000. The right to serve on a jury is not regained, however, § 561.026(3), RSMo 2000, and neither is the ability to hold office as a sheriff, § 57.010.1, RSMo 2000, nor is the legal ability to be employed as a highway patrol officer, § 43.060.1, RSMo 2000.

The prohibition from imposing legal disqualification or disability as articulated by section 561.016 is limited by the provisions of subparagraphs (1) through (4). These subparagraphs provide that a state constitution provision, code, or statute specifically disqualifying or restricting a convicted felon's participation in civil life is excluded from section 561.016.1. The result of the remaining legal disqualifications and disabilities not eliminated by section 561.016 and other statutes means that the convicted felon is not returned to full enjoyment of citizenship. . . .

The General Assembly, therefore, did not intend that section 561.016 eliminate all disqualifications or disabilities resulting from felony conviction. The legislature considered only legal disqualifications and disabilities in section 561.016. *Chandler v. Allen*, 108 S.W.3d 756, 761-62 (Mo.App. W.D. 2003). However, this does not mean that statutory provisions specifically disqualifying or restricting a convicted felon's participation in civil life are immune from attack as being violative of substantive due process.

danger, if any, that they pose to society. § 589.400.3. As observed, *supra* at 3-4, an offender who is subject to SORA's provisions must provide a statement in writing providing extensive personal information to law enforcement authorities. § 589.407. He or she must appear in person annually in the month of his or her birth to verify the information given in the registration statement required by § 589.407. § 589.414.6. If registered as a predatory or persistent sexual offender, if the victim was less than eighteen at the time of the offense, or if the offender is found guilty of failing to register or submitting false information when registering, the offender must report in person to the county law enforcement agency every ninety days to verify the information in their § 589.407 statement. § 589.414.5(1)-(3). Furthermore, changes of circumstance trigger additional duties under SORA. If a person subject to SORA's registration provisions changes residence or address and phone number within a county, he or she must inform the county's chief law enforcement officer of those changes within ten days. § 589.414.1. If he or she moves to another county or state, he or she must appear in person within ten days to notify both the chief law enforcement officer of the past county of residence and the chief law enforcement officer of the new county of residence of the change in address, and if applicable, change in phone number. § 589.414.2. A change in enrollment or employment status with any institution of higher education must be reported to the chief law enforcement officer within seven days. § 589.414.3. A change of name must also be reported to the chief law enforcement officer within seven days. § 589.414.4. The Court finds that these are significant impositions on Plaintiffs' liberty.

The Court also concludes that SORA also imposes a severe stigma – for life – on those to whom it applies. Although the general public may only request a complete list of the

names, addresses, and crimes for which the offenders are registered – information, which, admittedly, is already public – in some counties, information is made even more readily available. Even without wide dissemination of all the registration information or Internet dissemination of only the publicly available information, the stigmatizing effect is severe and undeniable. The Court finds that the registration and reporting obligations imposed by SORA on sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole. *Smith v. Doe*, ___ U.S. ___, ___, 123 S.Ct. 1140, 1157 (2003) (Stevens, J., dissenting in No. 01-729 and concurring in the judgment in No. 01-1231, *Connecticut Dept. of Public Safety v. Doe*, ___ U.S. ___, 123 S.Ct. 1160 (2003)); *id.* at 1159 (Ginsburg, J., dissenting). They evoke the “shaming punishments that were used earlier in our history to disable offenders from living normally in the community”, *Smith*, ___ U.S. at ___, 123 S.Ct. at 1156 (Souter, J., concurring in the judgment), and “to mark an offender as someone to be shunned.” *Id.* at 1159 (Ginsburg, J., dissenting). They expose registrants “to profound humiliation and community-wide ostracism.” *Id.*; *see also id.* at 1156 (Souter, J., concurring in the judgment). Even though the information is already public, SORA goes farther, sending “a message that probably would not otherwise be heard, by selecting some conviction information . . . and broadcasting it . . . Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.” *Id.* at 1156 (Souter, J., concurring in the judgment).

Defendant Stottlemire claims compelling state interests in assisting in the investigation of future crimes and to provide information to members of the public to facilitate them in

protecting themselves and their children. Tr. at 8 (citing Parties' Stipulation).⁴ However, even if these are compelling interests, the Court also concludes that SORA is not narrowly tailored to serve the claimed state interest because it covers *all* offenders from the time of their release until their death regardless of whether or not they are likely to repeat their offense, the gravity of their offense, or the danger they currently present to society. This is so even though the State knows that not all offenders are likely to re-offend and it knows that there are evaluations which can be performed to distinguish those sex offenders who are likely to re-offend from those who are not. Lacoursiere Discovery Deposition, September 5, 2002, at 21:22-22:15. Thus, the system is hardly narrowly tailored to achieve even legitimate state interests and denies due process to those registrants who could prove they were not going to re-offend with evidence sufficient to satisfy even the State's own expert.⁵ The registration requirement constitutes a severe deprivation of liberty, it is imposed in a totally arbitrary fashion on anyone who is convicted or who pleads guilty to a specified offense, and it is imposed only on those criminals and no others. Defendants have not convinced this Court that SORA is narrowly tailored to serve a compelling state interest. Therefore, the Court concludes that SORA lacks any legitimate rationality.

In sum, the Court finds that SORA adversely infringes upon Plaintiffs' fundamental

⁴County defendants Sanders and Phillips claim only an interest in enforcing the laws of the State of Missouri. Tr. at 6 (citing Parties' Stipulation). This is not a substantial interest in that they have no legitimate interest in enforcing an unconstitutional law of the State of Missouri. Their purported interest merely begs the questions Plaintiffs raise in their challenge to SORA.

⁵At a minimum, to satisfy due process, the statute needs to have levels of registration classification and a judicial safety-valve such as the Connecticut statute employs.

liberty interest in freedom from restriction after serving the sentence prescribed for their offense and/or release from probation or parole and that SORA imposes significant affirmative obligations. SORA also imposes severe stigma on persons to whom it applies. Despite the fact that constitutional fundamental liberty interests are being abridged by SORA, no compelling state interest is cited to justify the deprivation and SORA is not narrowly tailored to serve a compelling state interest. Accordingly, the Court concludes that Plaintiffs have shown a probability of success on the merits of their claim that SORA violates substantive due process and must be declared unconstitutional and, therefore, that preliminary injunctive relief prohibiting further registration of offenders and dissemination of the specified information is warranted.

B. Count II: Ex Post Facto Law/Retrospective Application of Statutes Under Article I, Section 13 of the Missouri Constitution

Missouri's Constitution forbids both *ex post facto* laws and forbids laws which are applied retrospectively. *Fults v. Missouri Board of Probation and Parole*, 857 S.W.2d 388, 390 (Mo.App. W.D. 1993). Article I, Section 13 provides “[t]hat no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.” MO. CONST. art. I, § 13. While the “*ex post facto* clause is aimed at laws that are retroactive and that either alter the definition of crimes or increase the punishment for criminal acts already committed,” *Cavallaro*, 908 S.W.2d at 136 (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, (1995); *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)), unconstitutional retrospective laws are generally civil in nature. *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289

(Mo.App. W.D. 1989). The Court concludes that SORA, whether considered to be criminal or civil, violates the Missouri Constitution's prohibition on *ex post facto* and retrospective laws.

1. If criminal, SORA is an unconstitutional *ex post facto* law

The Court concludes that SORA is an *ex post facto* law in violation of Missouri's constitution because it is retroactive in that it alters the consequences attached to a crime for which Plaintiffs have already been sentenced. Indeed, by its express terms, it applies to persons whose convictions or guilty pleas, commitments or findings of mental disease or defect date back to July 1, 1979. But to prevail, Plaintiffs must also demonstrate that SORA either alters the definition of crimes or increases the punishment for criminal acts already committed. *Cavallaro*, 908 S.W.2d at 136. SORA does not alter the definition of crimes, but it increases the punishment for criminal acts already committed. "Two elements are necessary for a law to be *ex post facto*: it must be retrospective and it must disadvantage the affected offender." *Cooper v. Missouri Board of Probation and Parole*, 866 S.W.2d 135, 138 (Mo. banc 1993) (citing *Miller v. Florida*, 482 U.S. 423, 430 (1987)); *Fults*, 857 S.W.2d at 390. "The *ex post facto* provision prohibits any law that . . . imposes an additional punishment to that in effect at the time the act was committed." *Cooper*, 866 S.W.2d at 137-38.

