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

JOHN DOE I, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 0616-CV-35929
	)	
MAJOR JAMES F. KEATHLEY, et al.,	)	Division 18
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs John Doe I-XI are sex offenders who seek declaratory and injunctive relief barring any further application to them of Missouri's Sex Offender Registration Act (SORA)[1] because, as explained in *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. *banc* 2006) ("*Phillips*"), its application as to them is retrospective in its operation in that the conduct for which they are being required to register predated the effective date of the legislation being invoked as requiring their registration. Stip. ¶ 1. There are three categories of plaintiffs.

The Count I Plaintiffs, John Doe I-V, VIII and IX, are persons who live in Missouri but whose sex offenses occurred and whose pleas or convictions were entered in another state, but prior to the effective date of Missouri's SORA on January 1, 1995. Stip. ¶ 7. The Count II Plaintiff, John Doe VI, was convicted in a military courts martial prior to January 1,

[1] MO. REV. STAT. §§ 589.400 to 589.425, also known as "Megan's Law."

1995. Stip. ¶ 8. Two of the Count III Plaintiffs, John Does VII and XI, were convicted of misdemeanor sex offenses prior to the effective dates of legislation amending SORA to require resignation of those convicted of various misdemeanor offenses. John Doe X, the other Count III plaintiff, was convicted after the effective date of the legislation amending SORA to require registration of those convicted of various misdemeanor offenses, but for conduct that occurred prior to the effective date of that legislation. Stip. ¶ 9.

Under the rationale of *Phillips*, none of the plaintiffs should be required to comply with SORA's requirements. Accordingly, this Court should grant summary judgment, declare SORA unconstitutional as applied to Plaintiffs, and enjoin any prosecution against Plaintiffs for failure to register as explained in this memorandum.

I. STANDARDS FOR DECLARATORY RELIEF UNDER RULE 87.02 AND INJUNCTIVE RELIEF UNDER RULE 92.01

Plaintiffs meet the standards for declaratory relief. "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute. . . and obtain a declaration of rights, status or other legal relations thereunder." Rule 87.02. To qualify as "any person", a party seeking a declaratory judgment must have a legally protectible interest at stake and the question presented must be appropriate and ready for judicial decision – that is, there must be an actual controversy between persons with interests adverse in fact which admit of specific relief through a conclusive decree as distinguished from a decree only advisory in character. *Absher v. Cooper*, 495 S.W.2d 696, 698 (Mo.App. Spgfd. 1973) (citing *Waterman v. City of Independence*, 446 S.W.2d 471, 474 (Mo.App. K.C. 1969); *City of Joplin v. Jasper County*, 161 S.W.2d 411, 413 (1942)).

Here, the Does are persons whose right under the Missouri Constitution to be free from retrospective application of the laws is impacted by SORA and Defendants' retrospective application of SORA to them. Thus, they may have this Court declare their rights and status vis à vis SORA and the defendants. Plaintiffs' right to be free of the retrospective application of SORA is a legally protectible interest given its basis in the Missouri Constitution. Plaintiffs' interests in not suffering the abridgement of their right to not be subjected to retrospective application of the law and in not being required to register under SORA are directly adverse to Defendants' interests in implementing SORA's registration requirement and prosecuting those who fail to comply with SORA. However, as the standard requires, this Court's decree can resolve this actual controversy. Accordingly, declaratory relief is appropriate.

