

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION SIX**

JOHN DOE,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 12-C-168
	)	
KIRK THOMPSON, DIRECTOR OF THE	)	
KANSAS BUREAU OF INVESTIGATION,	)	
and FRANK DENNING, JOHNSON	)	
COUNTY, KANSAS SHERIFF,	)	
	)	
	)	
Defendants.	)	
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**MEMORANDUM DECISION AND ORDER**

This matter comes before the Court on the parties' Motions for Summary Judgment pursuant to K.S.A. 60-256(c). After careful consideration, the Court finds and concludes as follows:

**UNCONTROVERTED FACTS**

1. On February 19, 2003, Plaintiff John Doe pled guilty to indecent liberties with a child/touching in Johnson County, Kansas, in violation of K.S.A. 21-3503(a)(1). At the time of his conviction, Doe became obligated to register with the Kansas Bureau of Investigation (KBI) as a sex offender for ten (10) years, or until 2013.
2. The Legislature amended the Kansas Offender Registration Act (KORA) in 2011. Under the amendments, offenders convicted of indecent liberties with a child/touching must register for twenty-five (25) years.

3. On June 15, 2011, the KBI informed Doe that the 2011 amendments to the KORA applied retroactively. Under the amendments, Doe has the following statutory duties:
  - a. to register for 25 years from the date of his conviction (until 2028);
  - b. to report in person four times per year in each jurisdiction in which he resides, works, or attends school;
  - c. to register in person within three days of changing residences, jobs, or schools,
  - d. at each in-person reporting, to pay a \$20 reporting fee and submit to an updated photograph;
  - e. to provide the following information on his registration form: address, phone numbers, vehicle and watercraft and aircraft information, professional licenses, palm prints, email address, online identities, membership in online social networks, and travel and immigration documents;
  - f. to provide law enforcement with notice of any international travel; and
  - g. to suffer a penalty of a severity level 6, person felony for a first conviction for violation of the KORA.
4. Members of the public can access Doe's registration information by searching for his name, city, or address on the Johnson County Sheriff's website. The website's "Share & Bookmark" feature allows users to share registry information via email, Google, Delicious, Stumble Upon, Windows Live, Facebook, Twitter, MySpace, Digg, and Reddit.
5. Members of the public can also access Doe's registration information from the KBI website. The website allows users to locate offenders on an interactive map or sign up for email notification about registered offenders living in Kansas.

6. The KBI does not actively search for offenders who have completed their registration requirements but are now subject to the extended registration requirements under the 2011 amendments to the KORA. The KBI instructs sheriffs' offices that offenders convicted on or after April 14, 1994, are subject to registration under the 2011 amendments to the KORA, but the KBI does not verify that the sheriffs' offices contact all offenders who are required to register.
7. The Johnson County Sheriff's Office does not use its internal databases to identify non-compliant offenders whose registration periods had expired but were extended by the 2011 amendments to the KORA.
8. On February 15, 2012, Doe filed a Petition for Declaratory Judgment, requesting that this Court declare that KBI Director Kirk Thompson and Johnson County Sheriff Frank Johnson cannot enforce Doe's 25-year registration period because it violates the *ex post facto* clause of the United States Constitution.
9. On November 9, 2012, Doe and his wife, Jane Doe, submitted affidavits to the Court describing how Doe's registration has negatively impacted their lives. John Doe made the following statements in his affidavit:
  - a. Doe is required to renew his driver's license every year, and his registered offender number is displayed on the license. He uses his driver's license often, and he is concerned that people who view the number will deny him services or discriminate against him.
  - b. Doe lost a job because his manager was concerned that his registration status would "expose the company to public relations liabilities and issues related to employees' concerns for workplace safety." While other employees had felony

convictions, they were not terminated because they were not on the registry. In addition, prospective employers told Doe to come back when he was “off the list.” Doe has started his own business but fears it will fail if he is “outed” to his customers.

- c. Doe’s former landlords told him that they could not rent to him because other potential tenants could access the sex offender registration maps and would not want to live near a sex offender. Doe’s current neighbors have told him that they worry that his registration status has lowered property values in the neighborhood.
- d. The registration requirements have caused Doe to feel “a strong sense of shame” and hopelessness.
- e. Shortly after Doe moved into his home, “it was defaced with threats.”
- f. Doe was removed from the site council, which reviews the school’s budget and plans for education enhancements at his children’s school, because of his registration status.
- g. Doe was not allowed to visit a neighbor at the hospital because of his registration status.

10. Jane Doe made the following statements in her affidavit:

- a. The registration requirements have “substantial, recurring consequences” for the Doe family. The family is “shunned” by its community, and lives under stigma of the “sex offender” label.
- b. Jane Doe is rarely granted the opportunity to address people’s concerns about her husband’s registration status.

c. The Does worry about the impact of registration on their children. The children have been teased by their peers about their father's registration status. Other parents have instructed their children to avoid the Doe children, and the Doe children have been excluded from social activities because of their father's reputation as a sex offender.

11. On November 9, 2012, both parties filed Motions for Summary Judgment. The Court held a hearing on the Motions on March 1, 2013.

### **STANDARD OF REVIEW**

Summary judgment is appropriate if “the pleadings, the discovery and disclosure material on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” K.S.A. 60-256(c)(2). “The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought.” *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009). “In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.” 288 Kan. at 32. Summary judgment must be denied if reasonable minds could draw different conclusions from the evidence. 288 Kan. at 32.