"The crucial question thus becomes, [are Plaintiffs] disadvantaged by the application of the law to [them]?" *State v. Lawhorn*, 762 S.W.2d 820, 824 (Mo. 1988). Here, not only has the Missouri Supreme Court recognized that registration is punitive⁶, but the disadvantage

⁶*State v. Larson*, 79 S.W.3d 891, 894 (Mo. banc 2002).

is obvious because SORA is punitive in effect. Absent SORA, none of the Plaintiffs would have been subjected to the initial registration requirements, nor would they have had to report in person annually or every ninety days to verify the registration information for the rest of their lives. Absent SORA, none of the Plaintiffs would have had to comply with the reporting requirements resulting from a change in address, enrollment or employment status with any institution of higher education, or name. Nor, absent SORA, would any of the Plaintiffs have suffered the public dissemination of their names, addresses, and crimes in the fashion facilitated by SORA.

The hearing testimony supports the conclusion that SORA is stigmatizing and disadvantages individuals subject to its requirements. Ms. S, who, while living in Texas, was given a suspended imposition of sentence and probation for the offense of permitting injury to a child when a spanking her ex-husband administered to her four-year-old daughter resulted in three bruises, testified about the effect of registration on her attempts to gain employment closer to home. She testified that the application of a potential employer asked her to state whether she was required to register under any law. When she asked whether an affirmative response would affect her chances, she was told that “unfortunately, yes, it would.” Tr. at 16:20-17:3; 20:5-20. She did not get the job. *Id.* at 20:12-13. The offense of permitting injury to a child was not even considered a sex offense under Texas law. *Id.* at 21:19-22:6.

Mr. S testified that he was charged with sodomy and inappropriate touching as the result of the 1993 allegation of his then eight-year-old stepdaughter’s babysitter that he had touched the girl’s genitals, with no penetration, while in the process of touching the girl’s buttocks. Tr. at 24:4-25:16. The babysitter was being investigated for engaging in a

hairdressing business when she was supposed to be providing day care and the babysitter attributed the investigation to Mr. S's wife. The next thing Mr. S knew, he was charged. Tr. at 25:17-26:4; 33:12-34:3. Although he initially pleaded not guilty, to save the estimated \$35,000 attorney fee that would be required for a trial and to save his stepdaughter from having to undergo a difficult cross-examination by his own attorney, Mr. S changed his plea to guilty with the understanding that he would be given a suspended imposition of sentence. His decision was influenced by the explanation of his own counsel and the prosecutor that if he successfully completed the three year probationary period, "there would be no record of [it] ever happening" Tr. at 26:5-28:2. After living with her grandparents for two years, the stepdaughter returned to Mr. S's home through a reunification process, with the approval of his sentencing judge, where she has remained. Tr. at 28:9-29:4. Mr. S now is general manager of an \$8 million manufacturing concern with 83 employees. He believes that people who do not know him well, but learn of his being subject to SORA's registration requirement, without knowing the details of the alleged offense, may lump him into a class of people who are dangerous and fears that his job would be in jeopardy should any major customers of his employer learn that he is subject to SORA's reporting requirement. Tr. at 29:25-31:16. Mr. S also testified that in the neighborhood where he was living when he first had to register, someone in the neighborhood obtained a copy of the list and saw his name. He was confronted by the neighbors and had to explain why he was on the list. He testified that it took "a period of years" for the neighbors to settle down a bit, but that he no longer lives in that neighborhood. Tr. at 32:11-18. The above demonstrates that, as the Court has already held, the stigmatizing effect is substantial, real and, further, disadvantages individuals subject

to SORA's requirements.

2. If civil, SORA is an unconstitutional retrospective law

Alternatively, even if SORA is ultimately determined to be a civil rather than a criminal law, the Court finds that it is unconstitutional because it is retrospective in application. Under Missouri law, an unconstitutional retrospective law is one that imposes a new obligation, duty, or disability with respect to a past transaction or that takes away or impairs a vested or substantial right. *Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 856 (Mo. banc 1998); *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338 (Mo. banc 1993). A retrospective law relates back to a previous transaction and gives it a different effect from that which it had under the law when it occurred and changes the legal effect of those transactions. *Gonzalez v. Labor and Industrial Relations Comm'n*, 661 S.W.2d 54 (Mo.App. W.D. 1983). Unconstitutional retrospective laws are generally civil in nature. *Webster*, 779 S.W.2d at 28. For the following reasons, the Court concludes that the Missouri constitutional prohibition against retrospective laws is applicable to this case.

First, the Court finds that SORA imposes a new obligation with respect to a past transaction. The statute creates a new obligation to register if an offender has previously been convicted of an enumerated sex offense. The registration requirement relates to a past transaction in that the statute applies to “any person who, since July 1, 1979, has been or is hereafter convicted of, been found guilty of, or pled guilty to,” an enumerated sex offense, or who, “since July 1, 1979, has been committed as a criminal sexual psychopath, or who, “since July 1, 1979, has been found not guilty as a result of mental disease or defect” of any of the

enumerated offenses. § 589.400.1 (1)-(5). All of the named plaintiffs were convicted of or pled guilty to an enumerated sex offense prior to the enactment of SORA in 1994. For three of the named plaintiffs, the acts underlying the offenses, their convictions, service of the sentence or probation, and discharges from parole or probation all occurred prior to the enactment of the Missouri sex offender registration statute. These convictions constitute past transactions for purposes of the retrospective analysis.

The Court finds that Plaintiffs' original transgressions trigger the obligation to register under and comply with SORA. These obligations are significant and substantial. Plaintiffs' transgressions occurred before the enactment of SORA. Therefore, the enforcement of the registration requirement on them and others whose convictions, pleas, or other qualifying events predate SORA's enactment is retrospective and is violative of the Missouri Constitution.

Second, the Court concludes that SORA takes away or impairs a vested or substantial right. As explained, *supra*, Missouri law restores most of the rights and privileges of citizenship to those who have completed their sentences or have been discharged from probation or parole. Thus, upon their discharges, Plaintiffs were again cloaked with the substantial rights guaranteed to all citizens by both the United States and Missouri Constitutions including the liberty interest discussed, *supra*, their right to privacy and to be free from unwarranted publicity, *Beiderman's of Springfield, Inc., v. Wright*, 322 S.W.2d 892 (Mo. 1959), and the right to travel, *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969). The Court concludes that, as applied to Plaintiffs, SORA impairs these substantial rights. In addition to depriving Plaintiffs of the liberty interest discussed earlier, the Court finds that

SORA affirmatively requires Plaintiffs to disclose their convictions to the public and suffer the dissemination of that information in a manner which impairs the right to privacy and to be free from unwarranted publicity. Similarly, the Court concludes that the requirement that Plaintiffs register and update his or her registration every 90 days for the remainder of their lives significantly impairs their right to travel. Plaintiffs have more than a mere expectation that their rights to liberty, privacy and travel will not be invaded by the state as long as they continue to remain law-abiding citizens. The Court concludes that enforcement of the registration requirement as to Plaintiffs is retrospective because it impairs substantial rights and therefore, violates Article I, section 13 of the Missouri Constitution.

A law may not impair a vested or substantial right. *Corvera Abatement Technologies*, 973 S.W.2d at 856. Application of SORA to Plaintiffs who have been released from parole or probation also impairs a vested right. A vested right has been defined as “a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.” *Fisher v. Reorganized School District No. R-V of Grundy County*, 567 S.W.2d 647 (Mo. banc 1978); *Doe*, 862 S.W.2d at 338. A vested right must be more than a mere expectation of the anticipated continuance of the existing law. *Id.* Moreover, the word “vested” means fixed, accrued, settled or absolute. *Robbins v. Robbins*, 463 S.W.2d 876, 879 (Mo. 1971). As a general proposition, after offenders complete their sentences, they are released from further obligation by the Board of Probation and Parole. These releases are unconditional and absolute. Many offenders and some of the plaintiffs to whom SORA applies have already fulfilled their duties to the State. Furthermore, MO. REV. STAT. § 217.730 authorizes the Board of Probation and

Parole to issue a final order of discharge to an offender when he or she has performed the obligations set forth by the state upon the Board's finding that such final release is compatible with the best interests of society. Accordingly, the Court finds that Plaintiffs have a vested right to insist that the State abide by the previously issued discharges.

However, in applying SORA to Plaintiffs and other offenders who were granted a discharge from further obligation to the State, the State essentially revokes the discharge by imposing a new and continuing registration requirement upon them. By virtue of the discharge given to these individuals, the State has already released them from any further obligations with respect to the aforementioned criminal judgment. "The grant of discharge from parole is a gift that, once accepted, cannot be recalled." *In re Eddinger*, 211 N.W. 54 (Mich. 1969). The Court finds that imposition of SORA on Plaintiffs and other who were granted a discharge by the Missouri Board of Probation and Parole renders that discharge meaningless.