This Court can appropriately grant Plaintiffs' request for injunctive relief as well. Injunctions are authorized where there is some substantial right to be protected. *Moseley v. City of Mountain Grove*, 524 S.W.2d 444, 446 (Mo.App. Spgfd. 1975) (citing *Higday v. Nicklaus*, 469 S.W.2d 859, 864 (Mo.App. K.C. 1971)). The indispensable basis for injunctive relief is the wrongful and injurious invasion of some legal right existing in the plaintiff, although the writ will issue also if invasion of that right is threatened by one having the power to do the wrong. *Id.* (citing *Howe v. Standard Oil Company of Indiana*, 150 S.W.2d 496, 497 (Mo.App. St.L. 1941); *Ewing v. Kansas City, Missouri*, 180 S.W.2d 234, 249 (Mo.App. K.C. 1944)). Plaintiffs must show they have no adequate remedy at law and that irreparable harm will result if relief is not granted. *Glenn v. City of Grant City*, 69 S.W.3d 126, 130 (Mo.App. W.D. 2002). Generally, the phrase "no adequate remedy at law"

means that "damages will not adequately compensate the plaintiff for the injury or threatened injury." *Id.* "Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct." *Id.*

Here, the same right under the Missouri Constitution to be free from retrospective application of the laws that warrants declaratory relief is a substantial right warranting injunctive relief. Subjecting Plaintiffs to the retrospective application of SORA is a wrongful and injurious invasion of their right under the Missouri Constitution to avoid just that sort of treatment by the government. *Phillips* undeniably establishes that SORA imposes a "new duty to register and to maintain and update the registration regularly, based solely on their offenses prior to its enactment" – "an affirmative obligation on them to register upon release and then regularly thereafter." *Phillips*, 194 S.W.3d at 852. No damages will adequately compensate for being wrongfully required to comply with SORA for the rest of one's life and, thus, there is no adequate remedy at law and irreparable harm is established.

II. The Standard for Granting Summary Judgment for Claimant

The purpose of summary judgment under Missouri's fact-pleading regime is to identify cases (1) in which there is no genuine dispute as to the facts and (2) the facts as admitted show a legal right to judgment for the movant. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. 1993). A claimant moving for summary judgment must show entitlement to judgment as a matter of law and that there is no genuine dispute about the material facts upon which that party would have had the burden of persuasion at trial. *Id.* at 380-381. Additionally, where, as here, a defendant raises an affirmative defense, a claimant's right to judgment depends on establishing that the

affirmative defense fails as a matter of law. *Id.* at 381. Although a claimant must establish all of the facts necessary to his claim in order to merit summary judgment, the affirmative defenses may be defeated by establishing that any one of the facts necessary to support the defense is absent. *Id.* *ITT Commercial* also guides the trial court's evaluation of the summary judgment motion:

> The adage that the record is viewed "in the light most favorable to the non-movant" means that the movant bears the burden of establishing a right to judgment as a matter of law on the record as submitted; any evidence in the record that presents a genuine dispute as to the material facts defeats the movant's prima facie showing. Similarly, the rule that the non-movant is "given the benefit of all reasonable inferences" means that if the movant requires an inference to establish his right to judgment as a matter of law, and the evidence reasonably supports any inference other than (or in addition to) the movant's inference, a genuine dispute exists and the movant's prima facie showing fails. Finally, the phrase "all facts that are not contradicted are taken as true" means, first, that the movant must establish that the material facts are not in genuine dispute; materials submitted by the movant that are themselves, inconsistent on the material facts defeat the movant's prima facie showing. Second, if there is no contradiction and the movant has shown a right to judgment as a matter of law, the non-movant must *create* a genuine dispute by supplementing the record with competent materials that establish a plausible, but contradictory, version of at least one of the movant's essential facts. Therefore, it is not the "truth" of the facts upon which the court focuses, but whether those facts are disputed. Where they are not, the facts are admitted for purposes of analyzing a summary judgment motion.

Id. at 382 (emphasis original).

III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THEIR CLAIMS

As to all three counts of their petition, Plaintiffs can show entitlement to judgment as a matter of law and that there is no genuine dispute about the material facts upon which they have the burden of persuasion.

