

CASE NO. 25-1892

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JANE DOES, et al.,

Plaintiffs-Appellants,

v.

DAVID FLANNIGAN, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri
No. 2:21-CV-04102-BP

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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SUMMARY OF THE CASE & REQUEST FOR ORAL ARGUMENT

This case presents novel questions of great importance to all Missourians, but in particular, the least popular ones: those whose homes are listed on the Missouri's public sex offense registry ("SORA") due to a past conviction of themselves, a spouse, or a parent.

Aided by unrebutted expert witness testimony and admissions from Defendants-Appellants, the Plaintiffs-Appellants proceeded to a bench trial on whether the registry constituted punishment given the documented lack of a public safety function, the impacts that it has on spouses and children, and the stark differences in society, technology and the law itself in the more than two decades since the Supreme Court last considered the question. The court below erred when it disregarded the evidence, misstated the record, misapplied the applicable standards, and declined to consider evidence of impacts on family members in concluding that mandatory lifetime registration was neither punitive, nor violated Substantive Due Process.

The court below further erred when it rejected arguments that portions of SORA were vague because it found Defendants-Appellees' interpretations of the law were not vague, failed to consider an overbreadth claim, and dismissed claims of family members *sue sponte*.

Given the novelty of the issues raised, Plaintiffs-Appellants respectfully request that the Court set the case for oral arguments with forty-five (45) minutes per side.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants brought federal constitutional claims below pursuant to 42 U.S.C. § 1983. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs-Appellants timely filed a Notice of Appeal on April 30, 2025, App. 289, R. Doc. 242,¹ from the court's March 31, 2025 Order and Judgment disposing of the remaining claims. App. 268, R. Doc. 242; App. 287, R. Doc. 241. Because the Order below being appealed from is a final order, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

This Court's jurisdiction encompasses not only the Court's final Order, but also the trial court's prior orders on April 17, 2023, App. 210, R. Doc. 86, and June 18, 2024, App. 237, R. Doc. 162, as they merge into the judgment being appealed. *Greer v. St. Louis Reg'l Med. Ctr.*, 258 F.3d 843, 846 (8th Cir. 2001).

¹ "App." refers to the parties' Joint Appendix, "R. Doc." refers to the docket entries below, "Tr. C." refers to the transcript of the November 5, 2024 conference, R. Doc. 204, "Tr. I" and "Tr. II" refer to the transcript of trial proceedings on March 24 and 25, 2025, R. Docs. 247 and 248, respectively. Several items in the Joint Appendix, such as the trial exhibits and depositions of the expert witnesses which were received in lieu of live testimony, are not included in the court's electronic record and will be referred to by their location in the Joint Appendix and a citation to the exhibit list entry below, R. Doc. 233 (Plaintiffs') and R. Doc. 234 (Defendants').

STATEMENT OF THE ISSUES

1. Are effects on family members, *inter alia*, the attempted suicide of one's child, directly traceable to the operation of SORA, relevant for a court to consider under the prevailing constitutional test of whether SORA is punitive?

Most Apposite Authorities:

Smith v. Doe, 538 U.S. 84 (2003)

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)

2. Is evidence regarding recidivism and the public safety impact of SORA—a law premised on the belief of high rates of recidivism—relevant in analyzing SORA's relationship with a non-punitive goal?

Most Apposite Authorities:

Smith v. Doe, 538 U.S. 84 (2003)

Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016)

3. Do differences in the legal and technological landscape of SORA since 2003 alter the constitutional analysis as to whether or not it is punitive?

Most Apposite Authorities:

Free Speech Coalition Inc. v. Paxton, 145 S. Ct. 2291 (2025)

Packingham v. North Carolina, 582 U.S. 98 (2018)

4. Does mandatory lifelong registration as a sex offender violate Substantive Due Process when applied to people who present no more risk of committing a sex offense than any other member of the community?

Most Apposite Authorities:

Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003)

Powell v. Keel, 860 S.E.2d 344 (S.C. 2021)

5. Does a complaint that alleges requirements of SORA that mandate the disclosure of online identifiers targets excessive amounts of speech and chills the willingness of people subject to it to engage in protected speech state an overbreadth claim?

Most Apposite Authorities:

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)

6. Does law enforcement's interpretation and application of a vague state criminal statute imposing restrictions on speech insulate that criminal statute from a vagueness challenge?

Most Apposite Authorities:

Kolender v. Lawson, 461 U.S. 352 (1983)

Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)

7. Did the trial court err when it dismissed, without notice or an opportunity to be heard on the question, the claims of family members that SORA violates their constitutional rights?

Most Apposite Authorities:

Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir. 1991)

STATEMENT OF THE CASE

I. Introduction

This case is about protecting the public. Given Appellants' identities and the posture of the case, that might seem a strange way to begin. But it's true.

Appellants are all either individuals who have been convicted of a crime requiring registration on Missouri's sex offense registry ("SORA"), or are married to them, or were born to them. Mr. Flannigan, *et al.* (hereinafter, the "Patrol") are all members of Missouri's Highway Patrol, and are statutorily charged with operating and maintaining the registry that is at the heart of this case. All are members of the public.

Missouri's registry, like many similar statutory schemes around the country, began as a public safety project in response to high-profile and horrific crimes against children in the early and mid-1990's. App. 217, R. Doc. 86, at 8. The core premise that animated these laws was the belief that rates of reoffending were "frightening and high," *McKune v. Lile*, 534 U.S. 24, 34 (2002), and that, consequently, a system that alerted the public to the presence of such individuals in their respective communities would advance a public safety objective. At the time, this belief was rational, and in the service of an undeniably laudable goal.

Nearly a decade after laws like Missouri's SORA were on the books, constitutional challenges to them filtered up to the Supreme Court. Anchored to the beliefs that formed

the etiology of these laws, the Supreme Court held in 2003's 6-3 decision, *Smith v. Doe*, 538 U.S. 84 (2003), that Alaska's first-generation registration statute was not so punitive as to render it punishment within the meaning of the Ex Post Facto Clause, adopting a non-exhaustive, multi-factor test from an earlier case, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Smith*, 538 U.S. at 97.²

In reaching that conclusion, the assumptions the Court made regarding risk of recidivism and length of registration being keyed to that risk, the lack of onerous registration procedures,³ the presumed public safety benefits of the registration law, and the reach of the law in 2003, all played central roles in its finding that Alaska's law was not punitive. *Id.*

Since their inception, and continuing after the *Smith* decision, state legislators have serially amended these laws to require more information, to require more updates be made frequently and in-person, to lengthen registration periods, and to impose significant criminal penalties on people who violate often extremely technical requirements. Carpenter & Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 U.C. L.J. 1071 (2012).

² The respondent in *Smith* subsequently brought an Ex Post Facto claim in Alaska on state constitutional grounds and prevailed. *Doe v. Alaska*, 189 P.3d 999 (Alaska 2008).

³ Of note, John Roberts—arguing the case for Alaska—described the process as no more arduous than filling out a Price Club application. *Smith v. Doe*, No. 01-729, Oral Argument at 11, (Nov. 13, 2002).

While the initial version of Missouri’s SORA was similar to the Alaskan law considered in *Smith*, it has also undergone significant revisions since the 1990’s. These revisions have expanded the offenses requiring registration, lengthened registration periods, and made the process of registration itself more burdensome and technical. APP. 28, Doc. 48 at 28. Presently, SORA categorizes individuals into one of three tiers—I, II, or III—with differing lengths of registration for each tier. RSMo § 589.414. Lifetime registration with no opportunity for relief is required of people placed into Tier III unless adjudicated as delinquent, whereas a deregistration procedure is available for people in Tiers I and II if they can demonstrate, *inter alia*, that they do not pose a public safety risk. RSMo § 589.401. Placement into a tier depends entirely on the title of offense that a person was convicted of. RSMo § 589.400; App. 1290, R. Doc. 233.

People subject to SORA must provide and continuously update a wide array of information, on pain of felony prosecution. RSMo § 589.414, RSMo § 589.425. Relevant to this appeal, they must provide information about any new or changed “online identifier.” RSMo § 589.414.9. This term, in turn, is defined in RSMo § 43.651 “electronic mail address and instant message screen name, user ID, cell phone number, or wireless communication device number or identifier, chat, or other internet communication name, or other identity information.” Rather than permitting mail-in updates to information as was the case in *Smith*, those subject to it, are “compel[led] . . . to interrupt [their] lives with

great frequency in order to appear in person before law enforcement to report even minor changes to their information.” *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016). The process of in-person registration itself can take hours, and can be very difficult to accomplish for people who lack transportation. Tr. I at 110-111; Tr. II at 274.