Therefore, the Court concludes that SORA is an impermissible retrospective law as to Plaintiffs who were granted a discharge from further obligation to the State since the conduct triggering the new registration requirement is based on criminal convictions that occurred before the enactment of the registration requirement. As to these Plaintiffs, the statute is impermissibly retrospective and violates Article I, section 13 of the Missouri Constitution. Cumulatively, these factors weigh heavily in favor of a finding that the law impairs a vested or substantive right and, hence, the conclusion that SORA violates the retrospective clause of the Missouri Constitution.

C. Count IV: Equal Protection Under Article I, Section 2 of the Missouri

Constitution

Plaintiffs claim that SORA violates the Missouri Constitution's guarantee of equal protection weighs in favor of issuing a preliminary injunction. Missouri's Constitution specifies:

[t]hat all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government . . .

Art. I § 2.

When presented with an equal protection claim, a court must determine whether the classification burdens a “suspect class” or impinges upon a “fundamental right”; in either event, strict judicial scrutiny is required. Either determination triggers strict judicial scrutiny of whether the statute is necessary to accomplish a compelling state interest. If no such right or category is present, then the statute will be upheld and a classification sustained if the classification is rationally related to a legitimate state interest. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991).

Here, Plaintiffs maintain that SORA impinges upon their fundamental rights. A fundamental right, under equal protection analysis, is a right “explicitly or implicitly guaranteed by the Constitution.” *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1996) (quoting *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33-34, (1972)). They include the rights to free speech, to vote, freedom of interstate travel, the right to personal privacy and other basic liberties. *Id.* See also *Blaske*, 821 S.W.2d at 829 (fundamental rights “include such things as . . . freedom of the press, freedom of religion, . . .

and the right to procreate). And, the Court has already held that Plaintiffs have established 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 as well as fundamental and constitutional rights to privacy and freedom from unwanted publicity and to travel.

The Court finds that SORA also impinges upon those fundamental rights in ways that offend the equal protection guarantee of the Missouri Constitution. Sex offenders are required to register under SORA with no regard for a given offender's propensity for recidivism or for the danger the offender presents to the public or society. This is so even though there are some offenders who are not likely to re-offend with another sexual offense and even though it is possible to determine which offenders are likely and which are not likely to re-offend after having once committed an offense. Lacoursiere Discovery Deposition, September 5, 2002, at 21:22-22:15. Thus, the State knows that it is requiring some offenders to register who are almost certainly not going to re-offend and it knows how to distinguish at least some of the not-likely-to-re-offend from the rest. Other persons convicted of violent crimes such as murdering an adult or battery upon an adult, no matter how they are found guilty of the offense, their recidivism, and no matter what current risk they may present to society are not treated similarly to sex offenders in that they are not required to register. All persons similarly situated – that is, those presenting an equal risk to society – are not treated similarly. Thus, the Court concludes that SORA is impermissibly biased against one subclass of offenders.

SORA also requires that dissimilar groups be treated similarly. This is so because

individuals are required to register regardless of whether they were found guilty by a jury or pled guilty. SORA also requires registration of persons given suspended imposition of sentence⁷ (SIS) or suspended execution of sentence (SES) even though an SIS⁸ does not result in a final judgment of conviction from which an appeal will lie. This is particularly egregious in the case of an individual who does not believe that the charges against him or her are valid, but the State does, and so, agrees to plead guilty to a suspended imposition of sentence believing that at the end of the probationary period, he or she would not have a conviction on his or her record.⁹ Thus, there may even be individuals who are actually innocent of charges, who might have been found not guilty at a trial, but who pled guilty either to avoid the embarrassment of a trial or because he or she thought the suspended imposition of sentence would result in avoiding the consequences of a guilty plea or conviction, but who are

⁷The Highway Patrol's Sex Offender Registration database does not indicate that registrants are registered as a result of an offense that was adjudicated by suspended imposition of sentence. Tr. at 8 (Parties' Stipulation).

⁸The Court believes that in requiring registration by those who receive a suspended imposition of sentence and permitting the public dissemination of that information, SORA conflicts with the

obvious legislative purpose of the sentencing alternative of suspended imposition of sentence to allow a defendant *to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow*. That legislative purpose is further evidenced in statutes concerning closed records; under § 610.105, R.S.Mo. 1986, if imposition of sentence is suspended, the official records are closed following successful completion of probation and termination of the case. Closed records are made available only in limited circumstances and are largely inaccessible to the general public. § 619.121 R.S.Mo., Supp. 1991.

Yale v. City of Independence, 846 S.W.2d 193, 195 (Mo. banc 1993).

⁹For example, an individual who receives a suspended imposition of sentence is not "convicted" for the purposes of MO. REV. STAT. § 491.050, which confers an absolute right to impeach the credibility of any witness with his or her prior criminal convictions. *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. 1995); *Yale*, 846 S.W.2d at 195-96.

nonetheless required to register under SORA.

Thus, since SORA impinges on fundamental rights, the Court applies strict scrutiny review to determine whether the infringement is necessary to accomplish a compelling state interest and whether the State used the least restrictive means to accomplish that compelling state interest. *Missourians for Tax Justice Education Project*, 959 S.W.2d 100, 103 (Mo. 1998); *State ex rel. Coker-Garcia v. Blunt*, 849 S.W.2d 81, 85 (Mo.App. W.D. 1993). As observed, SORA expresses no purpose whatsoever and while Defendants have asserted that SORA assists in law enforcement and in protecting the public, Defendants have not convinced the Court that SORA is narrowly tailored or uses the least restrictive means to accomplish that result. The burden is on the defendants to do so. *Coker-Garcia*, 849 S.W.2d at 85 (quoting *McCarthy v. Kirkpatrick*, 420 F.Supp. 366, 374-75 (W.D.Mo. 1976); and citing *Labor's Educ. and Political Club-Indep. v. Danforth*, 561 S.W.2d 339, 348 (Mo. banc 1977); *Witte v. Director of Revenue*, 829 S.W.2d 436, 439 (Mo. 1992) (quoting *Gumbhir v. Kansas State Board of Pharmacy*, 231 Kan. 507, 646 P.2d 1078, 1089 (1982), *cert. denied*, 459 U.S. 1103 (1983)).

The Court finds that neither the requirement to register nor the dissemination of information is based on any present danger to society or on the degree of risk the offender presents to the public. SORA applies to those who present no danger along with those who do present such a danger, yet it fails to require registration and dissemination of information from other persons convicted of violent crimes who do present a risk to society. Its requirements are applied to registrants for the remainder of their lives, but others who are violent and dangerous are not required to register and suffer neither the restrictions nor the

stigma and other consequences of registration and dissemination borne by registrants. There is no opportunity to escape the dictates of SORA's in person reporting requirements regardless of the registrant's health or other restrictions on ability to comply. Thus, even assuming a compelling state interest, there can be no showing that SORA employs the least restrictive means or is carefully tailored to minimize the infringement on Plaintiffs' fundamental liberties and rights. Accordingly, the Court concludes that Plaintiffs have demonstrated a probability of success on the merits as to their claim that SORA violates their right to equal protection as guaranteed by the Missouri Constitution and a preliminary injunction is warranted.

D. Count V: Bill of Attainder Under Article I, Section 30 of the Missouri Constitution

Article I, Section 30 of the Missouri Constitution prohibits bills of attainder in providing that “no person can be attainted of treason or felony by the general assembly.” The prohibition against bills of attainder “was intended not as a narrow, technical prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply – trial by legislature.” *State ex rel. Bunker Resource Recycling & Reclamation, Inc.*, 782 S.W.2d 381, 386 (Mo. banc. 1990) (citing *United States v. Brown*, 381 U.S. 437, 442 (1965)). Bills of attainder are “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” *Id.* at 385 (quoting *United States v. Lovett*, 328 U.S. 303, 315 (1965)).

Two elements identify a legislative act as a bill of attainder. The first is that the statute

singles out a “specifically designated person or group,” and the second element is that the act inflicts punishment on that person or group. *Id.* at 386 (citing *Selective Service System v. Minnesota Public Interest Research Group, et al.*, 468 U.S. 841, 846 (1984)).

The Court finds that SORA meets both of these elements.