Background and Nature of the Claims

In 1994, Missouri enacted a sexual offender registration statute, informally called

Megan's Law, requiring registration by certain sex offenders with their local sheriff's department. L. 1994, S.B. No. 693, § A (§ 1, subsecs 1, 2), eff. January 1, 1995, originally codified at MO. REV. STAT. §§ 566.600-566.620. As revised, Missouri's sex offender registration law is now codified at MO. REV. STAT. §§ 589.400-589.425. Stip. ¶ 79.

SORA provides that the chief law enforcement official of each county shall maintain, for all offenders registered in his county, a complete list of the names, addresses and crimes for which such offenders are registered ("short list"), and shall forward the completed offender registration form ("long list") to the MSHP which is to enter the information into the Missouri Uniform Law Enforcement System ("MULES"). The MSHP also operates a sex offender registry website. Stip. ¶ 83. Any person may request the short list from the chief law enforcement officer of any county. The statute contains no restrictions as to what any person may do with that list. Missouri does not regulate public access to publicly available information that has been provided by registrants under SORA based on any assessment of the level of dangerousness of an individual offender. Stip. ¶ 84. Anyone who is required to register and does not meet SORA's requirements may be charged with a crime. Stip. ¶ 82.

Even though Article I, Section 13 of the Missouri Constitution provides: "That no . . . law . . . retrospective in its operation . . . can be enacted", as passed in 1994 and subsequently amended, SORA reaches back to July 1, 1979, to include "any person" who was convicted, found guilty of or pled guilty to committing certain offenses. Stip. ¶¶ 85, 81. However, on June 30, 2006, the Missouri Supreme Court decided *Doe v. Phillips*, 194 S.W.3d 833 (Mo. *banc* 2006), in which it "determined that a law requiring registration as a sex offender for an offense that occurred prior to the registration law's effective date was retrospective in

operation in violation of Mo. Const. article I, section 13." *Doe v. Blunt*, 225 S.W.3d 421, 422 (Mo. *banc* 2007) (*Blunt*). As to the retrospective operation argument, the *Phillips* court held:

> The Does are correct that the portions of the law imposing an affirmative duty to register based solely on pleas or convictions for conduct committed prior to enactment of Megan's Law on January 1, 1995, some eleven and one-half years ago, violates Missouri's constitutional prohibition of laws "retrospective in . . . operation." To this extent, *and only to this extent,* Megan's Law's registration requirements may not be enforced as to this small group of persons.
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> This invalidation is very limited in nature. SVPs are still fully required to register and comply with all aspects of Megan's Law because their obligations are based on findings that they are SVPs and not merely on pre-Megan's Law criminal conduct. Persons who pled or were found guilty after January 1, 1995, or who committed additional crimes subject to Megan's Law after that date, are fully subject to Megan's Law's relevant requirements.
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> Here, however, the Does are not complaining that they have been held or will be held criminally liable for failing to register. They are complaining about application of the registration requirement to them, based solely on their pre-act criminal conduct. As to all but Jane Doe III, who was not convicted until 1998, the application of that requirement truly is retrospective in its operation. It looks solely at their past conduct and uses that conduct not merely as a basis for future decision-making by the state, in regard to things such as the issuance of a license, or as a bar to certain future conduct by the Does, such as voting. Rather, it specifically requires the Does to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on their offenses prior to its enactment. This violates the standard set out in [*Jerry-Russell Bliss v. Hazardous Waste*, 702 S.W.2d 77 (Mo. banc 1985)] and violates our constitutional bar on laws retrospective in operation.

Phillips, 194 S.W.3d at 838 (emphasis by the court), 852. Stip. ¶ 86.