There are, as of this filing, nearly twenty thousand people on Missouri’s SORA, a number which has steadily increased by about 3% per year since 2008. App. 148, R. Doc. 48-1. It is the fourth largest registry in the nation. App. 158, R. Doc. 48-2, at 3. As the record reflects here, SORA imposes significant consequences not only on anyone required to register, but on their family members as well. App. 163-166, R. Doc. 48-2, at 11. The amount of public safety resources that SORA consumes—both in terms of processing even minor changes to information, and in prosecuting and jailing people who fail to comply—is substantial. App. 158-160, R. Doc. 48-2, at 3-5.

While the Supreme Court has yet to weigh in directly again on the questions they were presented with in *Smith*, the unanimous opinion in *Packingham v. North Carolina*, 582 U.S. 98 (2018), striking down a social media ban, noted the following:

Of importance, the troubling fact that the law imposes severe restrictions on persons who have already served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.

Id. at 107. This “troubling fact” is the central issue in this appeal.

a. Changes in Society, Technology & Implementation of SORA Laws

The last twenty years have seen seismic shifts in our society in terms of technology and its centrality to our lives. Those changes, in turn, have impacted the implementation of SORA and its attendant impacts on registrants and their spouses and children.

In 2002, only 15% of Americans had access to broadband internet, and only 59% of adults used the internet at all, compared with 93% today. App. 187-188, R. Doc. 48-4, at 16. While only 6% of Americans said they would face difficulty in giving up a Blackberry (themselves anachronisms) in 2002, 85% of Americans own a smartphone today. *Id.* Google, once a competitor of Ask Jeeves, is now a verb. Social media platforms—which themselves played an instrumental role in the harassment Appellants have endured—“have gone from unheard-of to inescapable. They structure how we relate to family and friends, as well as to businesses, civic organizations, and governments.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 716 (2024). While the Court in *Smith* spoke of the town square as being a physical place, it is now a digital one. *Packingham*, 582 U.S. at 99 (referring to social media in particular as “the modern public square.”)

The trend towards increased reliance on technology has only accelerated in recent years, particularly in wake of the COVID-19 pandemic, rendering our communities increasingly reliant on screens and wi-fi to do the things we used to do in-person. App. 188, R. Doc. 48-4, at 17. Emerging technologies like facial recognition and artificial intelligence

are currently altering our technological landscape even more dramatically, and have direct bearing on the issues raised herein. App. 371-372, R. Doc. 233.

So, too, have these changes been visited upon how SORA is implemented and how related data is used. It is routinely scraped, repackaged, and commodified by third-parties – indeed, the Patrol makes it trivial for commercial entities to do this, and to subsequently push this data to consumers. App. 368-369., R. Doc. 233. A person’s registry status can be, and is, regularly encountered on the internet without anyone intending to undertake a visit to the “official archive,” as the *Smith* Court envisioned. *Smith*, 538 U.S. at 99. Because SORA is indexed by search engines, a person searching for the address of a business, for example, will quickly learn if anyone on Missouri’s SORA works there, leading to predictable outcomes. App. 183, R. Doc. 48-4; App. 402, R. Doc. 233. A Google search of nothing more than someone’s name will reveal their registry status at or near the top of those results, as is the case with all Appellants. App. 1200-1217, R. Doc. 233. As discussed further below, these technological changes are not just interesting in the abstract, but necessarily alter the legal analysis.

b. Advances in Scientific Understanding

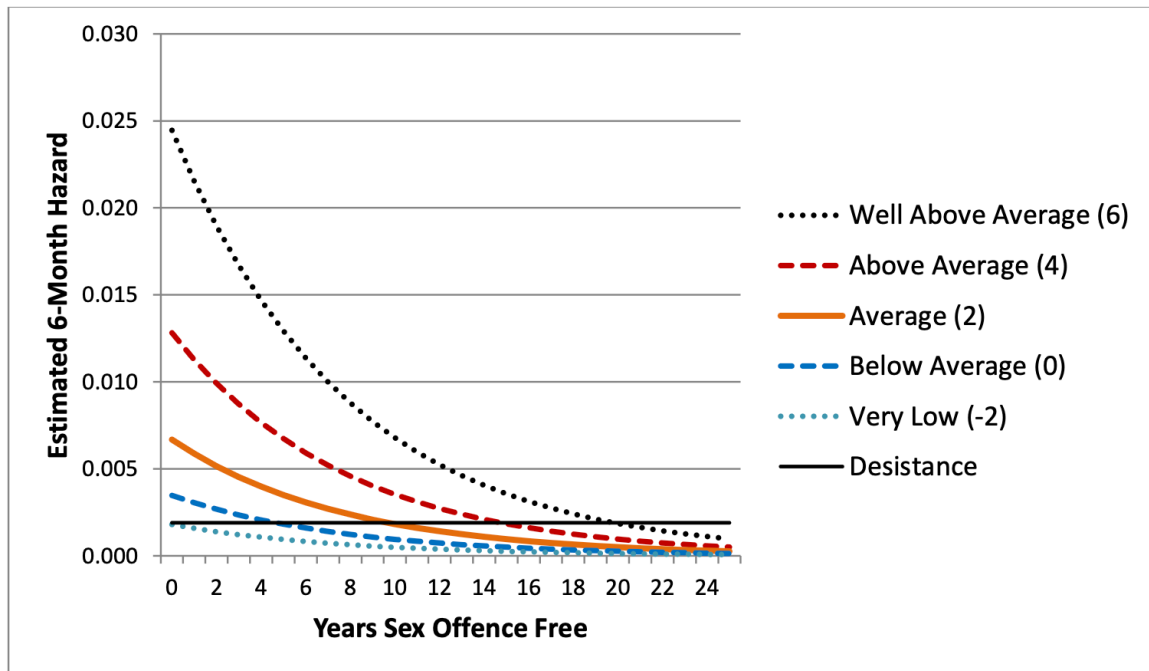
As our technology—and our reliance on it—has advanced, so too has our understanding of the world around us. We have learned that the Supreme Court was wrong. Its finding about recidivism in *McKune*, which was later relied on in *Smith*, is

traceable to an unscientific 1980's Psychology Today article from a treatment provider marketing his own services. Ellman & Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMT. 495 (2015). While author of that article subsequently disavowed how it was used by the Court, its impact on public perception (and the judiciary) endures. Jacob Sullum, *"I'm Appalled," Says Source of Phony Number Used to Justify Harsh Sex Offender Laws*, REASON, Sept. 14, 2017.

What decades of research have found is that the vast majority of people convicted of a sex offense are never convicted of a subsequent offense. App. 104, R. Doc. 48-1, at 2. Most people convicted of a sex offense have a recidivism rate of under 10% after five years. App. 130, R. Doc. 48-1, at 28. While risk of recidivism varies based on a number of factors that are ascertainable, the type of conviction, the age of the victim, and the criminal sentence that was imposed are not amongst them. App. 120, R. Doc. 48-1, at 18.

Importantly, this risk is not static throughout a person's lifetime, but declines as people age and the longer that they remain in the community without a new crime. App. 133-140, R. Doc. 48-1, at 31-38; App. 904, R. Doc. 233. This risk level eventually crosses a baseline desistance threshold, where an individual is no more likely to commit a new sex offense than any other member of the community. App. 138, R. Doc. 48-1, at 36; App. 904, R. Doc. 233. Most individuals convicted of a registrable offense cross this threshold

after 10 years in the community or sooner, and everyone (even those who are in the highest risk category at release) crosses it after 20 years, as illustrated in the following graph:



App. 138, R. Doc. 48-1, at 36. Nearly all reported sex crimes that are cleared by arrest—90-95%—are attributable to people without a prior conviction.⁴

This is not to say that anyone should be unbothered by recidivism. To be sure, any recidivism is a serious matter, but the relevant question for the constitutional analysis is the connection of the law with a non-punitive objective: preventing crime. In 2003, given the assumptions on which laws like SORA were based, it was rational to conclude that they would have a preventative impact. More than twenty years of research into the question,

⁴ App. 14, R. Doc. 48, at 14.

tracking the release trajectories of hundreds of thousands of people convicted of sex offenses, have concluded that offense-based registries like Missouri's SORA do not reduce recidivism. App. 760-761, R. Doc. 233; *see also Snyder*, 834 F.3d at 704 (“Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism.”); *see also* Agan & Prescott, *Offenders and SORN Laws*, in *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION* 120 (Logan & Prescott eds., 2021) (“[R]esearchers from different disciplines, working independently, have essentially failed to detect any evidence that notification reduces recidivism.”) More troublingly, available evidence suggests that the burdens that SORA imposes might have criminogenic effects, by making things like jobs and housing more inaccessible to people. App. 163-164, R. Doc. 48-2 at 8-9.