The specificity element is met by a statute which singles out an individual or group, whether the individual or group is called by name or described in terms of past conduct which, because it is past conduct, operates only as a designation of particular persons. *Id.* at 387. The Court finds that SORA meets the specificity requirement in that it singles out a group which is described in terms of past conduct that operates as a designation of particular persons, that is, persons convicted of or who have pled guilty to specified sex offenses. The group is described in terms of the past conduct of those who comprise the group. Legislation is not held to be directed at specific persons if the class is such that the affected persons can escape regulation merely by altering the course of present activities or bringing themselves into compliance with the law. *Id.* But the Court finds that with SORA, the opposite is true. No affected person can escape SORA’s requirements merely by altering the course of his or her present activities. Nor can anyone required by SORA to register and suffer public dissemination of registration data escape the law’s requirements by bringing themselves into compliance with the law.

As to the second element – that punishment be inflicted on a group – “the deprivation of any rights, civil or political, previously enjoyed, may be punishment” and “legislation which inflicts a deprivation on named or described persons or groups constitutes a bill of attainder whether its aim is retributive, punishing past acts or preventive . . . discouraging

future conduct.” *Crain v. City of Mountain Home, Arkansas*, 611 F.2d 726, 728 (8th Cir. 1978) (citing *Brown*, 381 U.S. at 448, 458). The Court finds that SORA deprives sex offenders, including those never given a judgment of conviction, of a previously enjoyed right to be free of registration and identification once their sentence, parole, or probation was completed. The question is whether there is constitutionally forbidden punishment, a determination informed by the answers to three inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in a 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. *Bunker Resource Recycling*, 782 S.W.2d at 387.

Sex offender registration and dissemination of registration information were only first enacted beginning in the 1940’s, suggesting that registration and public notification of registration data may not fall within the historical meaning of legislative punishment. However, as the Court has found, registration and notification resembles the “shaming punishments” of the colonial era and earlier days which were intended to inflict public disgrace, and which label, humiliate, and lead to ostracization of a registrant. As was often historically the case, the labeling of SORA is permanent, and as with those historical punishments, the aim is to make all registrants suffer permanent stigmas since the requirements are lifelong, and to disable them from living normally in the community. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991).

Whether the statute, viewed in light of the severity of the burdens it imposes, reasonably advances a nonpunitive legislative purpose requires analysis using a functional

approach in which the Court must determine if a nonpunitive legislative purpose is advanced by the law. *Bunker Resource Recycling*, 782 S.W.2d at 387. Generally, legislation intended to prevent future danger, rather than to punish past action, is not an unconstitutional bill of attainder. However, if the function of the statute does not advance the intended purpose and the statute operates only as a punishment of specific persons or a class, the act is a bill of attainder. *Id.* Here, Defendants have argued that SORA assists in investigating crimes and helps the public protect itself, but even a nonpunitive purpose does not establish the legitimacy of a law creating a class subject to a legislatively imposed punishment. *Bunker Resource Recycling*, 782 S.W.2d at 386. And the Court has found that the purpose of protecting the public is not furthered by SORA's non-discriminating listing of all offenders regardless of tendency to recidivism, severity of offense, and current dangerousness.

Finally, as to whether the legislative history discloses an intent to punish, there is no legislative history. Tr. at 7 (citing Parties' Stipulation). However, in *Bunker Resource Recycling* there was also no legislative history and the court concluded that both the specificity and punishment elements necessary to establish the statute as a bill of attainder had nonetheless been satisfied. *Id.* at 388. Here, too, even in the absence of legislative history disclosing an intent to punish, this Court finds that both the specificity and punishment elements necessary to establish that SORA is a bill of attainder have been satisfied. Accordingly, the Court concludes that the probability of success on the merits of Plaintiffs' claim that SORA is an unconstitutional bill of attainder is sufficient to warrant a preliminary injunction.

E. Count VI: Special Law Under Article III, Section 40(30) of the Missouri

Constitution

Section 40(30) of Article III of the Missouri Constitution provides that the Missouri general assembly shall not pass any local or special law “where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.”

When the challenge is that the law is an unconstitutional special law, the Court must answer two questions. First, is whether the law is a special or local law. Second, if the law is a special or local law, is whether the vice that is sought to be corrected is so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result. *Treadway v. State of Missouri*, 998 S.W.2d 508, 511 (Mo. banc 1999) (quoting *School Dist. of Riverview Gardens, et al. v. St. Louis County*, 816 S.W.2d 219, 221 (Mo. banc 1991)).

A special law is one that includes less than all who are similarly situated. *Savannah R-II School Dist. v. Public School Retirement System of Missouri*, 950 S.W.2d 854, 858 (Mo. banc 1997); *Batek v. Curators of the Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996). The Court concludes that 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 its registration requirement. However, a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis. *Id.* “The party defending the facially special statute must demonstrate a ‘substantial justification for the special treatment.’” *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 65 (Mo. banc 1994) (citing *City of Blue*

Springs v. Rice, 853 S.W.2d 918, 921 (Mo. banc 1993). 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 requirement of registration. “The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes.” *Batek*, 920 S.W.2d at 899.

Furthermore, whether a statute is, on its face, a special law depends on whether the classification is open-ended. *Treadway*, 988 S.W.2d at 510 (citing *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997)). Classifications are open-ended if it is possible that the status of members of the class could change. *Harris*, 869 S.W.2d at 65. Here, the Court finds that the designation in SORA of the class required to register is closed-ended in that it is not possible that the status of the members could change. The registration requirement and dissemination of registration data is lifelong. The Court concludes that SORA’s classification of those who must register is arbitrary and without a rational relationship to a legislative purpose in that it does not apply to all persons similarly situated. Even if a law purports to be general, if the classification is unreasonable, unnatural, or arbitrary so that it does not apply to all persons or things similarly situated, it is then, in fact, special despite its apparent purpose. *Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens*, 517 S.W.2d 49, 53 (Mo. 1974). “If in fact the act is by its terms or ‘in its practical operation, it can only apply to particular persons or things of a class, then it will be a special or local law, however carefully its character may be concealed by form of words.’” *Id.* (quoting *Dunne v. Kansas City Cable Co.*, 32 S.W. 641, 642, 131 Mo. 1, 5 (1895)).

Individuals are released from prison, parole, or probation who were convicted of violent crimes and who continue to be dangerous and present a risk to society, but they are not required to register as are sex offenders, who must register even if they are not dangerous or present no risk to society. These violent non-sex offenders who are dangerous and present a risk to society are similarly situated to violent sex offenders but are excluded from the requirements of SORA. Thus, the Court concludes, SORA is without a rational relationship to a legislative purpose in that it does not apply to all persons who are similarly situated because persons who are dangerous and present a risk to society. Additionally, the Court concludes SORA's classification as to who must register is unreasonable, unnatural, and arbitrary.

Furthermore, as a special law, SORA is unconstitutional because there are many other general laws that could be used to serve purposes that SORA may be argued to serve, including, for example, but not limited to § 43.504 *et seq.*, Reportable crimes; § 558.016 *et seq.*, Extended terms for recidivism; § 559.010 *et seq.*, Sexual Assault Prevention Act; and § 589.303 *et seq.*, Records required – public–access–court ordered access.

Plaintiffs have demonstrated that SORA is an unconstitutional special law imposing registration requirements and dissemination of a registrant's name, address, and crime on less than all similarly situated violent and dangerous offenders; that, although defendants have not demonstrated a substantial justification for the special treatment, there is no rational basis for SORA's classification; and, that there are many other general laws that could be used to serve the purposes Defendants have offered in SORA's defense. This demonstration constitutes a probability of success on the merits sufficient to merit the issuance of a preliminary

injunction.

II. THE REMAINING *DATAPHASE* FACTORS WEIGH IN FAVOR OF ISSUANCE OF A PRELIMINARY INJUNCTION

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

The Court finds that the risk of irreparable harm to Plaintiffs if the injunction is not granted is substantial. Once the registration data are disseminated, they cannot be recalled, may circulate in the public domain indefinitely, and as the experiences of Plaintiffs and the hearing witnesses demonstrated, may be put to harmful use. One plaintiff has been forced to leave his church; a second has lost her job. The loss of a job may, in turn, cause other economic damage such as the loss of a home or may require other assets be liquidated to pay living expenses. Dissemination may cause painful disruption to Plaintiffs' personal, familial, and social relationships because of the embarrassment and humiliation it causes to family and friends of those required to register.