In June, 2007, *Phillips* was applied by the Missouri Supreme Court in *Doe v. Blunt*, 225 S.W.3d at 422. Doe had pled guilty to a misdemeanor violation of MO. REV. STAT. § 573.060, public display of explicit sexual material, in May, 2004, when registration was not

required for those convicted of this offense. However, in August, 2004, the law changed to require those convicted of public display of explicit sexual material to register as a sex offender. When Doe did not register, a probation violation report was filed on him. Doe commenced a declaratory judgment action to determine his obligation to register. He argued that applying the revised registration statute to him would violate the Missouri constitutional prohibition on retrospective laws. Recognizing that its decision in *Phillips* controlled, the Missouri Supreme Court held that Doe had no obligation to register because the new law imposed a new duty, and, therefore, was an impermissible retrospective law. *Id.* *Blunt* makes apparent that *Phillips* will be applied by the Missouri Supreme Court as Plaintiffs suggest, particularly with respect to Count III.

Simply stated, the lesson of *Phillips* is that SORA's registration requirements cannot be imposed on persons because of their "pre-Act criminal conduct." *Phillips*, 194 S.W.3d at 852. To do so is impermissible because it "looks solely at their past conduct and uses that conduct" to require them to register. *Id.* SORA "specifically requires the Does to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on their offenses prior to its enactment." *Id.* That principle applies regardless of whether the person's offense occurred elsewhere or whether it was prosecuted under military or federal law. The principle also applies, as *Blunt* makes obvious, to amendments to SORA which bring more groups of offenders, including misdemeanor offenders, within its reach. Such amendments cannot be imposed on misdemeanor offenders whose criminal conduct was prior to the effective date of those amendments.

In each of the three counts, application of *Phillips* to the uncontroverted facts leads to

the conclusion that the Does are being required to register under SORA in violation of their right under the Missouri Constitution to be free from retrospective application of a law. Thus, judgment as a matter of law is appropriate; summary judgment with declaratory and injunctive relief should be granted.

A. Count I - Out-of-State Offenders (John Does I-V, VIII, and IX)[2]

The Count I Plaintiffs, John Does I-V, VIII, and IX, are convicted sex offenders, convicted in other states, convicted prior to January 1, 1995, in states other than Missouri, but now living in the State of Missouri. Some of the plaintiffs moved to Missouri prior to January 1, 1995[3], and others have moved to Missouri after January 1, 1995[4]. Stip. ¶ 7. John Does I, II, III, V, VIII, and IX are being required to register and information about them appears on the State sex offender website. Stip. ¶¶ 15, 20, 27, 28, 37, 38, 56, 65, and 66. Information about Does I, II, V, VIII, and IX, or a link to the State's website appear on county or other local websites. Stip. ¶¶ 15, 20, 38, 57, and 66. Information about John Doe IV appears on the MSHP's "exempt registry"[5]; at the time of filing, his information was displayed on Platte County, Missouri's website, although it was removed shortly thereafter. Stip. ¶ 33.

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[2]The conviction of John Doe II from the *Phillips* case was from Kansas, *see* 194 S.W.3d at 848, but that fact did not factor into the arguments of the parties or the decision of the court. Stip. ¶ 86.

[3]They are: Doe I, 1993, Stip. ¶ 13; Doe III, 1993, Stip. ¶ 24; Doe IV, 1988, Stip. ¶ 31; Doe VIII, 1993, Stip. ¶ 54; and Doe IX, 1973 or 1974, Stip. ¶ 61..

[4]They are: Doe II, 2000, Stip. ¶ 18; and, Doe V, 2004, Stip. ¶ 37.

[5] <http://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CRID/SOR/SORPage.html> (visited November 29, 2007)

The application of SORA to these Does because of conduct and convictions that occurred prior to the January 1, 1995, effective date of SORA "specifically requires them to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on their offenses prior to its enactment." *Phillips*, 194 S.W.3d at 852. It makes no difference that their offenses and convictions occurred in other states. Missouri's SORA cannot be the basis of a requirement that the Does with out-of-state offenses register given that those offenses occurred before January 1, 1995. Requiring these Does to comply with SORA is a violation of their right under the Missouri Constitution not to be subjected to a law retrospective in operation and, accordingly, this Court should grant judgment in favor of Does I-V, VIII, and IX, declare application of SORA to them to be unconstitutional, and enjoin efforts to require them to register or otherwise enforce SORA's provisions against them..