### **DISCUSSION AND CONCLUSIONS OF LAW**

#### *The KORA*

The KORA is an offense-based offender registration scheme that requires sex, drug, and violent offenders to register with law enforcement. K.S.A. 22-4902(a), 22-4905. Offenders must register in person and pay a \$20 fee four times per year in the county or location of

jurisdiction in which the offender resides, maintains employment, or is attending a school. See K.S.A. 22-4905(b), (k). The KORA applies retroactively, and offenders must register for fifteen (15) years to life depending on the severity of the crime and whether it is a subsequent offense. K.S.A. 22-4906. A first violation of the registration requirements is a level 6 person felony with a sentence of 32-36 months imprisonment, and subsequent violations carry increasingly harsher penalties. K.S.A. 21-6804(a); 22-4903(c). Offenders cannot petition for relief from registration requirements for any reason. K.S.A. 22-4908. The KORA requires that offenders notify law enforcement and the KBI of any plans to travel outside of the United States. K.S.A. 22-4905(o). Offenders also must renew their driver's licenses annually. K.S.A. 22-4905(l). Their licenses are marked with the letters "RO" and a distinguishing number to "readily indicate to law enforcement officers that such person is a registered offender." See K.S.A. 8-243(d). In addition, Kansas courts consider registration status when making child custody determinations. See K.S.A. 23-3203(h), (j).

Furthermore, registry information is published on the internet. Offenders' names, photographs, physical descriptions, addresses, schools, license plate numbers, convictions, and professional licenses, designations, and certifications are posted on websites created by registering law enforcement agencies and the KBI. K.S.A. 22-4909(a)-(b). Some registering law enforcement agencies' websites including the Defendant Johnson County's site, allow users to forward registry information to friends and relatives via social media sites like Facebook, Myspace, and Twitter.

*The KORA violates the ex post facto clause.*

In his Motion for Summary Judgment, Doe asserts that the 2011 Amendments to the KORA, which apply retroactively and increase his offender registration requirement from 10

years to 25 years, violate the *ex post facto* clause of the U.S. Constitution. Art I, § 9, cl. 3 (“No . . . ex post facto law shall be passed”). The *ex post facto* clause of the United States Constitution “forbids the application of any new punitive measure to a crime already consummated,” to protect citizens’ “individual dignity, freedom, and liberty.” *Kansas v. Hendricks*, 521 U.S. 346, 370, 117 S. Ct. 2072 (1997); *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996). Interpretation of the Kansas Constitution is not at issue here because the Kansas Constitution does not contain a corresponding prohibition against *ex post facto* laws.

In considering whether a retroactive law violates the *ex post facto* clause, the Court must first determine whether the legislature meant for the retroactive law to establish civil or criminal proceedings. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140 (2003). If the legislature meant to impose punishment, the retroactive law violates the *ex post facto* clause. *Smith*, 538 U.S. at 92. If, however, the legislature meant to impose a civil, regulatory scheme, the law is only unconstitutional if it is “so punitive either in purpose or effect as to negate the State’s intention to deem it civil.” *Smith*, 538 U.S. at 92 (internal punctuation omitted).

This Court is certainly well aware of the long held position that in determining a statute’s Constitutionality under the separation of powers doctrine, “this Court presumes statutes are constitutional and resolves all doubts in favor of a statute’s validity.” *Brennan v Kansas Insurance Guaranty Association*, 293 Kan 446, 450, 264 P.3d 102 (2011). Further, this Court must interpret the statute in a way that makes it constitutional if there is any reasonable construction that would maintain the legislature’s apparent intent. The Court has considered this case with those legal requirements in mind.

Doe next argues that the KORA violates controlling Kansas law as stated in *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996). In *Myers*, the Kansas Supreme Court considered

Kansas' 1994 offender registration scheme, the Kansas Sex Offender Registration Act (KSORA), and found that retroactive public disclosure of offender information was effectively a punitive and, thus, an unconstitutional measure. *Myers*, 260 Kan. at 671.

The Defendants, however, contend that Doe's claims are barred by statute and controlling United States Supreme Court precedent. The Defendants argue that K.S.A. 22-4908 bars this Court from granting an order relieving Doe of further registration. K.S.A. 22-4908 (stating that "[n]o person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act").

The Defendants further contend that *Smith* prevents Doe from arguing that the KORA is unconstitutional under the *ex post facto* clause. In *Smith*, the United States Supreme Court upheld the registration and public notification provisions of a retroactive Alaska offender registration scheme. The Defendants argue that the statute at issue in *Smith* was substantially similar to the KORA; thus, *Smith* should foreclose Doe's *ex post facto* claims. This Court is bound by the United States Supreme Court's interpretation of the Constitution. *Trinkle v. Hand*, 184 Kan. 577, 579, 337 P. 2d 665, 667 (1959). However, all offender registration laws are not immune from *ex post facto* challenges after *Smith*. If an offender registration scheme is distinguishable from the Alaska law at issue in *Smith*, it may fall outside the reach of *Smith* precedent. This Court finds that the KORA is significantly different from the Alaska statute considered in *Smith*. Since *Smith*, Kansas offender requirements have become increasingly severe, and the advent of social media has significantly changed the landscape for dissemination of offender information. Consequently, this Court considers Doe's *ex post facto* claims and finds that the KORA is unconstitutional because it is effectively a punitive measure.