The registration of people who pose no more risk of committing a crime than any other member of the community, in turn, necessarily undermines any public safety function that the law might otherwise have. App. 105, R. Doc. 48-1 at 3. By being simultaneously premised on concerns about recidivism and indifferent to whether those concerns are true, the law fails to do what state legislators are careful to say that it does: protect, rather than punish.

II. The Litigation Below

a. The Parties & Specific Harms Alleged

Appellants are all people who are required to be on Missouri's SORA due to a years- and sometimes decades-old criminal adjudication, or are their spouses or children. App. 7, R. Doc. 48 at 7. None of the Appellants have been convicted of a subsequent sex offense, and aside from a conviction of John Doe IX for failing to register online identifiers (relevant to Appellants' void-for-vagueness claim), none have any subsequent contact with the criminal justice system at all. All have alleged specific harms due to the operation of SORA, as opposed to the fact of a conviction (which, in the case of Jane Doe I, she does not even have).

i. Jane Doe I, John Does II-V, S.M., J.G., Jane Doe XII

Jane Doe I is married to John Doe II, and the parent of S.M, J.G., John Doe III, IV, and V, and Jane Doe XII. She was convicted of a registrable offense in 2009 for an act that occurred in 2007. App. 33, R. Doc. 48 at 33.⁵ She was never sent to prison, received a suspended imposition of sentence, meaning that she has no conviction. *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. 1993). Her probationary term was terminated in 2013 due to good behavior and lack of public safety risk. App. 34, R. Doc. 48, at 34. She has been assessed numerous times and been found to be very low risk. App. 1224-1225, R.

⁵ The allegations in the Second Amended Complaint were subsequently verified by declarations executed by those Appellants required to register. R. Doc. 131.

Doc. 233. She has had no further arrests. She is classified as a Tier III offender and must register on SORA for the remainder of her life. App. 34, R. Doc. 48, at 34.

Ms. Doe I worked at a dialysis clinic during her initial case, was allowed to remain employed there until she first began registering on SORA. App. 34, R. Doc. 48, at 34; Tr. I at 127-128. She subsequently obtained employment at Kohl's and performed well, though was fired from that job once a complaint was received that she was on SORA – her lack of conviction notwithstanding. App. 35, R. Doc. 48, at 35; Tr. I at 128-129. Doe I largely avoided the workforce since then, believing that she would be unable to maintain employment, and instead was a stay-at-home mom and relied on her husband, John Doe II, to provide for the family, which created financial strain for the family. App. at 1328-1329, R. Doc. 239; Tr. I at 134. Her prediction about her employment opportunities proved accurate, as when she recently applied for a position with the platform Instacart to shop for people's groceries she received a notice stating that she was not eligible due to her appearance on Missouri's SORA. App. 1320, R. Doc. 233.

Despite the lack of a criminal conviction, Ms. Doe I experienced shunning of herself and her family on outings, ostracism, and threats of physical violence, with people speaking directly to her children about their mother. Tr. I at 131. Private companies have refused her service based on her status on the registry. App. 1227, R. Doc. 233; Tr. I at 131-132. She estimates that, since her registration obligation began, she has made approximately 75

in-person trips to law enforcement to register, taking approximately an hour each time. App. 37, R. Doc. 48, at 37.

Jane Doe XII, Ms. Doe I's daughter, experienced significant harassment on social media platforms where others used her mother's presence on Missouri's SORA to harass her, culminating in an order of protection. App. 37, R. Doc. 48, at 37; App. 1237-1241, R. Doc. 233. Ms. Doe herself has received harassment online due to her presence on Missouri's SORA. Tr. I at 136. Ms. Doe I was able to participate somewhat in her children's education, but this was dependent on the discretion of the superintendent at any particular time – as she was required to seek permission to even drop off or pick up her children due to her presence on SORA. App. 1329, 1228-1236, R. Doc. 233.

ii. John Doe I, Minors S.C.L.R. I, II, and III

John Doe I is a widowed single father of three children. He pled no contest to a registrable offense in Los Angeles in 1992 for allegations stemming from 1989. He received a three (3) year prison term, was paroled, and discharged from parole supervision in 1993. App. 44-45, R. Doc. 48, at 44-45. At the time of his conviction, there was no online sex offense registry. To the best of the parties' knowledge, there are no news articles regarding Mr. Doe's conviction. Outside of a background check that encompasses California convictions, the only way Mr. Doe's conviction is accessible to the public is by way of the operation of Missouri's SORA.

Mr. Doe I has had lengthy experiences of a history of harm, housing instability, and employment-related challenges stemming from the operation of California's registry. In 2015, following the suicide of his wife, Mr. Doe I moved to Missouri where he was required to register for life based on his California conviction some two decades prior. App. 45-48, R. Doc. 48, at 45-48.

In Missouri, Mr. Doe I has experienced threats of violence tied to his status on Missouri's SORA, Tr. I at 80-81, including being texted threats of violence alongside his image from the website that the Patrol operates, Tr. I at 86. Mr. Doe I reported these incidents, but nothing was done by authorities. *Id.* During the course of this litigation, his daughter, Minor S.C.L.R. II, previously popular in school, was bullied by classmates who discovered Mr. Doe I's presence on SORA, and spread the image obtained from SORA's website on social media platforms. *Compare* App. 1310 and 1253, R. Doc. 233. This bullying culminated in her suicide attempt, which she survived due to her father discovering the same and taking her to the emergency room. App. 48-49, R. Doc. 48, at 48-49; Tr. I at 83. His youngest daughter, Minor S.L.C.R. III learned of Mr. Doe's registration status when she was googling their family name for a school project, as she was not yet old enough for Mr. Doe I to have a conversation with her about his offense. App. 49, R. Doc. 48, at 49.

iii. Jane Doe X, Minor S.P., Minor K.P., and John Doe XVI

Jane Doe X is divorced and the parent of two children. In 2010 she was convicted of a registrable offense for acts that occurred in 2008. She was sentenced to a non-custodial term aside from 30 days of shock detention, the requirements of which she completed in 2015. She is also categorized as a Tier III offender and must register for the rest of her life, in addition to being monitored by GPS. Tr. II at 303-304. While Jane Doe X has a college education, she has not attempted to utilize it because she would not be able to be licensed by the state of Missouri due to her presence on SORA. Tr. I 305. Her presence on SORA led to her inability to participate in church functions, as well as was a contributing factor in her divorce from her ex-husband. Tr. I at 308. Due to her presence on Missouri's SORA, she was unable to fully participate in her children's education. App. 1306, R. Doc. 233.

iv. John Doe VI, Jane Doe II & Minor C.C.

John Doe VI is a married parent of one child. In 2000 he pled guilty to registrable offenses for acts that occurred in 1998 and 1999 and received a seven (7) year prison term. He was paroled in 2003, completed his parole term in 2007, has had no new arrests or convictions since, and has always been assessed as a low risk of reoffending. He is classified as a Tier III offender under Missouri law and must register for the rest of his life. App. 49-50, R. Doc. 48, at 49-50.

Mr. Doe VI experienced significant financial and employment consequences when business competitors discovered his status on SORA. Id., Tr. I at 54-55, 57-58. A neighbor

of his posted his registration picture from the Patrol's website throughout the subdivision where he and his family reside, as well as signs referring to him as a monster. *Id.*, Tr. I at 58-60. Mr. Doe VI has also been prohibited from being on school property due to his status on SORA, and was unable to directly participate in his child's education. App. 1198, R. Doc. 233. After his child was named by the school administration in a letter to all parents as the child of a registrant, Mr. Doe VI's child was forced to change schools. App. 51, R. Doc. 48, at 51. Consequently, Minor C.C. has experienced a variety of ostracism and social exclusion. App. 1333-1334, R. Doc. 238. Jane Doe II, Mr. Doe VI's wife, experienced employment consequences as a result of her husband's status on SORA. *Id.*

v. John Doe VII⁶

John Doe VII is a married parent of two children who pled guilty to a registrable offense in 2011 and received probation and a suspended imposition of sentence. He was initially classified as a Tier I offender, but was then reclassified as Tier II when Missouri implemented their tiering system. App. 52-53, R. Doc. 48, at 53-53. He completed his term of probation in 2016 and has no other arrests or convictions. *Id.* Because of registering on SORA, Mr. Doe VII has experienced social, familial, and employment-related consequences. App. 55-57, R. Doc. 48, at 55-57. Since beginning to register, he has made numerous in-person appearances to do so. *Id.*

⁶ Mr. Doe VII's family members were voluntarily dismissed as parties. R. Doc. 106.

vi. John Doe VIII, Jane Doe III, Minor H.P.S. & Minor H.W.S.