B. Count II - Military Conviction (John Doe VI)

The Count II Plaintiff, John Doe VI, is a convicted sex offender, convicted in a military courts marital prior to January 1, 1995, specifically on February 21, 1985. Stip. ¶¶ 8, 41. Doe VI's offenses took place in Florida. Stip. ¶ 41. Doe VI was incarcerated in Leavenworth, Kansas, and while in prison, he filed federal and state income tax returns jointly with his wife, who had established a home in Ferrelview, Platte County, Missouri. Stip. ¶¶ 41, 42. On release from prison on July 1, 1996, Doe VI moved into the Ferrelview home. Stip. ¶ 43. Doe VI and his wife have since moved to Independence, Missouri. Stip. ¶ 44. Missouri state and Jackson County authorities construe SORA to require Doe VI to register because they do not consider *Phillips* to be applicable to persons convicted in a

military courts martial. Stip. ¶ 45. The address, personal identifying information, conviction information, and photograph of John Doe VI appear on the MSHP website, where he is designated as "compliant", and his address information appears on the Jackson County Sexual Offender website. <http://www.mshp.dps.mo.gov/CJ38/Search> (visited June 25, 2007); <http://www.co.jackson.mo.us/JCSOR/> (visited June 25, 2007). Stip. ¶ 46.

The application of SORA to Doe VI because of conduct and convictions that occurred prior to the January 1, 1995, effective date of SORA "specifically requires [Doe VI] to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on [his] offenses prior to its enactment." *Phillips*, 194 S.W.3d at 852. Requiring Doe VI to comply with SORA is a violation of his right under the Missouri Constitution not to be subjected to a law retrospective in operation and, accordingly, this Court should grant judgment in favor of Doe VI on Count II, declare application of SORA to Doe VI to be unconstitutional, and enjoin efforts to require him to register or otherwise enforce SORA's provisions against him.

C. Count III - Misdemeanor Convictions and Conduct (John Does VII, X, and XI)

Phillips and *Blunt* notwithstanding, Defendants contend that the Count III Does must comply with SORA even though their offenses and/or convictions occurred before the effective date of the legislation that added those offenses to those requiring registration. Two of the Count III Plaintiffs, John Does VII and XI, are convicted sex offenders, convicted of misdemeanor sex offenses prior to the effective dates of legislation amending SORA to

require registration of those convicted of various misdemeanor offenses.[6] State authorities have determined that John Doe VII and John Doe XI are required to register under SORA because they are required to register under federal law, even though the dates of their offenses and convictions are earlier than the effective date of the legislation adding the misdemeanor offenses of which they were convicted to the list of offenses in SORA requiring registration. Stip. ¶¶ 50, 77.

The other Count III Plaintiff, John Doe X, was convicted of a misdemeanor sex offense after the effective date of the legislation amending SORA to require registration of those convicted of various misdemeanor offenses, but for conduct that occurred before the effective date of that legislation.[7] Stip. ¶¶ 9, 48, 68, 73. State authorities have determined that John Doe X is required to register because his offense was a registrable offense at the time he was convicted. Stip. ¶ 70.

1. Does VII and XI

As to Does VII and XI, Defendants essentially concede that the application of the SORA amendments requiring registration to those whose misdemeanor sex offense conviction predates the effective dates of the relevant amendments would be a retrospective

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[6]John Doe VII pled guilty on May 26, 1999, and John Doe XI pled guilty on August 23, 1999, prior to the August 28, 2000, effective date of the amendment requiring registration of persons who had committed any misdemeanor offense of Chapter 566. Stip. ¶¶ 48, 73, 94, 95.