B. The Balance Between the Threat of Irreparable Harm to the Movants and the Injury That the Injunction's Issuance Would Inflict on Other Interested Parties

The Court also concludes that balance between the threat of irreparable harm to Plaintiffs and the injury that the injunction's issuance would inflict on other interested parties weighs in favor of issuing an injunction. On the one hand, the threat of irreparable harm to registrants is real and significant; some registrants have already sustained irreparable harm in the form of lost employment and a broken, decade-long relationship between a registrant and his wife and their church congregation. Plaintiffs and other registrants have already been deprived of fundamental liberty and privacy interests by SORA in the absence of any

compelling state interest and a demonstration that it is narrowly tailored to serve that compelling interest. That deprivation continues as dissemination of the information continues. The detriment to the privacy rights of victims, particularly incest victims, which SORA has occasioned would be somewhat abated by an injunction. But, more importantly, the issuance of an injunction would not necessarily inflict any injury on any other interested party. All that would result is that the registration and dissemination of information as facilitated by SORA's provisions would cease. Not gathering the information and/or withholding the information from the public does not injure the public any more than gathering the information and disseminating it prevents the public from harm, especially since the SORA list does not differentiate those who may currently present a danger to society and those who do not.

C. Whether the Issuance of an Injunction Is in the Public Interest

Issuance of an injunction is in the public interest because there is no public interest in enforcement of an unconstitutional statute. Even if validity of the statute is in doubt, the balance of public interest favors a cautious approach to avoid enforcement of an invalid statute until its constitutionality has been determined. Thus, this factor, too, weighs in favor of issuance of an injunction.

The Court has found that Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim that SORA is unconstitutional; that the risk of harm to Plaintiffs absent an injunction is substantial and outweighs the risk of injury to the other parties involved; and, that issuance of an injunction is in the public interest. Accordingly, Plaintiff's motion for a preliminary injunction is

SUSTAINED.

IT IS HEREBY ORDERED that Defendants are prohibited from engaging in any enforcement or implementation of MO. REV. STAT. § 589.400 *et seq.*, the Sex Offenders Registration Act (hereinafter, “SORA”) including registration, dissemination of information under, or enforcement for alleged violations until further order.

Motion for Class Certification

Plaintiffs also seek to maintain this action as a class action with a plaintiff class and two defendant classes. Class actions are designed to facilitate litigation when the number of persons having interest in a lawsuit is so great that it is impractical to join them all as parties. *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791, 794 (Mo. banc 1995) (citing *Sheets v. Thomann*, 336 S.W.2d 701, 709 (Mo.App. 1960)). Where the class seeks only injunctive or declaratory relief, for which the notice provision of Rule 52.08(c)(2) would not be mandatory, the Court has even greater freedom in both the timing and specificity of its class definition. *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 271 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).¹⁰

III. RULE 52.08(a) CLASS ACTION PREREQUISITES ARE SATISFIED

Certification of a class action requires that: (1) the class be so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class exist; (3) the claims of the representative parties are typical of the claims of the class; and, (4) the

¹⁰“Because Missouri Rule 52.08 and Federal Rule 23 are identical”, Missouri courts consider federal interpretations of Rule 23 in interpreting Rule 52.08. *Koehr v. Emmons*, 55 S.W.3d 859, 864 n. 7 (Mo.App. E.D. 2001).

representative parties will fairly and adequately protect the interests of the class. *Clark*, 106 S.W.3d at 486 (citing Rule 52.08(a); § 507.070, MO. REV. STAT. (2000)). These procedural rules are mandatory. *Id.* (citing *Beatty*, 914 S.W.2d at 795). Class certification is appropriate only if the prospective class meets each listed element. *Clark*, 106 S.W.3d at 486.

A. Numerosity Renders Impracticable the Joinder of All Members

Whether a class is so numerous that joinder is impracticable for class action purposes rests within this Court's discretion. *Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119, 132 (Mo. 1979). A number of factors are relevant to the numerosity inquiry, the most obvious of which is, of course, the number of persons in the proposed class. *Paxton v. Union National Bank*, 688 F.2d 552, 559 (8th Cir. 1982). No arbitrary rules regarding the necessary size of classes have been established. *Id.* (citing *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 54 (8th Cir. 1977)); *see also Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 1991 WL 441902, at *3 (E.D. Mo. Aug 2, 1991) ("Clearly, no 'magic number' for class certification exists . . ."). The approximately 800 schools comprising the membership of the Missouri State High School Athletics Association, "clearly constitute[d] a class 'so numerous that joinder of all members is impracticable.'" *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 739 (Mo.App. 1973). In addition to the class size, the Court may also consider the nature of the action, the size of the individual claims (irrelevant here, because there are no damages claims), the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members. *Paxton*, 688 F.2d at 559-60 (citing C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1762). The Court finds that all of the relevant enumerated considerations here weigh in favor of certifying the Doe Class

as well as the MCP and MCS Classes.

This action challenges SORA as unconstitutional and seeks injunctive relief. Individual claims or suits would be extremely inconvenient as there are thousands of individuals who can raise the same claim. The claims are essentially all the same. Separate joinder of all the individuals who have claims that SORA is unconstitutional would not only be extremely inconvenient but impracticable. Without a class action, the Court will be subjected to a stream of intervenors in this suit; every intervenor-plaintiff will necessitate adding as a defendant the county prosecutor and sheriff from that intervenor-plaintiff's county, and individual intervenor-plaintiffs and defendants would each require their own counsel. Undoubtedly, there would be litigation in other counties in which the same issues would likely be litigated in case after case, wasting judicial time and resources, and which could result in conflicting decisions. The eight present Doe plaintiffs reside in four different Missouri counties (Jackson, Platte, St. Louis, and Newton). Counsel for Plaintiffs already represent approximately 65 additional individuals from those four and seven more counties. During the pendency of the case, should an intervenor-plaintiff move from one county to another, the county prosecutor and sheriff from the intervenor-plaintiff's new county of residence will have to be substituted. During the pendency of the litigation, newly released individuals subject to SORA's requirements may tend to congregate in Jackson County because if a preliminary injunction is in place in Jackson County, they could avoid registration and dissemination by being here, instead of elsewhere in the State. Certifying the proposed plaintiff and defendant classes will help keep the litigation from becoming unwieldy and will promote judicial efficiency.

Accordingly, the Court believes that the apparent inconvenience and impracticability of trying individual suits to establish SORA's unconstitutionality weigh in favor of a class action.

1. Plaintiff Class is sufficiently numerous, yet its membership is identifiable

The Court finds that the proposed class of all current or future convicted sex offenders required to register under SORA is so numerous that joinder of all members is impracticable because the convicted sex offenders who are currently presumably required to register under SORA number approximately 9,212¹¹ and the number of future sex offenders who will be required to register under SORA is unknown, but is likely to be in the hundreds, if not in the thousands. As stated above, it is impracticable to bring them all before the Court. Class actions are appropriate when members of the class are from disparate geographical areas and where members cannot easily be identified. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131-32 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986). Here, the class members are dispersed throughout the State of Missouri. Accordingly, the Court finds that Plaintiffs Jane Doe I and II and John Doe I-VI are properly allowed to represent the interests of those sex offenders required to register under SORA currently and in the future. The Court also finds that even though the class is sufficiently numerous, the class members are identifiable because its membership is capable of ascertainment under an objective standard – here, requirement of registration pursuant to SORA, whether now or in the future, providing assurance that the interests of the class are adequately represented.

¹¹Tr. at 8 (citing Parties' Stipulation).

2. Missouri County Prosecutor and Missouri County Sheriff Classes are sufficiently numerous, yet their membership is ascertainable

Missouri has 115 counties¹², including the Independent City of St. Louis – and, thus, 115 sheriffs¹³ and 115 prosecutors¹⁴ in Missouri. While smaller than the proposed plaintiff class, the proposed MCP and MCS Classes are both sufficiently numerous as to render it impracticable to bring each prosecutor or sheriff before the court. The Court finds that Defendants Thomas Phillips and Michael Sanders are proper representatives, respectively, of the 114 other Missouri sheriffs and prosecutors who are charged with responsibilities identical to those of Phillips and Sanders. The 115 individuals who serve as Missouri sheriffs and the 115 individuals who serve as Missouri prosecutors are readily identifiable. The Court finds that in the absence of defendant classes, plaintiffs would have to name individually each prosecutor and each sheriff as defendants, each of whom would have his or her own counsel, which would soon render the case virtually unmanageable.

In sum, this Court concludes that the three proposed classes are sufficiently numerous as to warrant certification.

B. Questions of Law and Fact Common to the Class

Rule 52.08(a)(2) requires that there be common questions of law or fact among the members of the class, *Clark*, 106 S.W.3d at 486, but does not require that all questions of fact and law be shared commonly or that every question of law or fact be common to every

¹²<http://www.naco.org/counties/counties/state.cfm?state=mo>.