- a. The Legislature enacted the KORA as a civil statutory scheme.

A retroactive law violates the *ex post facto* clause if the legislature intended that the law impose punishment. *Smith*, 538 U.S. at 92. Thus, this Court must consider the KORA’s text and structure to determine the Legislature’s objective in enacting it. See *Smith*, 538 U.S. at 92. Doe argues that the legislature intended the KORA to be a criminal statutory scheme because it: (1) has no express statement of purpose, (2) is codified as a criminal procedure statute, and (3) is a complete regulatory scheme with safeguards for the criminal process. The Court finds, however, that the Legislature intended to enact a civil scheme.

1. Express statement of purpose

In deciding whether the Legislature intended for the KORA to be civil or criminal, this Court “must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *Hudson v. U.S.*, 522 U.S. 93, 99, 118 S. Ct. 488 (1997). The KORA does not contain an express statement of purpose. However, in *Myers*, the Kansas Supreme Court found that the legislative history of the 1994 KSORA implied that Kansas’ offender registration statutes served a non-punitive purpose—public safety. 260 Kan. at 681. The “overriding concern” behind the KSORA was “promotion of public safety with public access to information on the criminal history of released sex offenders.” 260 Kan. at 679.

Doe argues that the Legislature intended that the KORA serve a different purpose than the KSORA. Legislative history from 2011 suggests the Legislature passed the KORA at least in part to secure federal funding through compliance with the Adam Walsh Act, a federal offender registration Act. See Shawn P. Yancy, *The History and Future of Offender Registration in Kansas*, J. KAN. BAR ASS’N (October 2012). Doe contends that the purpose behind the KORA is to preserve federal grant money rather than to protect public safety. Yet, the Court finds that

the Adam Walsh Act was enacted to protect public safety. See 42 U.S.C. 3751(a)(1) (the federal funding attached to the Adam Walsh Act is authorized for criminal justice purposes); 42 U.S.C. 16901 (“[i]n order to *protect the public* from sex offenders . . . Congress in this chapter establishes a comprehensive national system for the registration of . . . offenders”) (emphasis added). Furthermore, in passing the KORA, the Legislature likely maintained the public safety purpose behind Kansas’ offender registration laws. See Testimony of Sgt. Al Deathe before the House Com, Corrections and Juvenile Justice, Feb. 17, 2011 (stating that “the changes requested in this bill serve the sole purpose to become “substantially compliant” with the Adam Walsh Act *and to better perform the intent of this law*”) (emphasis added). Thus, while the KORA does not contain an express statement of purpose, the legislature has impliedly indicated that the statute is non-punitive.

## 2. Codification as a criminal procedure statute

Doe further argues that the Legislature intended that the KORA serve a punitive purpose because the Legislature placed the entire offender registration scheme within Kansas’ criminal procedure code. See K.S.A. 22-4901 *et seq.* The *Smith* Court, however, stated that “the location and labels of a statutory provision do not by themselves, transform a civil remedy into a criminal one.” *Smith*, 538 U.S. 94. The legislature may label both civil and criminal sanctions as “penalties.” *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 n.6, 104 S. Ct. 1099 (1984). However, as suggested by an Ohio appellate court “where the legislature chooses to codify a statute suggests its intent.” *Bertram v State*, 2009 WL 3154902 (Ohio App. 11 Dist). In *Smith*, the Supreme Court held that statutory placement was not dispositive of legislative intent because many statutes in Alaska’s criminal procedure code did not involve criminal punishment. *Smith*, 538 U.S. 84, 94-95 (listing non-punitive criminal law provisions such as procedures for

disposing of recovered and seized property, protecting the confidentiality of victims and witnesses, etc.). Here Kansas' criminal procedure code also includes provisions that do not involve criminal punishment. See e.g., K.S.A. 22-3302 (providing the procedure for determining whether a defendant is competent). Therefore, the KORA's placement in Kansas' criminal procedure code is also not dispositive of the Legislature's intent.

### 3. A complete statutory scheme

In addition, Doe argues that the Legislature intended to make the KORA a punitive scheme because the KORA is a complete statutory scheme. By contrast, in *Smith*, the Alaska Legislature did not codify registration procedures but, instead, vested the Alaska Department of Public Safety with the authority to implement procedures. 538 U.S. 84, 96. The Alaska Act also did not require the Department of Public Safety to implement any safeguards associated with the criminal process, leading to an inference that the legislature intended the Act to be civil and administrative. 538 U.S. 84, 96. Doe argues that because the KORA outlines offender registration and notification procedures and provides safeguards associated with the criminal process, this Court can infer that the Legislature intended for the KORA to be a punitive statutory scheme. See K.S.A. 22-4905, 22-4913(a) (providing a procedural safeguard by stating that "cities and counties shall be prohibited from adopting or enforcing any ordinance, resolution or regulation establishing residential restrictions for offenders").<sup>1</sup>

This Court does not agree. The Alaska Legislature's decision to delegate procedural decisions to the Department of Public Safety strengthened the Supreme Court's conclusion that the Alaska offender registration scheme was civil. It does not follow that the legislature intended for the statutory scheme to be criminal when it chooses not to delegate, particularly because "the

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<sup>1</sup>K.S.A. 22-4904, which states that the court or correctional facility must provide the offender with notice of registration requirements, is not a procedural safeguard for offenders. In *Smith*, the Court stated that notice is an important part of a civil regulatory scheme and does not establish that a statute is punitive. 538 U.S. 84, 95-96.

location and labels of a statutory provision do not by themselves, transform a civil remedy into a criminal one.” *Smith*, 538 U.S. 94. The Kansas Legislature’s decision to codify the registration and notification procedures as criminal procedure provisions instead of having an agency create the procedures does not conclusively establish a punitive scheme. Moreover, because the Kansas Supreme Court has found that the KSORA, which also did not delegate procedural decisions to a state agency, served a remedial purpose, this Court does not infer that the comprehensive nature of the KORA renders it punitive. See L. 1994, ch. 107, § 3; April 14; *Myers*, 260 Kan. at 681. Thus, the Court finds that the Legislature did not intend for the KORA to be punitive.