John Doe VIII is a married parent of two children. He was court-martialed for registrable offenses for acts alleged to have occurred in 2005 and was sentenced to a term of 8 years, served nearly three in prison, and was discharged from parole in 2009. App. 58, R. Doc. 48, at 58. Changes to Missouri law recategorized him as a Tier III offender. *Id.* He has also been assessed as not posing a risk to public safety. App. 1279, R. Doc. 233. Mr. Doe VII experienced numerous employment-related consequences as a result of registration. App. 58-63, R. Doc. 48, at 58-63; App. 1276, R. Doc. 233. Due to the effects that Missouri's SORA had on himself and his family, Doe VIII and his wife and children moved out of Missouri to another state where he has no registration obligation, though, would like to move back to Missouri if he did not have to register. Tr. I at 146.

vii. John Doe IX

John Doe IX pled guilty to a registrable offense in 2012 for an arrest in 2008, was given a non-custodial sentence, and was discharged early from supervision in 2015. Previously, he could petition for relief from registration, but retroactive amendments to Missouri law have placed him into Tier III. App. 64, R. Doc. 48, at 64. Mr. Doe IX has experienced numerous employment-related consequences as a result of SORA, including loss of a job due to his presence on SORA. *Id.* He was prosecuted and convicted in 2019 for failing to register online identifiers, and received a fine. App. 66, R. Doc 48, at 66. This

prosecution, in turn, stemmed from confusion about what was required to be registered, as he had previously tried to register the identifiers he was later prosecuted for failing to provide, but was instructed by law enforcement that they were not necessary. *Id.*

Mr. Doe IX has a fiancé and a daughter, but refrains from fully participating in her education due to SORA. Since beginning to register, Mr. Doe IX estimates he has made 50 in-person trips to register, with each trip requiring an hour to complete. App. 67, R. Doc. 48, at 67.

viii. John Doe X-XI, Jane Does VI-VIII

John Doe X pled guilty to a registrable offense in 2002 and received a non-custodial sentence. He was discharged from supervision in 2009 and has remained a law-abiding citizen in the community ever since. App. 68, R. Doc. 48, at 68. He was also retroactively classified as a Tier III offender under changes to Missouri law, and must register for the remainder of his life. *Id.* Mr. Doe X has experienced numerous employment-related consequences, harassment and threats of harm. App. 70, R. Doc. 48, at 70; App. 1307-1308, R. Doc. 233. Since 2005, he has been assessed as low risk. App. 1309, R. Doc. 233.

ix. John Doe XII-XIV, Jane Doe V, Jane Doe IX & Jane Doe XI

John Doe XII pleaded guilty in 2005 to two registrable offenses for acts that occurred in 1995 and 1998. He received two concurrent five-year terms of imprisonment, was paroled in 2007, and discharged from supervision in 2010. Since that time, he has no

other arrests or convictions, yet is required to register for the remainder of his life. App. 71, R. Doc. 48, at 71. He has experienced numerous employment-related and social consequences as a result of SORA. App. 72-77, R. Doc. 48, at 72-77. He estimates that he has made 60-70 trips to register with law enforcement, with each trip taking more than an hour each time. App. 76, R. Doc. 48, at 76. Mr. Doe XII had armed vigilantes appear at his home and threaten him and his family as a result of SORA. App. 75, R. Doc. 48, at 75, Tr. II at 274-275. Because John Doe XII's son shares a name with him, his son is unable to form a romantic relationship as when his name is searched on Google, it returns John Doe XII's SORA page as the top result. Tr. II at 277.

b. The Complaint and Judgment on the Pleadings

Following briefing and motions practice, Appellants subsequently sought and were granted leave to file a Second Amended Complaint, the operative complaint on appeal. App. 1, R. Doc. 48. The complaint set out the circumstances of Appellants and the relevant scientific research described above and brought several constitutional claims challenging the operation of Missouri's SORA. *Id.* Relevant to this appeal, Appellants alleged that Missouri's SORA violates the Eighth Amendment (Count I), constitutes an Ex Post Facto punishment (Count II), that mandatory lifetime registration violates Substantive Due Process (Count IV), that it violates Equal Protection (Count VI), that it interferes with familial relationships and employment (Counts VII and VIII), that the requirement of

SORA mandating disclosure of online identifiers is unconstitutionally vague (Count X), and that the same requirement was overbroad (Count XI). App. 77-97, R. Doc. 48, at 77-97. The court below granted judgment on the pleadings to the Patrol on Appellants' Due Process and Equal Protection claims. App. 210, R. Doc. 86.

c. Discovery

The case proceeded to discovery, where Appellants who were subject to SORA were deposed, along with the parties' respective expert witnesses, whose findings are set out above.⁷ Of note in the discovery process, the Patrol failed to respond to Appellants' Requests for Admission. App. 1283-1305, R. Doc. 233. The trial court declined to permit the Patrol to submit them out of time. R. Doc. 161. Consequently, pursuant to Fed. R. Civ. Proc. 36, the admissions must be given "conclusive effect" in this case. *See Peterson v. Equifax Info. Servs.*, 44 F.4th 1124, 1128 (8th Cir. 2022). Generally, these admissions further establish the disconnect between SORA's ostensible public safety purpose and its operation,

d. Summary Judgment, Trial & Present Appeal

The parties cross-moved for summary judgment. R. Doc. 130, 133. The trial court granted Appellants judgment on a claim related to prior restraint, and granted the Patrol

⁷ Dr. Kelly Socia was not noticed as an expert nor deposed given the trial court's determination it could not consider arguments related to Missouri's exclusion zones, which are not a part of this appeal. R. Doc. 83 at 4.

judgment on a claim related to anonymous speech. App. 266, R. Doc. 162, at 30. While Appellants sought judgment on an overbreadth claim related to online identifiers, the trial court concluded it was not adequately pled and refused to consider it. App. 237, R. Doc. 162; App. 268, R. Doc. 240. Appellants' Ex Post Facto, Eighth Amendment, and vagueness claims proceeded to trial.

Prior to trial, Appellants had sought to present testimony from family members concerning the impact of SORA, but the trial court excluded this testimony, along with finding that Appellants' evidence regarding recidivism and efficacy of SORA was "irrelevant" to the analysis of whether it was punishment. Tr. C. at 4.

On March 24 and 25, 2025, the court below held a bench trial. Those Appellants required to comply with SORA testified, along with an employee of the Patrol, Kerry Creech. The depositions of the expert witnesses were submitted as trial exhibits in lieu of live testimony. R. Doc. 233, 234. Following trial, Appellants submitted affidavits from three family members under seal as an offer of proof. App. 1328-1335; R. Doc. 235, 237, 238.

On March 31, 2025, the trial court ruled in favor of the Patrol on the remaining counts. App. 268, R. Doc. 240. Following the analytical framework in *Smith*, it concluded that SORA was not punitive, and thus it did not violate either the Ex Post Facto Clause or the Eighth Amendment. Further, the trial court concluded that the Missouri legislature

had delegated authority to the Patrol to determine what the law related to online identifiers meant, and since the Patrol created a form specifying what information was required, the law was not unconstitutionally vague. Finally, the trial court also dismissed, without an opportunity to be heard, Appellants who were family members of someone on SORA, and declined to consider their independent constitutional claims. Id.

On April 30, 2025 Appellants timely-filed their Notice of Appeal. App. 289, R. Doc. 242. The instant round of briefing results.

SUMMARY OF THE ARGUMENT

The trial court's numerous errors stem from a misreading of *Smith v. Doe*, 538 U.S. 84 (2003). In *Smith*, the Supreme Court stated that the factors it selected for analyzing the punishment question were non-exhaustive, yet the trial court concluded the opposite and improperly restricted the evidence it would consider. The Supreme Court anchored its analysis in assumptions that it made about risk of recidivism (and consequently, the public safety utility of SORA), yet the trial court concluded that evidence refuting the same was not relevant to the analysis. Despite the Supreme Court repeatedly admonishing that technological changes are relevant to constitutional analysis, the trial court disagreed. Despite registration requiring frequent and time-consuming appearances before law enforcement, the trial court thought this indistinguishable from the mail-in updates at issue in *Smith*.

These errors had a cascading effect on the trial court's rulings. By moving the goalposts in *Smith*, the trial court effectively transformed *Smith* into an irrefutable presumption of both the dangerousness of people required to register and the attendant benefits of SORA, no matter the evidence one might amass to contradict those presumptions, no matter the changes in society or technology, and no matter the empirical evidence one can present about the preventive effects or punitive impact of SORA on those required to be on it and their family members. It cannot be, for example, that evidence regarding risk of recidivism – the central premise of SORA itself – is both irrelevant, but at the same time central to the trial court's reasoning in finding that the law has a connection with a non-punitive objective. Such a posture is one that, in effect, shuts the courthouse doors to Appellants. Appellants seek a fair evaluation of their claims, as expert evidence presented by Appellants supporting their claims either went unrefuted, was conclusively established by the Patrol's admissions, or both. The trial court failed to afford Appellants that evaluation.