¹³<http://www.ago.state.mo.us/sheriffs.htm>.

¹⁴<http://www.ago.state.mo.us/proscutr.htm>.

member of the class. *Paxton*, 688 F.2d at 561 (citing *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1334 (8th Cir. 1974); *Like v. Carter*, 448 F.2d 798, 802 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972)). All that is required is that a question of law or fact be presented which is shared in the grievances of the prospective class as defined. *Wilcox v. Petit*, 117 F.R.D. 314, 317 (D. Me. 1987), *aff'd*, 864 F.2d 915 (1st Cir. 1988) (citing *Weiss v. York Hospital*, 745 F.2d 786, 808-09 (3d Cir.1984), *cert. denied*, 470 U.S. 1060 (1985); 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-1 (2d ed.1987)); *see also Ralph*, 835 S.W.2d at 524 (where only common question of law was resolved in another suit and remaining fact questions were specific to each claimant, no abuse of discretion in refusal to allow case to proceed as a class action). The commonality requirement may be satisfied, for example, "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *American Finance Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D. Md. 1974).

The Court concludes that there are questions of law and fact common to the proposed Doe Class as well as to the proposed MCP and MCS Classes. As to the Doe Class, all sex offenders to whom SORA applies share the question of law whether SORA violates due process and equal protection guarantees of the state constitution. Those currently required to register under SORA share the questions of law with respect to whether SORA violates, *ex post facto*, and retrospective law prohibitions of the Missouri constitutions. Additionally, members of the class share the question of whether application and enforcement of SORA violates the right to jury trial afforded by the state constitution or the state constitutional prohibitions against bills of attainder and special laws.

The Court also concludes that there are questions of law common to the MCP and MCS Classes. They are the same questions of law that are common to members of the proposed Doe Class, but are couched in terms of whether conduct required of Missouri prosecutors and sheriffs under SORA violates the state due process or equal protection rights of those to whom SORA applies, whether that required conduct violates state prohibitions against *ex post facto* laws or Missouri's prohibition against retrospective laws, or denies the right to trial by jury guaranteed by the state constitution. Additionally, the suit inquires whether conduct required of Missouri prosecutors and sheriffs under SORA violates state constitutional prohibitions against bills of attainder or special laws.

Furthermore, the Court also finds that there are common questions of fact applicable to the Doe Class. As is the case with Jane Does I and II and John Does I-VI, all current and future convicted sex offenders are, by the terms of the statute, required to register with the sheriff of the county in which they reside. As is the case with Jane Does I and II and John Does I-VI, each member of the Doe Class would be subject to prosecution for failure to comply with SORA's registration requirements. As with Jane Does I and II and John Does I-VI, if required to register, each member of the Doe Class would be stigmatized as a presently dangerous sex offender, irrespective of whether that was or was not true, and because the registration information can be disseminated worldwide, would be subjected to loss of good name and reputation, harassment, humiliation, embarrassment, inconvenience, mental suffering, and anguish.

C. The Representative Parties Have Claims and Defenses Typical of the Class's Claims and Defenses

Rule 52.08(a)(3) requires the representative party's claims to be typical of the claims of the class. A class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo.App. W.D. 2000) (citing *Harris v. Union Elec. Co.*, 766 S.W.2d 80, 86 (Mo. banc 1989) (quoting *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). The "typicality" requirement is generally considered to be satisfied "if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory." *Paxton*, 688 F.2d at 561-62 (citing C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1764 at n.21.1 (Supp. 1982)). The typicality requirement as customarily applied tends to merge with "commonality." *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Typicality "requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff." *Paxton*, 688 F.2d at 562 (citing *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977); *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975); *White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D.Colo. 1971)); *Koger*, 28 S.W.3d at 410 (citing *Harris*, 766 S.W.2d at 86). There must be a demonstration that the representative is not alone in his or her dissatisfaction so as "to assure that there is in fact a class needing representation." *White*, 53 F.R.D. at 415. Here, six John Does and two Jane Does requested status as plaintiffs to raise claims on behalf of themselves and as class representatives, providing this Court with assurance that there is a class of plaintiffs needing representation.

The Court finds that Plaintiffs' claims that SORA violates state due process, equal

protection, open courts and jury trial rights as well as state prohibitions against *ex post facto* and retrospective or retroactive laws, special laws, and bills of attainder, are typical of the claims that would be held by members of the Doe Class. The Court holds that, as in *Paxton*, the claims of the putative Doe Class rest on the same legal theories as those of Plaintiffs. Similarly, the Court finds that the defenses of Defendants Phillips and Sanders are typical of those which would be raised by members of the MCS and MCP Classes, respectively, and rest on the same legal theories. The typicality requirement as to all three proposed classes is readily met.

D. Interests of the Class Will Be Fairly and Adequately Protected by the Representative Parties

The final prerequisite is the ability of the named representatives to “fairly and adequately protect the interests of the class.” Rule 52.08; *Clark*, 106 F.3d at 486. The adequacy of a representative class must be determined under the factual circumstances of each case. *City of O’Fallon v. Bethman*, 569 S.W.2d 295, 299 (Mo.App. 1978) (citing *City of St. Ann v. Buschard*, 299 S.W.2d 546, 554 (Mo.App. 1957)). Although many factors may be considered in making such a determination, the primary consideration is that all diversified class interests and points of view be represented and that those parties that are named represent a truly adverse interest so that issues are actually litigated without collusion. The rights of absent class members must be protected. *Id.*

Accordingly, the focus of the Court’s inquiry under Rule 52.08(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through

qualified counsel. *Paxton*, 688 F.2d at 562-63. The Court finds that the plaintiffs who seek status as named representatives fulfill both tests. There is no apparent conflict between Plaintiffs and the class members since all individual sex offenders who currently or who will in the future fall within the ambit of SORA's registration and enforcement requirements stand to gain by having their rights defended and observed if their challenge to SORA succeeds. Moreover, counsel for Plaintiffs are experienced and capable, and their efforts so far manifest their intention to prosecute the case vigorously. Thus, the Court concludes that the plaintiffs have fulfilled the prerequisites set forth in Rule 52.08(a) for certification of the Doe Class.

Similarly, the Court finds that Defendants Sanders and Phillips fulfill both tests to be the named representatives for the MCS and MCP Classes. There is no apparent conflict between the class representatives and the class members since all sheriffs and prosecutors who have duties and obligations with respect to SORA's registration and enforcement requirements stand to gain by having the constitutionality of SORA resolved. Public officials have no interest in enforcing an unconstitutional law. Moreover, Defendants Phillips and Sanders have access to experienced and capable lawyers from the County Counselor's office and the Court is convinced that Phillips and Sanders will defend the claims made against them and the MCS and MCP Classes. Thus, the Plaintiffs have fulfilled the prerequisites set forth in Rule 23(a) for certification of the MCS and MCP Classes as well as for certification of the plaintiff class.

* * * *

Defendant Stottlemire argues with respect to commonality, typicality, and adequacy of representation that the plaintiffs will not properly pursue all issues with the same vigor

because they may not be as dangerous as others subject to SORA and might unduly focus on claims related to the statute's failure to provide for individuals who are not dangerous to escape SORA's requirements. The Court agrees with Plaintiffs, however, and finds that these arguments go more to whether the class is sufficiently subdivided. The overriding thrust of Plaintiffs' action is to invalidate the statute. A broadly defined class is appropriate at this preliminary stage. As issues develop, additional class representatives may need to be identified to represent various, yet-to-be-identified subclasses. In the meantime, however, and for purposes of preliminary relief, a broadly defined plaintiff class will suffice.

Furthermore, the Court concludes that Plaintiffs' allegations that they are not dangerous do not render them incapable of adequately representing the interests of other members of the class who have may have been convicted of multiple offenses or who have a poor record for abiding by the law when not in prison. All individuals who are subject to SORA have the same interest in assuring that its provisions are not applied absent requisite constitutional protections and the same interest in invalidating an unconstitutional statute. Stottlemyre's fear that Plaintiffs have an incentive to pursue their own separate interests at the expense of the interest of other members of the class who have multiple offenses and a poor record is misplaced. The Does' interest in having an unconstitutional law invalidated is no different than the interest of those who have multiple offenses and a poor record. The effect of an invalidation is the same on all offenders because SORA could not be applied as to any of them. Unlike an action for damages, in which it is conceivable that those having a good case for larger damages might not represent well the claims of those whose likelihood of receiving large damages are poor, this case seeks a declaration of unconstitutionality and

injunctive relief as to all class members, not just some of them.