*b. The KORA is punitive in effect.*

Because the Kansas legislature likely meant to impose a civil, regulatory scheme, the Court must next determine whether the KORA is “so punitive either in purpose or effect as to negate the State’s intention to deem it civil.” *Smith*, 538 U.S. at 92 (internal punctuation omitted). The Court determines whether the KORA is punitive in effect under the framework of the *Mendoza-Martinez* factors. *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169, 835 S. CT. 554 (1963). The factors, which are “neither exhaustive nor dispositive,” but simply “useful guideposts” are the following:

“[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.”

*Myers*, 260 Kan. at 681. The U.S. Supreme Court has stated that five of the factors provide significant guidance as to whether a statute has a punitive effect--affirmative disability or

restraint, retribution and deterrence, rational connection to a nonpunitive purpose, excessiveness, and traditional punishment and shaming. *Smith*, 538 U.S. at 97.

Doe argues that the KORA is distinguishable from the laws at issue in *Smith*. This Court agrees and finds that the KORA violates the *ex post facto* clause. The traditional punishment and shaming factor does not suggest that the KORA has a punitive effect because the *Smith* court found that offender registration statutes do not serve a retributive purpose and that a statute can deter crime without imposing punishment. The other four factors suggest, however, that the KORA has a punitive purpose because the KORA provisions are generally harsher than those analyzed in *Smith*.

#### 1. Affirmative disability or restraint

In analyzing affirmative disability or restraint, the Court considers “how the effects of the act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.” *Smith*, 538 U.S. at 100. Imprisonment is the paradigmatic affirmative disability or restraint. *Smith*, 538 U.S. at 100 (stating that occupational disbarment fell short of being an affirmative disability or restraint) (citing *Hudson v. United States*, 522 U.S. 93, 104, 118 S. Ct. 488 (1997); *De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146 (1960); *Hawker v. New York*, 170 U.S. 189, 18 S. Ct. 573 (1898)). The KORA subjects offenders to affirmative disability or restraint via in-person reporting, housing and occupational problems, and registration fees.

##### A. In-person registration

The KORA requires that an offender register in person four times per year in each county where the offender lives, works, and attends school. K.S.A. 22-4905. These registration requirements resemble parole or probation. They impose on offenders’ time and serve as a

physical restraint 12 times per year for offenders who live, work and attend school in different counties. See K.S.A. 22-4905(a). Further, the KORA reporting requirements are more burdensome than the mail-in registration considered by the *Smith* Court. *Smith*, 538 U.S. at 101. Other states have also found that quarterly reporting obligations constitute affirmative restraints akin to supervision. See e.g., *State v. Letalien*, 985 A.2d 4, 18 (Me. 2009), which distinguished in-person reporting from the reporting requirements in *Smith*:

“[The defendant] asserts that the Alaska statute is distinguishable because it does not contain provisions similar to those in [the Maine offender registration statutes] requiring quarterly, in-person verification procedures. We agree. These provisions, which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an “impractical impediment that amounts to an affirmative disability.” See *Doe*, 2007 ME 139, ¶ 32, 932 A.2d at 562. The majority in *Smith* concluded that the procedure at issue, which did not require updates to be made in person, did not amount to a form of “supervision.” 538 U.S. at 101, 123 S. Ct. 1140. Here, however, quarterly, in-person verification of identity and location of home, school, and employment at a local police station, including fingerprinting and the submission of a photograph, for the remainder of one’s life, is undoubtedly a form of significant supervision by the state. In this respect, [the Maine registration scheme] imposes a disability or restraint that is neither minor nor indirect.”

Because in-person, quarterly reporting restricts offenders’ time and freedom, it is an affirmative disability or restraint.

#### B. Occupational and housing problems

Public dissemination of registry information subjects offenders to affirmative disability or restraint because it often causes them occupational and housing problems. In *Smith*, the Court rejected arguments that registries subject offenders to substantial housing and occupational disadvantages. The Court reasoned that because convictions are public record, offenders could suffer the same disadvantages as a result of routine background checks by landlords and employers. See *Smith*, 538 U.S. at 100. The Court stated that “the fact of conviction,” and not dissemination of registry information, was the cause of the occupational and housing disadvantages. *Smith*, 538 U.S. at 101. Here, however, social science research confirms that the

registry is the cause of significant employment and housing disadvantages. The Court takes judicial notice of these studies and finds that public dissemination of registry information serves as an affirmative disability or restraint.