Because the trial court found that SORA was non-punitive, it further concluded that it did not violate the Eighth Amendment. This is erroneous for both procedural and substantive reasons, namely because the trial court mistook Appellants' allegations and premised its findings on the analysis just described with respect to punishment.

The court's analytical errors with respect to its punishment analysis carried over into its analysis of the Due Process and Equal Protection claims. The trial court was required to credit Appellants' assertions at that stage of the proceedings, but a close reading of the trial court's analysis on the Due Process and Equal Protection claims indicates that it necessarily did the opposite, and further, employed the incorrect standard of review given the nature of Appellants' claims.

The trial court further erred on Appellants' First and Fourteenth Amendment claims. First, the trial court stated that Appellants never alleged that Missouri's SORA was excessive in terms of speech-related information that it requires Appellants to provide, nor that it impeded speech, yet those allegations are in the operative complaint. Because Appellants' allegations fairly put the Patrol on notice as to the claim, the court erred in refusing to consider it. The trial court's analysis on Appellants' vagueness claim was similarly askew. The trial court concluded that the legislature could properly delegate to law enforcement alone the authority to divine the meaning of criminal statutes, yet this is the exact arrangement the void-for-vagueness doctrine regards as forbidden.

Lastly, in addition to precluding the family member Appellants from offering evidence regarding SORA's impacts, the trial court dismissed the parties *sua sponte* without an opportunity for briefing or to be heard. From the beginning, this case alleged that not only does SORA infringe on the constitutional rights of those Appellants who are required

to be on it, but that it infringes on the rights of family members as well. Because the trial court did not permit argument on this point, and because their testimony is needed to fully develop the record that is necessary for fair consideration of Appellants' other claims, Appellants respectfully request that this Court reverse the trial court and remand for further proceedings.

ARGUMENT

I. Standards of Review

This Court employs a *de novo* standard of review for questions of law. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 710-711 (8th Cir. 2003). A lower court's factual findings are reviewed for clear error. *Williams v. Carter*, 76 F.3d 199, 200 (8th Cir. 1996). Fairness of judicial proceedings are reviewed *de novo* under this Court's supervisory authority. *See, e.g., Reserve Mining Co. v. Lord*, 529 F.2d 181, 184-89 (8th Cir. 1976).

In evaluating a motion for judgment on the pleadings, a district court is required to accept all allegations of the non-moving party as true and view the same in a light most favorable to the non-moving party. *Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 663 (8th Cir. 2009). A district court's grant of judgment on the pleadings is reviewed *de novo*. *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009).

Here, the trial court’s rulings were grounded in its legally erroneous analysis, and several were predicated on misreading Appellants’ allegations. Both of those errors in turn improperly limited the consideration of the evidence and claims. Thus, Appellants urge that the *de novo* standard of review applies here to all claims. *Reserve Mining Co.*, 529 F.2d at 184; *Darst-Webbe*, 339 F.3d at 710-711.

II. The Trial Court Erred in its Analysis of the Punishment Claims

As discussed above, the leading case on the question whether laws like SORA constitute punishment—and thus can violate either the Ex Post Facto Clause or the Eighth Amendment—is *Smith v. Doe*, 538 U.S. 84 (2003). *Smith* set out a two-step test for determining whether a law constitutes punishment: in the first step, the court examines the intent of the legislature, and if the intent of the legislature was not to punish, it moves to the second step: examining “whether the statutory scheme is ‘so punitive either in purpose or effect’” to negate the erstwhile civil designs. *Id.* at 92 (citing *United States v. Ward*, 448 U.S. 242 (1980)). The Court in *Smith* adopted a non-exhaustive set of “guideposts” for the second step of the analysis, which it borrowed from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The guideposts include whether the law in its operation “has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a

rational connection with a nonpunitive purpose; or is excessive with respect to this purpose.” *Smith*, 538 U.S. at 97.

The Sixth Circuit performed the *Smith* two-part analysis in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), a case that provides a useful example of how the analysis evolves in a changing scientific, legal, and technological landscape.⁸ In *Snyder*, which involved a similar challenge to a state registration requirement, the Sixth Circuit found Michigan’s SORA was punitive, in that it:

categorizes [people] into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and [] requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe

Id. at 705. Thus, the Sixth Circuit determined it was “something altogether different from and more troubling than Alaska’s first-generation registry law.” *Id.* The Sixth Circuit further found that the Michigan law’s retroactive application “implicate[d] the core counter-majoritarian principle embodied in the Ex Post Facto clause,” *id.* at 705-06, and that “[a]s the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice.” *Id.* Notably, the aftermath of the *Snyder* decision provides a

⁸ While this Court considered Ex Post Facto claims in *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), those claims did not encompass the operation of Iowa’s SORA. *Id.* at 716.

prescient example of what happens when the task of responding to evidence is left to the legislature in this arena: even when confronted with a federal court order, state legislatures have simply enacted laws that continue to offend these core principles. *See Does v. Whitmer*, 773 F. Supp. 3d 380, 388 (E.D. Mich. 2025).

a. The Trial Court Erroneously Concluded that Evidence from Family Members Could Not Be Considered When Assessing SORA's Punitive Impact

Turning to the analysis here, the court made several analytical errors. First, the trial court erred when it concluded that *Smith* rejected consideration of effects on family members. App. 273, R. Doc. 240, at 6, n.7. It read into *Smith* a prohibition that is contrary to its text. No part of *Smith* addressed familial impacts, let alone rejected their consideration, as the Court itself in *Smith* noted that the factors were non-exhaustive. *Smith*, 538 U.S. at 97. This error had a cascading effect on the presentation of Appellants' case, as it precluded consideration of testimony from family members and altered the trial court's analysis of the ultimate punishment question.⁹

This exclusion is particularly problematic because the evidence the trial court declined to consider speaks directly to the factors employed in *Smith* —specifically, the

⁹ Historical precedent emphasizes that the founding fathers considered effects on family members to be relevant to the concept of punishment and understood that such punishments were so *anathema* to the constitutional order that they banned them in the main body of the constitution: namely, the Corruption of the Blood. U.S. Const. art. III. § 3.

affirmative disability inquiry, which encompasses consideration of “how the effects of the Act are felt by those subject to it.” *Smith*, 538 U.S. at 100-101. Even if the *Smith* Court did not mean what it said when it referred to the factors as non-exhaustive, effects on family members are direct effects on registrants themselves. John Doe I rushing his daughter to the emergency room to save her life following a suicide attempt had an effect on him. Jane Doe X’s divorce was an effect on her. Armed vigilantes threatening the safety of John Doe XII’s family had an effect on him. The social exclusion of Minor C.C. due to a crime committed before he was born has an effect on his parents. Thus, even if the trial court were correct in concluding that *Smith* rejected evidence of impacts on family members, it was still error not to consider them as direct effects of the law on Appellants who were themselves required to register under SORA.

b. The Trial Court Refused to Acknowledge That Missouri’s SORA Imposes Far More Burdens in 2025 than Alaska’s Did in 2003

As the record reflects, Appellants must appear in person before law enforcement numerous times to update and make changes to their SORA information, akin to traditional criminal supervision. This can take hours. It requires people to miss work. For people who lack transportation, it can be difficult, if not impossible. The court rejected this evidence with a single sentence: “To the extent Plaintiffs compare SORA to probation, the Supreme Court rejected this analogy in *Smith*.” App. 273, R. Doc. 240, at 6. This ignores Appellants’ argument that the registry evaluated in *Smith* did not require updates

to be made frequently and in-person, as Missouri's SORA does. *See Smith*, 538 U.S. at 102. Courts which have grappled with such differences have concluded otherwise. *See, e.g., State v. Hinman*, 530 P.3d 1271 (Mont. 2023), *People v. Betts*, 968 N.W.2d 497 (Mich. 2021); *Doe v. State*, 189 P.3d 999 (Ak. 2008); *Doe v. State*, 111 A.3d 1077 (N.H. 2015); *State v. Letalien*, 985 A.2d 4 (Me. 2009). SORA is, in many respects, even *more* punitive than traditional criminal supervision, as graduated sanctions for technical violations, individually-tailored restrictions, and a rehabilitative purpose are all hallmarks of supervision that are absent here.