[7]The conduct giving rise to John Doe X's guilty plea, sexual misconduct in the first degree, occurred sometime in 1999, but his guilty plea did not take place until July 23, 2002. Stip. ¶ 68. Thus, the conduct took place before, but the guilty plea after, the August 28, 2000, effective date of the amendment requiring registration of persons who had committed any misdemeanor offense of Chapter 566. Stip. ¶ 94.

application of the law and that, therefore, SORA alone cannot be the basis for requiring them to register. However, Defendants' argument that federal law (the Sex Offender Registration and Notification Act, 42 U.S.C. § 16901 *et seq.*, "SORNA") requires them to register under SORA should be rejected.

SORNA includes special provisions for cases in which the highest court of a jurisdiction has held that the jurisdiction's constitution is in some respect in conflict with SORNA requirements:

> (1) In general
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> When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.
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> (2) Efforts
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> If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.
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> (3) Alternative procedures
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> If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

42 U.S.C. § 16925(b). See also, National Guidelines for Sex Offender Registration and

Notification, U.S. DOJ, Office of the Attorney General (May 2007) at 11. This statutory language renders SORNA's requirement subordinate to the Missouri Constitution and the holdings of *Phillips* and *Blunt*, and, accordingly, those excused from the registration obligation under *Phillips* are not required to register because of the enactment of SORNA.

Senator Kennedy's comments during consideration of H.R. 4472 and Senate Amendment 4686 add support to this argument:

> . . . section 125 of the compromise is very important. Each State will face challenges in the implementation of these new Federal requirements, and States should not be penalized if exact compliance with the act's requirements would place the State in violation of its constitution or an interpretation of the State's constitution by its highest court.
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> The Massachusetts Supreme Judicial Court has concluded that offenders are entitled to procedural due process before being classified at a particular risk level and before personal information about them is disseminated to the public. Massachusetts has been vigilant in implementing a comprehensive and effective sex offender registry, and it should not lose much needed Federal funding where there is a demonstrated inability to comply with certain provisions of this new Federal law.
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> No State should be penalized and lose critical Federal funding for law enforcement programs as long as reasonable efforts are under way to implement procedures consistent with the purposes of the act.

152 CONG REC. S. 8023 (daily ed. July 20, 2006) (statement of Sen. Kennedy); <http://thomas.loc.gov/cgi-bin/query/F?r109:7:./temp/~r109bxgutA:e93520:> (visited August 9, 2007). These comments emphasize that Congress contemplated that application of SORNA would have to take into consideration the dictates of a State's constitution and the interpretation of that constitution by its highest court.

In sum, like SORA, SORNA "impose[s] an affirmative obligation on [offenders] to register upon release and then regularly thereafter. The obligation to register by its nature imposes a new duty or obligation. . . . the application of that requirement truly is

retrospective in its operation." *Phillips*, 194 S.W.3d at 852. Thus, given Congress' direction to take into consideration the dictates of a State's constitution and the interpretation of that constitution by its highest court, SORNA cannot be used to circumvent the Missouri Constitution.

2. Doe X

As for Doe X, Defendants contend that although the conduct constituting the sex offense for which registration is being required of Doe X took place before the effective date of the legislation requiring registration for that particular misdemeanor offense, because the *conviction* was not until after the effective date, Doe X must register. Stip. ¶ 70. Doe X disagrees, and this Court should reject the argument, because the rationale and language of *Phillips* support the construction that it is the date of the *conduct* that is key, not the date of the conviction.

There is no doubt that the *Phillips* opinion employs the term "conviction", particularly when describing who remains subject to SORA's registration requirements.[8] But when the Missouri Supreme Court discusses the rationale underlying its decision, it becomes undeniable that the crucial date that must be prior to SORA's effective date for the law to operate retrospectively is the date of the conduct, not the date of the conviction or plea:

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[8]*See*, *e.g.*, *Phillips*, 194 S.W.3d at 838 ("Persons who pled or were found guilty after January 1, 1995, or who committed additional crimes subject to Megan's Law after that date, are fully subject to Megan's Law's relevant requirements."); at 852 ("As to all but Jane Doe III, who was not convicted until 1998, . . ."); at 852-53 (". . . to invalidate Megan's Law's registration requirements as to, *and only as to*, those persons who were convicted or pled guilty prior to the law's January 1, 1995, effective date. . . . the law is fully in effect as to all persons whose pleas or judgments of conviction were entered on or after its effective date of January 1, 1995 . . ...").