Further, the Court finds that whether Plaintiffs may not be currently dangerous or as dangerous as other offenders subject to SORA has little to do with Plaintiffs' claims that SORA is unconstitutional. For example, as Plaintiffs have observed, the claim that SORA violates the Missouri Constitution's prohibition against laws which have retrospective application would, if successful, invalidate the law as to all offenders as to whom the law had applied in such retrospective fashion irrespective of the present level of dangerousness presented by any particular offender. The Court finds that Plaintiffs' claims of unconstitutionality are sufficiently broad that they present sufficient issues of common questions of law and fact to permit certification. There may be individuals as to whom being subject to SORA's unconstitutional provisions may seem more *unfair*. But this does not mean there are not common questions of law and fact and the Court concludes that such common questions exist.

IV. RULE 52.08(b) REQUIREMENTS HAVE BEEN MET

Although the Court has concluded that the requirements of Rule 52.08(a) have been satisfied, to be maintained as a class action, an action must also satisfy at least one of the three conditions set forth in Rule 52.08(b). *Clark*, 106 S.W.3d at 487; *Paxton*, 688 F.2d at 563 (“We must still inquire, however, whether that action is maintainable under *any* of the subdivisions of Rule 23(b).”) (emphasis added). Plaintiffs seek certification of the action as a class action pursuant to Rule 52.08(b)(2). Alternatively, Plaintiffs maintain their action is maintainable as a class action pursuant to Rule 52.08(b)(1) or (b)(3).

A. A Class Action Is Appropriate Under Rule 52.08(b)(2)

Rule 52.08(b)(2) provides that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and, in addition, the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. MO. R. CIV. P. 52.08(b)(2). Certification under subsection (b)(2) is appropriate where plaintiffs seek to enjoin application and/or enforcement of a statute. *Sweat v. City of Fort Smith, Arkansas*, 265 F.3d 692, 694-95 (8th Cir. 2001).

The Court finds that Defendants Sanders and Phillips are “acting”, *i.e.*, implementing and enforcing SORA on the premise that the law is constitutional – a basis for their action that is generally applicable to the class. Thus, injunctive and/or corresponding declaratory relief would be as appropriate as to the Doe Class as a whole as it is as to Plaintiffs. Because Defendants Phillips and Sanders and the MCS and MCP Classes must all observe the requirements of and perform duties specified by SORA, the Court finds that the two proposed defendant classes are also appropriate. As with the Doe Class, injunctive and/or corresponding declaratory relief would be as appropriate to the MCS and MCP Classes as a whole as it is to Defendants Phillips and Sanders.

B. Alternatively, a Class Action Is Also Appropriate Under Rule 52.08(b)(1)

Alternatively, the Court finds that the class action proposed here, with a plaintiff class and two defendant classes, is appropriate under Rule 52.08(b)(1) because the prosecution of separate actions by or against individual members of the plaintiff and defendant classes would create a risk of inconsistent or varying adjudications with respect to individual members of

both plaintiff and defendant classes. Even if these Plaintiffs prevail on their claims that SORA is unconstitutional, it is possible that courts in which separate actions pending could rule otherwise, resulting in inconsistent results for members of the class. Varying or inconsistent adjudications on a myriad of timetables could establish inconsistent and/or incompatible standards of conduct for the Defendants. MO. R. CIV. P. 52.08(b)(1)(A). The Court also finds the class action is appropriate here because separate actions would create a risk of adjudications with respect to individual members of the class which, as a practical matter, would be dispositive of the rights and interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their rights and interests. MO. R. CIV. P. 52.08(b)(1)(B).

C. Alternatively, a Class Action Is Also Appropriate Under Rule 52.08(b)(3)

The Court finds that a class action is also appropriate under Rule 52.08(b)(3) because the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. MO. R. CIV. P. 52.08(b)(3). Rule 52.08(b)(3) identifies four factors matters pertinent to determining whether questions of law or fact predominate over questions affecting only individual members. Here, all weigh in favor of class certification.

First, the Court finds that the interest of members of the class in individually controlling the prosecution or defense of separate actions is at most minimal and more likely nonexistent in this action which seeks injunctive and/or declaratory relief relating to the constitutionality, implementation, and enforcement of SORA. Second, the Court finds that

the extent and nature of the litigation concerning the controversy already commenced by the Plaintiffs leads to the conclusion that the questions of law and fact common to members of the Doe Class and the MCS and MCP Classes predominate over questions affecting only individual members. Third, it is in the interest of judicial economy to concentrate the litigation of the claims in this forum since the original litigation was commenced here and the Court is already familiar with the claims and defenses as well as the questions of law and fact presented by this litigation. Finally, the Court recognizes that while class action litigation presents case management concerns, judicial economy is furthered by a single class action as opposed to the thousands of individual cases which could be brought by members of the class. Any difficulties likely to be encountered in the management of a class action pale in comparison to the burden imposed on the judiciary should individual class members resort to filing separate actions to achieve the same aim which could be accomplished by the class action.

V. OTHER OBJECTIONS TO CERTIFICATION OF A PLAINTIFF CLASS LACK MERIT

Defendant Stottlemire contends class certification is not necessary, arguing that if this Court concludes that SORA is unconstitutional and enjoins enforcement of its registration or notification provisions, the decision will be generally applicable and will benefit all SORA registrants who share the plaintiffs' characteristics; in essence, that class certification here adds nothing to the injunctive relief sought and is unnecessary. STOTTLEMYRE'S RESPONSE at 2. But class certification has been granted where, as here, preliminary and/or injunctive or declaratory relief is a consideration. *See, e.g., Doe v. Mundy*, 514 F.2d 1179 (7th Cir. 1975);

Saenz v. Roe, 526 U.S. 489, 496-98 (1999) (district court certified class of ““ all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after April 1, 1997, and who will be denied full California AFDC or TANF benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid’ ”, enjoined implementation of the statute, and was affirmed by Ninth Circuit and Supreme Court); *Colautti v. Franklin*, 439 U.S. 379, 383-84 (1979) (class certified and preliminary injunction enjoining implementation of state statute entered by three-judge district court, affirmed by Supreme Court); *Brown v. Chote*, 411 U.S. 452, 456-57 (1973) (in class action challenge to ballot filing fee statutes, preliminary injunction of three-judge district court allowing names of candidates to be on ballot without payment of fees was held by the Supreme Court not to be an abuse of discretion); *Quinn v. State of Missouri*, 839 F.2d 425, 425-26 (8th Cir. 1988) (no abuse of discretion in entering temporary restraining order, treated on appeal as a preliminary injunction because of its duration, in class action challenge to Missouri constitutional provision requiring St. Louis Board of Freeholders to be owners of real property); *Hodgson v. State of Minnesota*, 1985 WL 6547 (D.Minn. January 23, 1985) (noting, in class action challenge to state statutes requiring parental notice where minors seek abortions, entry of a preliminary injunction enjoining enforcement of that provision of the statute). *See also*, *Howe v. Varsity Corp.*, 896 F.2d 1107, 1111 (8th Cir. 1990) (acknowledging procedure by which district court conditionally certified a broad class for purposes of preliminary relief and remanding for, *inter alia*, redefinition of the class in light of circuit court’s holdings); *cf. Kremens v. Bartley*, 431 U.S. 119, 134-35 (1977) (remanding for reconsideration of class definition and substitution of

class representatives where named plaintiffs' claims have become moot).

The Court concludes that here, the need for preliminary relief renders necessary the plaintiff and defendant classes requested. Individuals required to register under SORA continue to report for initial registration and must appear for re-registration annually or, in some cases, every ninety days. Without an injunction in place as to each county's sheriff or prosecutor, information gathered about those individuals can be and continues to be disseminated about them. Furthermore, should individuals covered by SORA fail to heed its directives, they can be prosecuted.

VI. OBJECTIONS TO DEFENDANT CLASSES LACK MERIT

A. Whatever Financial and Administrative Burdens Are Imposed by the Litigation Would Be Imposed on Any Proposed Class Representatives and No Better Representatives Have Been Identified

Phillips and Sanders admit that their interests are shared with their respective proposed defendant classes, and do not argue that no defendant classes should be certified. However, they object to being named as class representatives, claiming that representation of the remaining county sheriffs and prosecutors would impose an administrative and financial burden on them. COUNTY DEFENDANTS' RESPONSE at 2-3. That may be so. But the Court finds that Phillips and Sanders have not established that there is no mechanism for them to obtain the financial assistance of the other counties whose sheriffs and prosecutors would be represented. Nor is it likely that any other county sheriff and/or prosecutor is in a better financial situation or has more administrative resources to devote to this litigation and would be a better choice. As to each class, the burden will have to fall on a prosecutor and a sheriff.