The court further discounted Appellants' evidence of significant employment challenges, harassment, and ostracism that was traceable to the operation of SORA. App. 275, R. Doc. 240, at 8. For instance, Jane Doe I has no conviction, but was fired from multiple positions anyway. While the trial court referred to significant media coverage, that coverage is not what is returned when searching Jane Doe I's name – her SORA listing is. App. 1212-1213, R. Doc. 233. The trial court considered those effects stemming from Google searches as though they were somehow independent from the operation of SORA, but as discussed below, they are integral to the implementation of SORA—which the trial court also refused to reckon with.

c. The Trial Court Erred in Concluding That the Last Two Decades of Change in Law and Society Do Not Render SORA Comparable to Practices Regarded as Punishment

The trial court stated in its order that “there is no reason to believe [the *Smith* Court] would reach a different decision upon learning the technological advances that have made publicly available information even more readily available.” App. 273-274, R. Doc. 240, at 6-7. This, too, ignores the text of *Smith*, where the Court observed that a citizen still had to make affirmative efforts to seek out registry information, an effort “more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality.” *Smith*, 538 U.S. at 99. Those affirmative efforts, as the record in this case indicates, are no longer needed. SORA-related information is readily encountered by the public without ever intending to access it or seek it out, which has had consequences as predictable as they are tragic for Appellants.

As recently as this summer, the Supreme Court explained that courts must consider technological developments in the context of constitutional analysis. In *Free Speech Coalition Inc. v. Paxton*, 606 U.S. _____, 145 S. Ct. 2291 (2025), the Court described the dramatic changes in American teenagers’ use of the internet over the last twenty-five years and recognized that the Court, in deciding similar cases a quarter century earlier “could not have conceived of these developments.” *Id.* at 1314. It then explained:

It is misleading in the extreme to assume that *Reno* and *Ashcroft II* spoke to the circumstances of this case simply because they both dealt with “the internet” as it existed in the 1990s. The appropriate standard of scrutiny to

apply in this case is a difficult question that no prior decision of this Court has squarely addressed.

Id. See also *Detroit Free Press, Inc. v. Dep't of Justice*, 829 F.3d 478, 485 (6th Cir. 2016) (“Twenty years ago, we thought that the disclosure of booking photographs, in ongoing criminal proceedings, would do no harm. But time has taught us otherwise. The internet and social media have worked unpredictable changes in the way photographs are stored and shared.”) (Cole, C.J., concurring).

To the extent *Smith's* reference to a visit to “an official archive” was ever true, it is true no longer.¹⁰ Contrary to historical criminal record data, SORA provides advanced tracking, mapping, and browsing capabilities, App. 176-179, R. Doc. 48-4, at 5-8, and as noted above provides bulk data export capabilities with no restrictions placed on use of that data. App. 185, R. Doc. 48-4, at 14. Third parties, in turn, commodify and push this data to consumers for profit without an individual ever affirmatively seeking it out. App. 188-196, R. Doc. 48-4, at 17-25. A user simply seeking the address of a business via search engine will immediately be alerted if someone required to register pursuant to SORA works there. App. 182-183, R. Doc. 48-4. People can download smartphone apps

¹⁰ Justice Kennedy’s observation in *Smith* that the registry does not offer a place to “post comments underneath” a registrant’s individual’s profile, *Smith*, 538 U.S. at 99, reflects an understanding of the future of technology that is anachronistic to how these systems operate today, and the reality of harassment Appellants have been subjected to.

(themselves a rarity in 2003) that will automatically alert them if they come within a certain distance of a home listed on SORA. App. 196, R. Doc. 48-4 at 25. This design and operation necessarily implies that those so listed are presently dangerous, App. 182, R. Doc. 48-4 at 11, even over and above Justice Souter’s “selection makes a statement” observation in his *Smith* concurrence. *Smith*, 538 U.S. at 109 (Souter, J., concurring). Indeed, the Patrol affirmatively represents this fact to the public themselves. App. 1169, R. Doc. 233.

The *Smith* Court characterized historical shaming punishments as “forcing an offender to appear in public with some visible badge of past criminality.” *Smith*, 538 U.S. at 99. True, SORA does not require those subject to it to appear in the town square for harassment and derision, but as the Supreme Court recognized in 2017, that town square is now online. *Packingham*, 582 U.S. at 107. The trial court failed to perform any serious analysis on this point, which, as the Supreme Court advised in *Free Speech Coalition*, is necessary to understand the constitutional implications of a law in a changed technological landscape.

d. The Trial Court’s Remaining Analysis Rests on Assumptions That Were Refuted by Evidence and Admissions It Ignored

The trial court determined that SORA served the non-punitive purposes of “alert[ing] the public to the presence of sex offenders in their community,” and “assist[ing] law enforcement in preventing and protecting against the commission of future offenses.”

App. 276, R. Doc. 240, at 9. The court went on to find that there was a rational connection between SORA and these purposes, and that SORA—including lifelong registration—was not excessive in relation to them. App. 276-278, R. Doc. 240, at 9-11.

The trial court had previously decided that Appellants' evidence regarding recidivism and the effectiveness of SORA—which speak directly to its ability to meet the above-stated purposes and thus serve a public safety function—were not relevant. The trial court further failed to give credit to the Patrol's constructive admissions here, App. 1283-1305, R. Doc. 233, as it was required to do. The refusal to consider the evidence or credit the admissions was error.

The *Smith* decision rested on empirical (and non-empirical) evidence that was available at that time because it was believed that it spoke to the assumed public safety benefits of SORA. *Smith*, 538 U.S. at 103. The district court effectively violated this precedent from the Supreme Court when it determined that the evidence Appellants presented—that speaks to those same issues—was irrelevant to its ultimate determination. Thus, as stated above, the trial court's analysis of the question of whether SORA is punitive is necessarily flawed, and ostensibly results from legal error of the trial court's misread of *Smith*, and the issues it considered to be relevant to the determination.

e. The Trial Court's Eighth Amendment Analysis Misstates the Record and is Similarly Flawed

The trial court went on to find, hypothetically,¹¹ that “neither the First Amended Complaint nor the Second Amended Complaint allege SORA is barbaric” and that “nothing presented at trial persuades the Court that SORA is sufficiently disproportionate” and thus SORA would not violate the Eighth Amendment. App. 280, R. Doc. 240, at 12. The court’s first conclusion is simply wrong, and the second is flawed for the reasons discussed immediately above.

In the very count at issue in the Second Amended Complaint, Appellants alleged that SORA is “barbaric and torturous.” App. 79, R. Doc. 49, at 79. Counsel informed the court of this at trial as well. Tr. II at 344. In any event, the court’s conclusion that SORA does not violate the Eighth Amendment flowed naturally from its above-described legal errors with respect to the threshold punishment question, Appellants’ arguments below as to why SORA violates the Eighth Amendment notwithstanding. R. Doc. 140, at 67; Tr. II at 344 – 347. Because the trial court’s analysis of the punishment question—on which Appellants’ Eighth Amendment claim rests—was flawed, the trial court’s conclusion about disproportionality was similarly erroneous.

Appellants submit that SORA differs from traditional criminal punishment in that traditional criminal punishment serves many different purposes, both rehabilitative and

¹¹Appellants believe the district court’s Eighth Amendment analysis is dicta given its ruling that SORA is not punishment, but address it briefly in an abundance of caution.

retributive, and criminal sentences when imposed consider the underlying facts of a case and the circumstances of the defendant. *See* 18 U.S.C. § 3553(a). None of this is true of SORA. Jane Doe I's offense, for example, was not so serious as to even merit imprisonment *or* a conviction in the eyes of the prosecutor who charged her or the judge who sentenced her, yet SORA operates to impose a lifelong punishment *on top of* her criminal sentence on both her and her family members with no hope of escape, with no consideration of her circumstances or the facts of her case, and—unlike traditional criminal punishment—does not even presume to be in the service of any rehabilitative goal. Appellants' evidence, which should have been credited, shows it doesn't serve a protective one, either. It is naked retribution which, as the record reflects, inflicts unique harms onto people who committed no crime. Further, outside of the United States, the practice is essentially unheard-of, excepting perhaps Western Australia. App. 740, R. Doc. 233. *See Trop v. Dulles*, 356 U.S. 86, 102 (1958) (examining international practices in Eighth Amendment context). For these and the reasons discussed herein, SORA, particularly in its mandatory lifetime imposition, violates the Eighth Amendment.

III. The Trial Court Erred in Granting Judgment on the Pleadings with Respect to Appellants' Due Process Claims

Appellants argued below that the exclusion zones created by SORA *and* the overall application of SORA, with its mandatory lifetime obligation in the case of individuals in

Tier III, infringed on registrants' Equal Protection and Due Process¹² rights with respect to familial relationships and employment. App. 83-86, R. Doc. 48, at 83-86; App. 89-93, R. Doc. 48, at 89-93; App. 92, R. Doc. 48, at 92.

Appellants also argued below that a standard of review more stringent than rational basis review was warranted, which is apparent from the face of the Complaint itself. App. 83-84, R. Doc. 48, at 83-84 (citing, *inter alia*, *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432 (1985)); *see also Romer v. Evans*, 517 U.S. 620, 633 (1996) (“[D]iscriminations of unusual character especially suggest careful consideration[.]”); *Lawrence v. Texas*, 539 U.S. 538, 580 (2003) (O’Connor, J., concurring).