> The Does are correct that the portions of the law imposing an affirmative duty to register based solely on pleas or convictions *for conduct committed prior to enactment* of Megan's Law on January 1, 1995, . . . violates [sic] Missouri's constitutional prohibition of laws retrospective in operation." . . . registration requirements may not be enforced as to this small group of persons.
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> * * *
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> They [the Does] are complaining about application of the registration requirement to them, based solely on their pre-act criminal *conduct*. As to all but Jane Doe III, who was not convicted until 1998, the application of that requirement truly is retrospective in its operation. *It looks solely at their past conduct* and *uses that conduct* not merely as a basis for future decision-making by the state, ... Rather, it specifically requires the Does to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, *based* solely on their *offenses* prior to its enactment. This violates the standard set out in *Bliss* and violates our constitutional bar on laws retrospective in operation.

Phillips, 194 S.W.3d at 838, 852 (emphases added). That *conduct* constituting a registrable sex offense occurred is what imposes SORA's requirements; a conviction or plea alone does not do it – there must be conduct constituting a registrable offense as SORA defines it. What is being "looked" at in order to subject the offender to SORA's requirements is his or her *conduct* – the fact that a registrable sex offense occurred – not the fact of the ensuing conviction or plea.

Neither SORNA nor the fact that Doe X's conduct was before, but his conviction after the effective date of the legislation requiring registration of misdemeanor offenders give this Court reason not to rule in favor of Does VII, X, and II. The application of SORA to these Does because of conduct and convictions that occurred prior to the August 20, 2000, effective date of legislation requiring registration of misdemeanor offenders "specifically requires them to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on their offenses prior to its enactment."

Phillips, 194 S.W.3d at 852. Requiring these Does to comply with SORA registration requirements for misdemeanor offenders is a violation of their right under the Missouri Constitution not to be subjected to a law retrospective in operation and, accordingly, this Court should grant judgment in favor of Does VII, and X, and XI, declare application of SORA to them to be unconstitutional, and enjoin efforts to require them to register or otherwise enforce SORA's provisions against them.

IV. ALL OF KEATHLEY'S AFFIRMATIVE DEFENSES FAIL FOR LACK OF PROOF OF A NECESSARY FACT

Defendant Keathley pleads eight affirmative defenses. DEFENDANT KEATHLEY'S AMENDED ANSWER TO SECOND AMENDED PETITION ("KEATHLEY AM. ANS. TO SECOND AM. PET.") at 14-16. As observed, *supra* at 4-5?, a claimant's right to judgment depends on establishing that all affirmative defenses fail as a matter of law, too. *ITT Commercial*, 854 S.W.2d at 381. Affirmative defenses may be defeated by establishing that any one of the facts necessary to support the defense is absent. *Id.*

First Defense

Defendant Keathley's first defense is that Plaintiffs have failed to state a claim upon which relief can be granted. KEATHLEY AM. ANS. TO SECOND AM. PET. at 14. However, the discussion in Section III demonstrates that Plaintiffs are entitled to judgment as a matter of law on each of their claims. It follows that if, as Plaintiffs contend, they are entitled to judgment as a matter of law, they certainly have stated a claim upon which relief can be granted. Because Plaintiffs are entitled to judgment as a matter of law, this defense fails.