Regarding employment, social science research suggests that employment difficulties associated with registration are pervasive. See Richard Tewksbury & Elizabeth Ehrhardt Mustaine, *Stress and Collateral Consequences for Registered Sex Offenders*, J. OF PUB. MANAGEMENT & SOCIAL POL., 215, 221 (Fall 2009) (finding that 35% of Kansas and Oklahoma registered sex offenders participating in the study had lost a job as a consequence of registration); Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Assessing the Impact in Wisconsin*, National Institute of Justice 1, 10 (2000) (finding that 57% of Wisconsin sex offenders who participated in the study reported loss of employment as a consequence of public notification of registry information).

One study stated that the employment search is often “fraught with rejections and dead-ends, when potential employers learn that [registrants] are convicted, *registered* sex offenders.” Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOCIOLOGICAL SPECTRUM 309, 319-20 (2006) (emphasis added). As a result, registrants expect bottom-of-the ladder jobs, regardless of their education level. Tewksbury & Lees, 26 SOCIOLOGICAL SPECTRUM at 321.

Regarding housing, research shows that offenders experience difficulties with housing as a collateral consequence of being registered. See Tewksbury & Mustaine, J. of Pub. Management & Social Pol., at 216, 226; Zevitz & Farkas, National Institute of Justice at 11. For example, twenty-five (25) out of thirty (30) registered offenders interviewed in Wisconsin reported that they had been excluded from their residence as a consequence of registration.

Zevitz & Farkas, National Institute of Justice at 10. Thus, offenders often become “nomadic lepers” because the stigma of registration is a large barrier to housing and employment. See William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 INT’L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 83, 89 (2001). These barriers are more burdensome than occupational disbarment because occupational disbarment only prevents a person from working in a certain field, whereas the barriers offenders face under the KORA create housing and employment difficulties everywhere. The barriers ostensibly hamper offenders’ abilities to meet their basic needs and, therefore, subject offenders to affirmative disability or restraint.

### C. Registration fees

Under the KORA, offenders must pay at least \$20 each quarter (with three listed exceptions), paying up to a maximum of \$240 per year (between \$2,000 and \$6,000 over twenty-five (25) years). See K.S.A. 22-4905(k). This is a substantial cost that offenders likely feel day-to-day, particularly if they have employment difficulties as a result of registration.

KORA registration fees are also significantly higher than other states’ fees that have been deemed non-punitive. See e.g., *People v. Foster*, 87 A.D.3d 299, 309, 927 N.Y.S.2d 92 (N.Y. App. Div. 2011) (finding that a sex offender registration fee [\$50 for first offense, \$1050 for second offense] levied at sentencing was revenue-generating measures rather than punishment”); *Horner v. Governor*, 157 N.H. 400, 404, 951 A.2d 180 (N.H. 2008) (finding that the \$34 annual charge serves a regulatory purpose and defrays the costs of maintaining the sex offender registry). The KORA’s quarterly registration fees impose a significant burden on offenders and subjects offenders to affirmative disability or restraint.

#### D. Registry information

Doe also asserts that the information offenders are required to provide to law enforcement and registration's impact on parental rights subject offenders to affirmative disability or restraint. The Court finds, however, that these are minor and indirect burdens that do not serve to make the KORA punitive. While Doe is required to provide law enforcement with more than 21 pieces of information at registration, much of that information is likely to change infrequently, making the information reported a much smaller burden than the frequency of reporting.

#### E. Child Custody Determinations

When making child custody determinations, Kansas courts must consider whether a parent is subject to the KORA registration requirements or residing with someone who is subject to the KORA requirements. See K.S.A. 23-3202(h), (j). This statutory mandate is likely a minor disability though because registration status is only one of many factors the court considers in a custody proceeding, and child custody statutes do not indicate that registration status is a dispositive factor in child custody arrangements. Therefore, only quarterly, in-person reporting, occupational and housing problems, and registration fees subject offenders to affirmative disability or restraint.

#### 2. Retribution and Deterrence

If a statutory scheme serves the traditional aims of punishment—retribution and deterrence—it is more likely to effectively serve as punishment. Doe contends that this Court should follow Kansas Supreme Court precedent in *Myers* and find that unlimited public notification promotes deterrence and retribution. See *Myers*, 260 Kan. at 695. The *Smith* Court, however, held that a governmental program can deter crime without imposing punishment and

that designating deterrent programs as criminal would “severely undermine the Government’s ability to engage in effective regulation.” *Smith*, 538 U.S. at 102.

The *Smith* Court also found that Alaska’s broad registration categories, in which the length of registration is calculated by the extent of wrongdoing rather than the risk of recidivism, did not serve a retributive purpose because they were reasonably related to the danger of recidivism. *Smith*, 538 U.S. at 102. Following *Smith*, the KORA cannot be punitive merely because its provisions may deter potential offenders or because the length of registration is an offense-based calculation. See K.S.A. 22-4906.

### 3. Traditional Shaming and Punishment

The Court must next consider whether the KORA resembles traditional punishment. The *Smith* Court stated that at this stage, “[a] historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such.” *Smith*, 538 U.S. at 97. In colonial times, offenders were held up “face-to-face” with the community, shamed, or expelled. See *Smith*, 538 U.S. at 98. Here the Court finds that the KORA’s web notification provisions and drivers’ license notations resemble the traditional, colonial punishments.