At the stage in the proceedings when the trial court disposed of Appellants’ Equal Protection and Due Process claims, the trial court was required to take the allegations in the Complaint and attached declarations at face value, and to view the same in a light most favorable to Appellants. *Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 663 (8th Cir. 2009) In reasoning that a more searching form of review was not warranted, and that lifetime registration satisfied the rational basis standard, the trial court not only failed to credit Appellants’ claims in the Complaint, it did the opposite. In a footnote, the trial court explained:

¹² The Supreme Court in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7 (2003) expressly left unanswered a Substantive Due Process claim with respect to risk-indifferent SORA registration.

Plaintiffs' assertions (which focus exclusively on recidivism concerns) regarding the legislature's motivations are insufficient to conclude the goal of public safety is pretextual, **especially considering the legitimate community notice purpose advanced by SORA.**

App. 221, R. Doc. 68, at 12, n.4 (emphasis added).

The district court's decision was procedurally and substantively erroneous. As an initial matter, it misses the mark because "[t]he presence of community animus can support a finding of discriminatory motives by government officials, even if the officials themselves do not personally hold such views." *Ave. 6E. Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016). In any event, the trial court's reasoning wrongly assumes that Appellants' allegations regarding recidivism and the lack of positive impact on public safety are false; this is apparent from its conclusion that SORA advances a "legitimate community notice purpose[.]" The legitimacy of that purpose hinges entirely on its impact on recidivism, as discussed above, because if Appellants are no more likely to commit a crime than anyone else in the community, what purpose is "advanced" through notifying the public about them?

The South Carolina Supreme Court's decision in *Powell v. Keel*, 860 S.E.2d 344 (S.C. 2021) is instructive on this point. In *Powell*, the court was confronted with the question of whether South Carolina's mandatory lifetime registration requirement violated Due Process. The *Powell* court recognized that protecting the public from recidivism was a legitimate governmental goal, and that the state's interest in requiring sex

offender registration, at least initially, satisfied a rational basis standard. *Id.* at 348.

However, the *Powell* court then addressed the constitutionality of requiring lifetime registration:

Notwithstanding this finding, we hold SORA's lifetime registration requirement without any opportunity for judicial review to assess the risk of re-offending is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending. Indeed, "a likelihood of re-offending lies at the core of South Carolina's civil statutory scheme." *Dykes*, 403 S.C. at 507, 744 S.E.2d at 510; *see* S.C. Code Ann. § 23-3-400 (2007 & Supp. 2020) ("Statistics show that sex offenders often pose a high risk of re-offending."). However, the lifetime inclusion of individuals who have a low risk of re-offending renders the registry over-inclusive and dilutes its utility by creating an ever-growing list of registrants that is less effective at protecting the public and meeting the needs of law enforcement. *See State v. Letalien*, 2009 ME 130, 985 A.2d 4, 30 (Me. 2009) (Silver, J., concurring) (noting "the catch-all scope of the [sex offender registration] statute's application dilutes its utility"); Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. Rev. L. & Soc. Change 727, 752 (2013) ("As registries expand, they become even less useful to both the public and law enforcement.").

Moreover, there is no evidence in the record that current statistics indicate all sex offenders generally pose a high risk of re-offending. *See Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (noting the record provided "scant support for the proposition that SORA in fact accomplishes its professed goals" and that recent empirical studies cast significant doubt on the pronouncement in *Smith* that sex offenders' risk of recidivism is "frightening and high"). Because SORA does not provide a mechanism to evaluate a registrant's individual risk of recidivism, it "is not tied to the relative public safety risk presented by the particular registrants and is excessive with respect to the purpose for which it was enacted." *Letalien*, 985 A.2d at 30 (Silver, J., concurring); *see also Smith v. Doe*, 538 U.S. 84, 116, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (Ginsburg, J., dissenting) (finding the scope of the Alaska Sex Offender Registration Act, ASORA, "notably

exceeds” its legitimate civil purpose); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008) (finding ASORA’s broad scope significant where the Act “provides no mechanism by which a registered sex offender can petition the state or a court for relief from the obligations of continued registration”). Thus, the registry fails to promote the State’s legitimate interest. We therefore hold SORA’s lifetime registration requirement is unconstitutional absent any opportunity for judicial review to assess the risk of re-offending.

Id. The *Powell* court’s reasoning is equally applicable here. Concerns about recidivism are central to the operation of Missouri’s SORA, just like they were in South Carolina. Not only do Appellants’ arguments implicate Equal Protection and Substantive Due Process concerns, but the ultimate efficacy of SORA itself at meeting its stated goals when it is applied to people who pose no more risk of committing a crime than anyone else. Because the trial court neither credited Appellants’ claims, nor construed them in a light most favorable to Appellants, the court’s decision to grant the Patrol judgment on the pleadings was erroneous.

IV. The Court Erred in Concluding Overbreadth Had Not Been Adequately Pled and Dismissing Count XI Without Addressing Appellants’ Claims

In summary judgment briefing, Appellants moved for summary judgment on Count XI—which was their claim that the provisions of SORA mandating disclosure of internet identifiers was overbroad—particularly given that the Patrol adduced no evidence in discovery that such information had ever been used to investigate, solve, or prevent a crime. R. Doc. 131, at 14. *See Cornelio v. Connecticut*, 691 F. Supp. 3d 529 (D. Conn.

2023) (entering summary judgment in favor of plaintiff on similar law on overbreadth grounds, noting absence of evidence that law had ever been used to prevent or solve a crime in 15 years). The trial court refused to consider Appellants' motion, however, on the ground that the overbreadth claim had not been adequately pled in the Second Amended Complaint. App. 259, R. Doc. 162. The trial court dismissed Count XI after trial as a "redundant claim," without ever addressing the arguments made in it, App. 97-99, R. Doc. 48, at 97-99.

The trial court's own description of what was contained within Count XI shows that it misread the record, as with Appellants' Eighth Amendment claim. The trial court wrote that "nothing in it—or, importantly, the Second Amended Complaint—suggests Count XI alleges that SORA requires registrants to report too much information or that it impairs registrants' access to the internet or related services." App. 259, R. Doc. 162, at 23.

That assertion is incorrect. Count XI did contain the information the trial court stated was absent, particularly in paragraphs 604 ("Plaintiffs are reluctant to engage in protected online speech, as to do so would require them to report those identifiers to authorities..."), 608 ("...many Plaintiffs have opted to self-censor as opposed to go through the legal process of registration and face the prospect of reprisal and harassment from the general public"), and, especially, 611 ("The requirement of SORA that Plaintiffs disclose

their identifiers is not narrowly tailored in that it targets *all* speech, and is not limited to those individuals whose offenses involved the use of computers or technology.”) App. 98-99, R. Doc. 48, at 98-99 (emphasis in original).

To be sure, Count XI did not use the word “overbreadth,” but it did otherwise set out the elements of an overbreadth claim sufficient to put the Patrol on notice of the substance of the claim. Whether a claim is properly pled does not rest on whether it includes “labels and conclusions” or “a formulaic recitation of the elements,” but whether it sets forth factual matters sufficient to state a plausible claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The overbreadth claim Appellants advanced on summary judgment did not rely on any facts or theories that were not articulated in the Second Amended Complaint, nor in particular in Count XI, such that Patrol did not have notice to defend against it. The law is clear that complaints are to be read as a whole and construed liberally. *Warmington v. Bd. of Regents of the Univ. of Minn.*, 998 F.3d 789, 795 (8th Cir. 2021). Consequently, the court erred in refusing to consider the overbreadth claim.

V. The Court Erred When It Concluded That Because the Patrol’s Interpretation of Missouri Law Was Not Vague, That Meant the Law Itself Was Not Vague

The trial court concluded that RSMo § 43.651 was not unconstitutionally vague because the Patrol’s interpretation of the statute’s requirements—as reflected in the

registration form it had published, App. 1164, R. Doc. 234—was not unconstitutionally vague. App. 282, R. Doc. 240, at 15. Stated differently, the trial court reasoned that, even if the statute itself could be described as vague, that vagueness had been resolved by the issuance of the Patrol’s form. The trial court noted, for example, that “[t]he form does not ask for cookies; therefore, Plaintiffs need not volunteer information about cookies.” App. 282, R. Doc. 240, at 15.