Second Defense

Keathley maintains that to the extent Plaintiffs might request monetary relief, as a

public official acting within his discretionary capacity, he is protected by official immunity. KEATHLEY AM. ANS. TO SECOND AM. PET. at 14. Plaintiffs do not concede that Keathley is acting in a discretionary capacity or that an official immunity would apply. But, even assuming *arguendo*, that both are true, because Plaintiffs' Petition does not seek monetary damages, *i.e.*, a fact necessary to the applicability of the defense – an existing claim for money damages – is absent, this defense is inapplicable and fails.

Third Defense

Keathley maintains that to the extent Plaintiffs might request monetary relief, he is protected by the public duty doctrine because he was acting pursuant to a duty owed to the general public. KEATHLEY AM. ANS. TO SECOND AM. PET. at 15. Plaintiffs do not concede that the public duty doctrine would necessarily apply. But, because Plaintiffs' Petition does not seek monetary damages, *i.e.*, a fact necessary to the applicability of the defense – an existing claim for money damages – is absent, this defense is inapplicable and fails.

Fourth Defense

Keathley claims that to the extent Plaintiffs' claims are based upon a doctrine of respondeat superior, they must be dismissed because *respondeat superior* "is not a sufficient basis for liability in suits brought against public employees." *Id.* Plaintiffs' claims do not rely on *respondeat superior* as a basis for liability, so a fact necessary to the applicability of the defense – reliance on *respondeat superior* – is absent, and thus this defense is inapplicable and fails.

Fifth Defense

Keathley claims that to the extent Plaintiffs seek monetary relief against him in his

official capacity, he is entitled to sovereign immunity. *Id.* Plaintiffs claims do not seek monetary damages. Therefore, a fact necessary to the applicability of the defense – an existing claim for money damages – is absent, and accordingly, this defense is inapplicable and fails.

Sixth Defense

Here, Keathley incorporates "each and every additional affirmative defense that may be uncovered or made known during the investigation and discovery in this case" and "reserves the right to amend his answer to include affirmative defenses at the time they are discovered." *Id.* No facts exist to support any of these heretofore unpled defenses and so they fail.

Seventh Defense

Here, Keathley incorporates affirmative defenses pled by other defendants, but no other defendants raised any affirmative defenses. Accordingly, a fact necessary to the defense – the existence of at least one affirmative defense pled by some other defendant – is absent, and so the defense fails. *Id.*

Eighth Defense

Keathley claims he is privileged to fulfill his duties because such acs are performed in the course of his "public responsibilities." *Id.* But there is no "public responsibility" to violate the Missouri constitution and Defendant has cited no authority for such an absurd notion.

Every affirmative defense pled by Keathley fails for at least one reason, factual or legal. Accordingly, not only have Plaintiffs established the elements of their claims, but they

have surmounted the additional hurdle of defeating Defendant's affirmative defenses as well.

CONCLUSION

Plaintiffs appropriately seek declaratory relief in that they have a legally protectible interest in their right under the Missouri Constitution to be free from the retrospective application of SORA at stake, their interests are adverse to Defendants' interests in implementing and enforcing SORA, and this Court can resolve the controversy with its decree. Likewise, injunctive relief is appropriate because the right Plaintiffs seek to protect is a substantial one; the violation of that right is wrongful and injurious in that it imposes unconstitutional burdens and obligations on Plaintiffs; and they are without adequate remedy at law and suffer irreparable harm in that no damages can compensate for the unconstitutional imposition of an obligation to register for the remainder of one's life. There is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law because application of SORA as to them is retrospective, and, thus, is prohibited by the Missouri Constitution, in that the conduct for which they are being required to register predated the effective date of the legislation being invoked as requiring registration. For the reasons herein set forth, Plaintiffs seek this Court's order granting their motion for summary judgment on Counts I-III of their Second Amended Petition for Declaratory and Injunctive Relief, declaring SORA unconstitutional as applied to Plaintiffs, and enjoining any prosecution against Plaintiffs for failure to comply with SORA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via electronic mail and First Class U.S. Mail, postage prepaid, this ______day of December, 2007, on counsel listed below:

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