#### A. Website notification provisions

Doe argues that the KORA provisions for state- and county-sponsored websites that provide the public with registry information resemble historical punishments. In *Smith*, the U.S. Supreme Court determined that Alaska’s offender registry notification websites did not resemble early shaming punishments because the purpose behind the websites was public safety, and humiliation was only a “collateral consequence” of a valid statutory scheme. 538 U.S. at 99. The websites at issue here are distinguishable in two ways from those in *Smith*.

First, the Johnson County Sheriff's website includes tools for sharing registrant information that were not available in *Smith*. In *Smith*, the Court analogized a visit to the state offender registry website to a visit to an official archive of criminal records. 538 U.S. at 99. The individual seeking the information had to "take the initial step" of going to the website, finding the registry, and looking up the information. 538 U.S. at 99. In Doe's case, a citizen may obtain registry information without taking any initial steps to receive it. Today, a person who visits the Johnson County Sheriff's website can forward registration information via social media sites like Facebook, Myspace, and Twitter to friends and relatives who never requested the information. Unlike the official archives, the websites do not merely make information available for public viewing.

In addition, Doe's case is distinguishable because citizens can now use the county-sponsored notification website to comment on registration entries and shame offenders. In *Smith*, the Court noted that the Alaska-sponsored websites did not resemble historical shaming punishments because citizens could not publicly disparage offenders. "The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record." 538 U.S. at 99. In Doe's case, however, many citizens have the opportunity to do just that. When citizens use the Johnson County website to post registry information on social media websites, social media users can then comment about the registry posting. In short, citizens can use the county-sponsored website to create a virtual forum for public shaming, which closely resembles traditional punishment.

Doe also argues that third-party websites and cell phone and tablet applications, such as offendex.com and cjonline.com, resemble historical punishment because they also allow users to comment on registry entries. The Court does not take these websites and applications into

consideration because they are not authorized by the KORA. Moreover, even if the KORA did not contain web notification provisions, third-parties could still create shaming websites using conviction information available as part of the public record.

b. The “RO” notation on driver’s licenses

The statutory provisions requiring that offenders’ driver’s licenses be marked with the letters “RO” and a distinguishing number also resemble historical punishments. See K.S.A. 8-243(d) (stating that a “driver's license issued to a person required to be registered under K.S.A. 22-4901 *et seq.*, and amendments thereto, shall be assigned a distinguishing number by the division which will readily indicate to law enforcement officers that such person is a registered offender”).

The Defendants argue that the notation on the driver’s license does not serve a traditional shaming function because people do not necessarily know what the notation means and Doe does not have to use his driver’s license as his form of identification. However, if the legislature did not intend for offenders to carry and use their licenses as identification on a daily basis, the statute would not serve its purpose of “readily indicat[ing] to law enforcement officers that such person is a registered offender.” Offenders regularly display their driver’s licenses to many people outside of law enforcement, so the offender is frequently brought face-to-face with other community members who view the driver’s license and may ask questions about the “RO” notation on it. Thus, the notation on the license is a visible badge of past criminality in line with traditional punishment.

4. Rational connection to a non-punitive purpose

Next, the KORA is not likely to have a punitive effect if it is rationally connected to its alleged nonpunitive purpose, which is public safety. *Smith*, 538 U.S. at 102. The U.S. Supreme

Court has deemed the rational connection factor the “most significant factor” in the *ex post facto* analysis. *Smith*, 538 U.S. at 102. The “rational connection” standard is not demanding; a statute does not have a punitive effect “simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.” *Smith*, 538 U.S. at 103; *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005). Doe argues that the KORA is not rationally related to protecting public safety because numerous studies suggest that offender registries do not actually protect the public, and the KORA registration requirements do not apply to all offenders residing in Kansas. The Court finds that while there is not a particularly close fit between the KORA and public safety, the registration portion of the KORA satisfies the rational connection standard set out in *Smith*. The registration provisions are rationally related to public safety because they assist law enforcement and consequently reduce recidivism. The notification provisions, however, are not rationally connected to public safety because they may actually increase recidivism.

#### A. Offender registration provisions

Doe argues that recidivism rates are lower than previously thought, suggesting that the Department of Justice (“DOJ”) studies that the *Smith* Court relied on are now outdated. See *Smith*, 538 U.S. at 103. The DOJ studies provided estimated, rather than actual, rates of recidivism (52%) for a high-risk sample of civilly committed offenders. Doe contends that general recidivism rates are much lower—about 5 to 14% within three to six years of the offense. Jill Levenson, *Sex Offender Recidivism, Risk Assessment, and the Adam Walsh Act*, 10(1) SEX OFFENDER L. REP. 1, 12 (2009). Doe further asserts that registries do not actually reduce recidivism or deter sex crimes. See Amy Baron-Evans, *Rethink Misguided Sex Offender Registration and Notification Act*, 20(5) Fed. Sent’g Rep., 357, 359 (2008); Levenson, 10(1) SEX OFFENDER L. REP. at 10 (2009) (citing Geneva Adkins, David Huff, & Paul Stageberg, *The Iowa*

*Sex Offender Registry and Recidivism*, Iowa Dep't of Human Rights (2000) in which Iowa sex offenders who were required to register had a recidivism rate of 3% and those who were not required to register had a recidivism rate of 3.5%).