The trial court viewed RSMo § 43.651.2(1)(2) as authorizing the Patrol to determine what information is encompassed within the meaning of “online identifiers,” App. 282, R. Doc. 240, at 15, but that section of the law speaks about the Patrol’s authority to promulgate regulations related to the use and disclosure of online identifiers to third parties – not free-standing authority to determine what the identifiers themselves are. RSMo § 43.651.2(2).¹³

The trial court’s approach is problematic for pragmatic and constitutional reasons. From a practical perspective, what remedy would anyone have if the Patrol’s interpretation changes? And legally, while the trial court’s analysis views the Missouri legislature as vesting unbridled discretion in the hands of law enforcement to determine the meaning of

¹³ Even. if the legislature could properly delegate the interpretation of an otherwise vague statute to law enforcement, and even if the Missouri legislature did so here, such a proposition is unworkable in the wake of *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), which abrogated judicial deference to agency interpretation of ambiguous statutes.

criminal statutes, that is precisely the concern that animates the void-for-vagueness doctrine. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries[.]”) The Patrol can no more insulate the Missouri statute from constitutional challenge by guessing (and announcing in a form) that IP addresses are an online identifier that must be reported but that cookies are not, than could California law enforcement guess what constituted “credible and reliable” identification in *Kolender v. Lawson*, 461 U.S. 352 (1983). It is the **legislature’s** responsibility to draft statutes that guard against arbitrary enforcement and provide notice as to what conduct is prohibited. *Id.* at 358. The legislature failed in that responsibility here.

The authority relied on by the trial court is inapposite. In *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 347-48 (1986), a vagueness challenge to a Puerto Rico statute and regulations that restricted casino advertising was turned away because the Court was bound by a narrowing construction adopted by the Puerto Rico Supreme Court. In *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997), this Court was confronted with school disciplinary regulations—which this Court observed “need not be as detailed as criminal code which imposes criminal sanctions”—and still found that a school district’s prohibition on gang-related symbols was void-for-

vagueness. *Id.* at 1308 (citing *Bethel School Dist. No. 403 et al. v. Fraser*, 478 U.S. 675 (1986)).

The central case that the district court described as “analogous” to this dispute, *Reproductive Health Services of Planned Parenthood v. Nixon*, 428 F.3d 1139 (8th Cir. 2005), is far from it. App. 282, R. Doc. 240, at 15. As an initial matter, *Nixon* involved a challenge to a medical statute—a law requiring doctors to discuss “indicators and contraindicators, and risk factors” with patients before performing abortions—outside the First Amendment context and where there was no threatened enforcement action, contrary to the law at issue in this case, which already has resulted in at least one Appellant being criminally convicted. *Id.* at 1143. Most critically, however, no party argued in *Nixon* that the state’s development of a model form that could be used by physicians when providing the required advisements would resolve the vagueness concern. In fact, the statute itself provided that “such a model form shall not affect the duties of the physician [under] this section.” *Id.* at 1141-1142 (alteration in original).

The district court here characterized the holding of *Nixon* as “[upholding] the preliminary injunction barring enforcement, **at least until the form was available,**” App. 282, R. Doc. 240, at 15 (emphasis added), but that misstates the decision. This Court actually modified the preliminary injunction so that it would expire “ten days after the final state court judgment” (referring to a separate case in which a state court had been asked to

construe the meaning of the statute at issue). *Id.* at 1145. The use of an interpretive form, while encompassed within the district court’s preliminary injunction in *Nixon*, had little to do with this Court’s ultimate disposition of the vagueness concern. The construction of the statute itself was left to the courts as opposed to leaving to a state agency the ultimate authority to guess for itself the meaning of a criminal statute.

And the Patrol *is* guessing, as shown by the briefing and testimony below. For instance, the Patrol forcefully argued in summary judgment briefing that Appellants “artificially engineer[ed] a sense of vagueness” when “a plain reading” of RSMo § 43.651.1(4) clearly indicates that information assigned to registrants like IP addresses and other information not shared with others need not be disclosed under the law. R. Doc. 134, at 47. So why, then, does the Patrol collect IP addresses? App., 1091, R. Doc. 234; App. 1311, R. Doc. 233. If the reporting requirement were limited to identifiers that were self-selected for the purposes of communication and/or shared with others, why does the Patrol interpret it to mean “any website that the offender owns, maintains, or has administrative rights to make changes,” and to encompass commercial websites like eBay and Amazon? App. 1091-1092, R. Doc. 234; *see also Packingham*, 582 U.S. at 114-15 (Alito, J., concurring) (observing that the challenged law restricted registrants’ use of Amazon, to the law’s detriment). The Patrol’s testimony at trial through Kerry Creech served to emphasize this confusion. Tr. I at 208-209 (when asked to define “Maintained

Internet Sites,” responding “any Internet site that, **maybe**, the registrant **might** maintain”) (emphasis added); Tr. I at 206 (when asked to define “Internet Identifier, Carrier” responding “that’s kind of who you access the Internet through, so typically, **it might be**, like, a search engine, like a Google or a Microsoft Edge or **something of that nature.**”) ¹⁴ (emphasis added). These are guesses, akin to throwing spaghetti at a wall. The record shows that when the Patrol was filing its briefs, when Mr. Creech was testifying, and when Appellants go to register, they all were (and will be) unsure what the law requires, similar to the law struck down in *Doe v. Kentucky ex rel. Tilley*, 283 F. Supp. 3d 608 (E.D. Ky. 2017). For all of these reasons, the trial court’s ruling on Appellants’ vagueness claim was erroneous.

VI. The Trial Court Erred When It Dismissed All Family Member Plaintiffs Sua Sponte

From the beginning of this case, it was alleged that SORA violates not only the constitutional rights of people who are required to be on it, but of their immediate family as well. The first time the trial court addressed that issue was four years later, in its post-trial Order, in which it dismissed all claims by Appellants who are family members of people required to register. App. 270, R. Doc. 240, at 3, n.4.

¹⁴ It should be noted that Google is a search engine, Microsoft Edge is a web browser, and neither is a carrier (at least as that term is commonly understood).

The trial court's reasoning was that the family members' experiences were not relevant to the punishment question (which is flawed for the reasons discussed above), and that "most" of their claims related to harms they had suffered by virtue of the operation of Missouri's exclusion zones, which was an issue that previously had been dismissed from the case. App. 270, R. Doc. 240, at 3, n.4. The trial court also referenced its prior orders, but none of those orders addressed the question of whether SORA, independent of the exclusion zones, violated the rights of family members, and the issue was not briefed or discussed by the parties at the trial in this matter. The trial court effectively dismissed these claims *sua sponte* without any consideration of them.

Due process encompasses the right to be heard, and the family member Appellants were denied that right by the dismissal of their claims. In *Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir. 1991), this Court held that in the Rule 12(b)(6) context, *sua sponte* dismissal without an opportunity to be heard was inappropriate unless it was "patently obvious" from the complaint that a party could not prevail. It is not patently obvious from the complaint, nor from the record below, that the family member Appellants could not prevail on a constitutional claim, especially since the presentation of their evidence was limited by the trial court as discussed above. For this reason, the dismissal was in error.

CONCLUSION

Protecting the public is an essential undertaking, but the way SORA is implemented, it fails at this task. By requiring many thousands of individuals who pose no more risk of committing a sex offense than any other member of the community to register, it necessarily undermines the usefulness of any registry, wasting law enforcement resources in processing and tracking minor changes to information, as well as in prosecuting and jailing people who fail to comply with a dizzying array of requirements that themselves have no public safety benefit.

Appellants are members of the public, too. Appellants have committed crimes, that is true. At least some of them. Some are in this because of the circumstances of their heart, or the circumstances of their birth. While SORA leaves them all less safe in the same way it does everyone else, it also endangers them in other ways and implicates their constitutional rights as set out herein. Where constitutional rights are implicated, courts have an independent duty to review factual findings. *Gonzales v. Carhart*, 550 U.S. 124 (2007). The trial court abdicated that role below, and thus Appellants seek it from this Court.

For the foregoing reasons, Appellants respectfully request that this Court reverse the ruling of the trial court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32 (g)(1), excluding those portions designated Fed. R. App. Proc. 32(f), counsel certifies that the foregoing Opening Brief of Plaintiffs-Appellants Jane Does, *et al.*, contains 12,990 words, per the word count feature of the software that was used to prepare the brief. Counsel further certify that this brief was prepared using 14-point Garamond Premier Pro font, in compliance with Fed. R. App. Proc. 32(a)(5) and 32(a)(6). Pursuant to 8th Cir. R. 28A(h)(2), counsel certifies that Plaintiffs-Appellants' Opening Brief and addendum have been scanned for viruses and are virus-free.

/s/ Guy Hamilton-Smith
Guy Hamilton-Smith

CERTIFICATE OF SERVICE

Counsel certifies that the foregoing Opening Brief of Plaintiffs-Appellants Jane Does, *et al.*, was filed via the Court's CM/ECF system on this the 28th day of August, 2025 which will cause the same to be served on all parties in this action.

/s/ Guy Hamilton-Smith
Guy Hamilton-Smith