No *better* representatives than these are available.

The Court concludes that *Missouri Health Care Association v. Attorney General of the State of Missouri*, 953 S.W.2d 617, 621 (Mo. 1997), cited by Phillips and Sanders, is distinguishable. In *Missouri Health Care*, the attorney general was empowered by the express language of the statute in question, MO. REV. STAT. § 407.020.4, to enforce that statute. SORA, however, specifies no such role for the attorney general. *State ex rel Westhues v. Sullivan*, 224 S.W. 327, 331 (Mo. 1920), is also distinguishable. There, the Missouri Supreme Court held that a county prosecuting attorney could not proceed in the name of the state on matters arising outside the jurisdiction of such prosecuting officer. That case does not stand for the proposition that county prosecutors and sheriffs are not proper class representatives where prosecutors and sheriffs have prescribed duties under a statute such as is the case for sheriffs and prosecutors under SORA.

B. Personal Claims Against Every Member of the Defendant Classes Are Unnecessary Because of the Juridical Links Among Missouri Sheriffs and Prosecutors

Stottlemire objects to the proposed defendant classes because the various members of the proposed classes perform their duties only within limited jurisdictions. STOTTEMYRE'S RESPONSE at 6-7. The Court agrees with Plaintiffs that the holding in *Ellis v. O'Hara*, 105 F.R.D. 556 (E.D. Mo. 1985), cited by Stottlemire, is inapposite here. *Ellis*, in which plaintiffs sought monetary as well as declaratory and injunctive relief, borrows its analysis from *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), *Thillens, Inc. v. Community Currency Exchange Assoc. of Illinois, Inc.*, 97 F.R.D. 668, 675 (N.D. Ill.1983), and *In re Gap Store Securities Litigation*, 79 F.R.D. 283, 293-95 (N.D. Cal.1978). Each of

these cases sought damages from defendant classes whereas here, no monetary relief is requested. Accordingly, the considerations underpinning application of the rule in *Ellis*, *LaMar*, *Thillens*, and *In re Gap Store* are not present here.

Furthermore, the *Ellis* court overlooked an exception to the rule that a defendant class is improper unless each named plaintiff has a claim against each defendant class member, an exception recognized in *LaMar*, *Thillens*, and *In re Gap Store*. The exception, which the Court finds applicable here, is described in *Thillens*:

The requirement that each named plaintiff must have a claim against each defendant may be waived where the defendant members are related by a conspiracy or “juridical link.” A “juridical link” is some legal relationship which relates all defendants in a way such that single resolution of the dispute is preferred to a multiplicity of similar actions.

Thillens, 97 F.R.D. at 675-76 (N.D. Ill. 1983); see also *LaMar*, 489 F.2d. at 469-70. For other examples of juridical links, see *Broughton v. Brewer*, 298 F.Supp. 260 (N.D. Ala. 1969) (the Governor of Alabama, the Attorney General of Alabama, and various Mobile County and city officials); *Samuel v. University of Pittsburgh*, 56 F.R.D. 435 (W.D. Pa. 1972) (all state and state related universities and colleges in the Commonwealth of Pennsylvania similarly situated); and *Washington v. Lee*, 263 F.Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (Commissioners of Corrections, members of the Board of Corrections, all county sheriffs and wardens and jailers of city and town jails in the state). *Mudd v. Busse*, 68 F.R.D. 522 (N.D. Ind. 1975), *aff'd on other grounds*, 582 F.2d 1283 (7th Cir. 1978), *cert. denied*, 439 U.S. 1078 (1979), makes clear that the *LeMar* analysis does not apply in every situation and that this case is the kind of exception *LeMar* contemplated:

The *LeMar* court did recognize that in certain instances, where all members of the

defendant class were connected by a common “juridical link,” a plaintiff class versus a defendant class suit could be appropriate, even though no named plaintiff would have personal claims against most members of the defendant class. Such “juridical links” would most often be found in instances where all members of the defendant class are officials of a single state and are charged with enforcing or uniformly acting in accordance with a state statute, or common rule or practice of state-wide application, which is alleged to be unconstitutional. In such a case an action against the defendant class is simply a procedural alternative to challenging the constitutionality of a statute by suit against the state directly

Mudd, 68 F.R.D. at 527-28.

Given these authorities, this Court declines to follow the limited application of the rule in *Ellis* and finds that there is a common juridical link here among all county prosecutors and all county sheriffs charged with enforcing or uniformly acting in accordance with SORA.

C. Due Process Concerns Raised by Defendants Are Not Present Here

Finally, all three defendants raise due process concerns, citing *City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53 (Mo.App. W.D. 2000). However, the Court finds that the due process considerations that were present in *Elms Redevelopment*, a condemnation action, are not present here. In *Elms Redevelopment*, the City and the LCRA sought to extinguish the property interests of “Gold Key Club members” who had purchased timeshare rights to stay at the Elms Hotel. Due process required that all of the members receive either adequate representation or actual notice of the condemnation action, but the absent members received neither. Thus, adequacy of representation was clearly lacking. Here, of course, no one is seeking to condemn the property rights of the proposed defendant classes.

Moreover, the individuals named as representatives of the defendant class while unwilling to serve, were Gold Key Club members who were unsophisticated individuals, all

but one of whom were not even represented by counsel. “The representatives demonstrated virtually no inclination to represent anyone’s interest even their own.” *Elms Redevelopment Corp.*, 18 S.W.3d at 60. Prosecutor Sanders is an attorney and Sheriff Phillips is a professional, elected law enforcement official eliminating the underlying concern for adequacy of representation.

[T]he test for adequate representation of a defendant class is similar to that employed to determine whether a plaintiff will fairly protect the interests of the class members[.] The defendant class member or members named and served by the plaintiff must be represented by qualified counsel and they must have common interests with and not be antagonistic towards their fellow class members [S]ome courts have noted that closer scrutiny is necessary in determining the adequacy of the representation of a defendant class because of the risk that plaintiff [in selecting the named representatives] will seek out weak adversaries to represent the class. Of course, if there is any evidence that the defendant representative is not able to or will not vigorously defend the action, then the class should not be certified.

Id. (citing 7A CHARLES A. WRIGHT, ARTHUR MILLER AND MARY KANE, FEDERAL PRACTICE AND PROCEDURE § 1770 (2d ed. 1986)).

The Court finds that Sanders and Phillips are represented by qualified counsel. Should the development of the issues eventually result in Sanders and Phillips concluding that their interests are sufficiently divergent as to require separate counsel, that matter can be addressed at such a time. Otherwise, the Court concludes that Sanders shares the same interest in the outcome of this litigation as would be held by any other prosecutor in the state and, similarly, Phillips shares the same interest in the outcome of this litigation as would be held by any other sheriff in the state. Neither has presented any evidence of, or even identified any antagonism toward the other members of their respective classes. It could hardly be said that in nominating the prosecutor and sheriff of Jackson County, Missouri, which is one of the most

populous counties in the state, the plaintiffs selected weak adversaries to represent the two proposed classes. While it may be that Sanders and Phillips would rather not represent their respective classes because of administrative and financial considerations, neither expressed the intention to not defend the lawsuit, and they will be defending the claims for themselves in any event. The time and expense that goes into that effort might just as well inure to the benefit of all of Missouri's prosecutors and sheriffs.

In sum, the Court concludes that the proposed defendant classes are appropriate here, because the due process concerns raised by Defendants are not applicable and by virtue of the juridical link which exists among all county prosecutors and sheriffs charged with responsibilities under SORA. Furthermore, the Court finds that there are no better class representatives for the proposed defendant classes than those nominated and the proposed defendant classes do not present so great an administrative and financial burden on Jackson County that the advantages of certifying the proposed defendant classes are outweighed.

Accordingly, Plaintiffs' Motion for Class Certification is
SUSTAINED.

IT IS HEREBY ORDERED THAT:

1. Plaintiffs may maintain their suit as a Class Action pursuant to Rule 52.08 (b)(2), or, alternatively, may maintain their suit as a class action pursuant to Rule 52.08 (b)(1) or (b)(3);

2. Plaintiffs Jane Doe I and II and John Doe I through VI are hereby approved as class representatives of the Plaintiff Class;

3. Defendant Michael Sanders is hereby approved as class representative of the

Defendant MCP Class; and

4. Defendant Thomas Phillips is hereby approved as class representative of the Defendant MSP Class.

Hon. Jon R. Gray

Date: _____

Respectfully submitted,

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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 December, 2003, on counsel listed below:

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