In response, the Court takes judicial notice of a recent, comprehensive study showing that the registration provisions of offender registration schemes increase public safety to some degree. See J. J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. ECON. 161, 192 (2011). Prescott and Rockoff undertook the study to provide a more complete picture of offender registration and notification than the smaller studies cited by Doe, which suggested offender registration and notification laws had little meaningful impact on the overall number of sex offenses. See Prescott & Rockoff, 54 J. L. ECON. at 163-64. The researchers found that placing registration information in the hands of local law enforcement decreased recidivism. See Prescott & Rockoff, 54 J. L. ECON. at 181 (finding that registration laws reduced the annual number of sex offenses reported per 10,000 people by .098 crime [approximately 1.07%]). Because Prescott and Rockoff found decreases in recidivism, there is a rational connection between the registration provisions of the KORA and public safety, even if the changes in recidivism are small and do not suggest a perfect fit between offender registration schemes and public safety.

#### B. Offender notification provisions

Nevertheless, the offender notification provisions are not rationally related to public safety. The Prescott and Rockoff study described a potential trade-off with offender notification provisions. Prescott and Rockoff found that the threat of notification and its associated costs deterred potential criminals, reducing the frequency of crime by 1.17 crimes per 10,000 people per year (approximately 12.8%), but the psychological, social, and financial costs of notification

led to increased recidivism for convicted offenders. Prescott & Rockoff, 54 J. L. ECON. at 165, 168, 181, 185 (citing William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Police: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 INT'L J. OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY, 83 (2001); Robert Freeman-Longo, *Prevention or Problem*, 8 SEXUAL ABUSE: A J. OF RESEARCH & TREATMENT, 91 (1996); Robert Prentky, *Community Notification and Constructive Risk Reduction*, 11 J. OF INTERPERSONAL VIOLENCE 295 (1996); Lois Presser & Elaine Gunnison, *Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?*, 45(3) CRIME DELINQ., 299 (1999)). Because notification schemes can increase recidivism, they are not rationally related to public safety. The increases in deterrence are undermined by the fact that the very notification schemes that are meant to protect the public from possible recidivism are likely to increase recidivism.

### C. Underinclusive registration requirements

Doe also argues that the KORA is not rationally related to public safety because the KORA does not reach all offenders in Kansas. The KORA does not require registration by offenders who completed their initial registration period before the 2011 amendments to the KORA and have not re-entered the justice system. Moreover, Kansas law enforcement does not try to locate offenders who were never on the registry but are required to register. As a result, the KORA does not reach every person who could possibly threaten public safety. This discrepancy is a common shortcoming of most legislation. State government has limited resources to apply to public safety, and the law does not require a perfect fit between the KORA and the nonpunitive aims it seeks to advance. Thus, Doe's argument fails. Only the KORA

notification provisions, which increase offender recidivism, lack a rational connection to public safety.

#### 5. Excessiveness

The Court must finally consider whether the KORA appears excessive in relation to its nonpunitive purpose. *Myers*, 260 Kan. at 681. The Court considers “whether the regulatory means chosen are reasonable in light of the nonpunitive objective.” *Smith*, 538 U.S. at 105. Doe contends that the KORA is excessive in relation to public safety because it (1) does not account for offenders’ individual risks of recidivism, (2) has long offender registration periods, (3) has lengthy sentences for failing to comply with registration requirements, (4) does not allow courts to provide offenders with relief from registration requirements, and (5) ostracizes offenders.

Doe’s first argument fails because under controlling precedent, offense-based schemes which do not account for individual determinations of future dangerousness cannot violate the *ex post Facto* clause. In *Smith*, the Court held that a state’s “determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *ex post facto* Clause.” 538 U.S. at 104. However, the Court finds Doe’s remaining arguments persuasive and very significant to the Court’s determination of whether the KORA is punitive in effect. Here the remedial statute has placed so many requirements on offenders that it has become punitive.

##### A. Duration of Registration

Doe’s 25-year registration period is excessive. It is significantly longer than the registration period at issue in *Smith*, and recent studies indicate the risk of recidivism decreases over time. The *Smith* Court found that a 15-year registration for a single, nonaggravated sex crime was not excessive, but under the KORA, a similar offense requires an additional 10 years

of registration. K.S.A. 22-4906(b)(1)(E); *Smith*, 538 U.S. at 90, 104 (citing AL 12.63.010(d)(1), 12,63.020(a)(2)).

Additionally, the *Smith* Court relied on empirical research indicating that sex offenders reoffend as many as 20 years after release. *Smith*, 538 U.S. at 104 (citing National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, *Child Sexual Molestation: Research Issues* 14 (1997)). Studies now show that recidivism decreases as offenders age. One recent study stated that

“after the age of 45, the risk for sexual reoffending drops precipitously. In addition, our data indicate that after 20 years in the community offense free, the risk of reoffending is extremely low.”

Rebecca E. Swinburne, et al., *Predicting Reoffense for Community-Based Sexual Offenders: An Analysis of 30 Years of Data*, *Sexual Abuse: A J. of Research and Treatment* 11-12 (2012).

Another study found that three-quarters of sex offenders had not reoffended after 15 years. See Levenson, 10(1) *SEX OFFENDER L. REP.* at 12. Thus, research suggests that Doe’s registration period is increasing as his risk for recidivism declines. A 25-year registration period exceeds the amount of time necessary to protect public safety.

#### B. Consequences for failing to satisfy registration requirements

The consequences of failing to meet registration requirements are also excessive when compared to the public safety goals of the KORA. An offender violates the KORA if the offender fails to comply with any and all provisions of the act. See K.S.A. 22-4903(a). An offender’s first conviction for violating the act results in a level 6 person felony with a sentence of 32-36 months imprisonment. K.S.A. 21-6804(a); 22-4903(c)(1)(A). An offender who registers quarterly for many years and does not have any changes in personal information may be incarcerated for more than 2.5 years for failing to register in person just one time. Such consequences are excessive in relation to public safety, especially when compared to the Alaska

statute considered in *Smith*, in which failing to comply with registration requirements was a Class A Misdemeanor with a sentence not to exceed one year. AL 11.56.835, 11.56.840, 12.55.135(a).

#### C. No relief from registration requirements

In addition, the KORA forbids courts from relieving offenders of their registration duties. Under the KORA, “[n]o person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act.” K.S.A. 22-4908. As shown above, research now shows that an offender’s risk of recidivism decreases over time. Without a mechanism for challenging long registration periods, offenders who are compliant with the registration requirements and have a low risk of recidivism suffer consequences that outweigh the minimal increases in public safety created by registration.

#### D. Stigma

The stigma that results from the KORA also makes it excessive in relation to its public safety goals. In *Smith*, the Court held that the potential for wide dissemination of offender information on the internet did not make Alaska’s passive registration scheme excessive. However, the effects of offender stigma and ostracism are likely greater now than they were when *Smith* was decided. As explained in section b(3)(A), county offender registration websites are no longer passive. They now allow users to share offender information through social media sites. As explained by the Indiana Supreme Court, aggressive notification schemes stigmatize offenders and put them and their families at risk: “[i]t appears to us that through aggressive notification of their crimes, the Act exposes registrants to profound humiliation and community-wide ostracism. Further the practical effect of this dissemination is that it often subjects offenders to ‘vigilante justice’ which may include lost employment opportunities, housing

discrimination, threats, and violence.” *Wallace v. State*, 905 N.E.2d 371, 380 (2009). Because the current internet notification schemes are more aggressive than they were when *Smith* was decided, offenders are at a greater risk of suffering ostracism and even vigilante acts by members of the community.

Thus, the duration of registration, consequences for failing to register, denial of relief from registration requirements, and the stigma associated with registration are not reasonable in light of the KORA’s public safety goals. While the KORA was likely adopted as a remedial statute, its provisions are now so burdensome that they exceed what is necessary for public safety. The provisions are distinguishable from those considered in *Smith* and have become “so punitive either in purpose or effect as to negate the State’s intention” to deem the KORA a civil statute. *Smith*, 538 U.S. at 92.

In conclusion, the legislature likely enacted the KORA as a non-punitive statutory scheme. There is evidence that both the KORA and earlier versions of Kansas’ offender registration statutes were enacted to protect public safety. Nevertheless, the Court’s examination of the KORA’s effects under the *Mendoza-Martinez* factors leads to the determination that the KORA is effectively punitive. The KORA imposes affirmative disabilities and restraints in the form of in-person reporting multiple times per year, registration fees of at least \$80 per year, and notification provisions that lead to housing and occupational problems for offenders. The KORA also resembles traditional punishments. Social media and the KORA notification provisions have created a forum for publicly shaming offenders. Moreover, the notification provisions of the KORA are not rationally connected to its public safety purpose. While the notification provisions may deter potential offenders, research has shown that offender notification provisions decrease public safety by increasing recidivism.

Finally, the KORA is excessive in relation to its alleged purpose of protecting public safety. The KORA requires offenders to register for long periods of time, incarcerates violators for up to three years upon a first violation, does not offer relief from registration for any reason, and has a notification scheme that ostracizes offenders. These provisions have become oppressive to the point of punishment. Therefore, the KORA's retroactive application assigns a new punitive measure to a crime already consummated, in violation the *ex post facto* clause.

The Court finds that John Doe is subject to affirmative disability or restraint due to the KORA's increased in-person reporting, problems created for Mr. Doe in obtaining and maintaining housing and jobs and the punitive registration fees. The Court also finds that the KORA's web notification provisions and drivers license notations subject Mr. Doe to punishment akin to traditional colonial punishments. The increased notification period of fifteen (15) years is not rationally connected to its public safety purpose and may actually decrease public safety by increasing recidivism. Finally, if Mr. Doe misses a registration requirement he may be incarcerated for up to three years for his first violation. He has no method to obtain relief from registration or the notification scheme. The KORA's current provisions subject Mr. Doe to punishment under any definition.

This Court is aware of the emotion elicited by the KORA. Any person with children, grandchildren, sisters, brothers or nephews and nieces understands that emotion. However, people controlled by this act also have relatives that are affected by the act. The increased requirements that are in effect, increased punishment, do not and cannot survive the revealing light of our constitution. We must protect the individual rights of all people to insure the protection of our own individual rights, no matter what our emotions might tell us.

## CONCLUSION

After careful review, this Court GRANTS the Plaintiff's Motion for Summary Judgment and DENIES the Defendants Motion for Summary Judgment. The Court hereby enters a declaratory judgment, requiring the Defendant's to immediately terminate Mr. Doe's additional fifteen (15) year registration requirement. Additionally, all information publicly displayed which is required by the KORA will be immediately deleted. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

Dated this \_\_\_\_ day of July, 2013.

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Larry D. Hendricks  
District Judge

**CERTIFICA OF MAILING**

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in pick-up bin this \_\_\_\_\_ day of \_\_\_\_\_, 2013, to the following:

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