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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
CIVIL COURT DEPARTMENT

JOHN DOE,)	
)	
<i>Plaintiff,</i>)	
)	
vs.)	Case No. 12 C 168
)	Div. No. 6
KIRK THOMPSON, DIRECTOR,)	
<i>et al.,</i>)	
)	
<i>Defendants.</i>)	

**DEFENDANTS' JOINT REPLY IN SUPPORT OF SUMMARY JUDGMENT
AND REQUEST FOR ORAL ARGUMENT**

Defendants Kirk Thompson, Director of the Kansas Bureau of Investigation ("KBI"), and Frank Denning, Sheriff of Johnson County, Kansas, (collectively, "Defendants") hereby file this reply brief in support of Defendant's joint motion for summary judgment, and also request the opportunity for oral argument on the pending cross-motions for summary judgment.

ARGUMENT

Plaintiff's Response to Defendants' Motion for Summary Judgment ("Plaintiff's Response" or "Pl. Resp.") is telling in its lack of specificity. Despite Plaintiff's invocation of generalities and his failure to offer any clear picture of the relief that he seeks, Plaintiff's claim still remains fundamentally flawed as a matter of law.

Regarding the facts in this case, Plaintiff's vague response has two important consequences. First, Plaintiff does not controvert any of Defendants' material facts. *See* Pl. Resp., p. 2. It is well-settled that uncontroverted facts in a motion for summary judgment are

deemed admitted by the opposing party. *See, e.g., Gietzen v. Feleciano*, 25 Kan. App. 2d 487, 488-89, 964 P.2d 699 (1998). Second, the lack of any genuine issue of material fact means that this case should be resolved on summary judgment, as Plaintiff agrees. *See Pl. Resp.*, p. 2 (Plaintiff “agrees . . . that the case is appropriate to [be] decided on summary judgment.”).

Regarding the law, Plaintiff’s Response cannot salvage his claim. To be clear, his specific challenge is a request that all post-2003 amendments to the Kansas Offender Registration Act (“KORA”) be declared to be unconstitutional as applied to him. *See Petition* ¶26. Of course, that is the only claim he has standing to bring. *See State v. Coman*, 294 Kan. 84, 90-91, 273 P.3d 701 (2012) (holding plaintiff had no standing to raise hypothetical constitutional claims of others). *See also Ulster County Court v. Allen*, 442 U.S. 140, 155, 99 S. Ct. 2213 (1979) (“if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations”); *State v. Thompson*, 221 Kan. 165, 172, 558 P.2d 1079 (1976) (“unconstitutional governmental action can only be challenged by a person directly affected and such a challenge cannot be made by invoking the rights of others”). Plaintiff has no standing to raise a constitutional challenge to any pre-2003 version of KORA because he has no *Ex Post Facto* claim against statutes in effect before his conviction in 2003.

As a consequence, that leaves many of KORA’s amendments unchallenged in this case. Plaintiff’s response, by incorporating his own summary judgment arguments, complains about having to provide more specific information than he needed to when he began registering. Yet nearly all of the information he mentions has been required since before his conviction in 2003. *See Defendants’ Joint Response in Opposition to Plaintiff’s Motion for Summary Judgment* (“Def. Resp.”), pp. 9-10. He has padded his argument with items already determined to be

constitutionally permissible in *Myers* – such as conviction information, *see* Def. Resp., p. 9 – and items in effect before 2003 that he has no standing to challenge – such as information about birthplace, victim, anticipated future residence, vehicles, and schools, *see* Def. Resp., pp. 9-10. Even assuming *arguendo* that the Court were to find merit in any component of Plaintiff's request to be released from either registration or the public registry or both, particular care would be needed to limit the impact of the Court's ruling. Doing so would protect the paramount public safety purpose of KORA. For example, if any specific registration item or public disclosure of such item were to be deemed punitive and unconstitutional as applied to Plaintiff, then, applying *Ex Post Facto* principles, those items would nonetheless remain effective running forward. Thus, each amendment's effective date would need to be considered. Furthermore, in the event that the Court is considering the drastic remedy of striking down any part of KORA as applied to Plaintiff, a prompt ruling during the 2013 session of the Legislature would allow for any corrective legislation that might be necessary. *See Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 310-311 (2005) (staying mandate to allow for corrective legislation).

Ultimately, two issues remain at the heart of this case, and both should be resolved in Defendants' favor. First, Plaintiff, who is a "sex offender" under KORA, argues that the requirement to provide registration information to law enforcement agencies – periodically and in person – counts as a "punitive" effect for purposes of the *Ex Post Facto* Clause of the United States Constitution. But periodic registration is plainly not punitive under the *Ex Post Facto* Clause. That question has already been resolved against Plaintiff by the Kansas Supreme Court in *State v. Myers* and the United States Supreme Court in *Smith v. Doe*. There is nothing in the reasoning of either decision to support the idea that simply having to provide *more* information to law enforcement agencies would amount to a new unconstitutional burden on Plaintiff. In turn,

if having to provide registration information does not amount to punishment at all, then the *Ex Post Facto Clause* has no application, and changes to the mechanics and duration of that civil requirement are also constitutionally permissible. The Legislature has made a policy choice that sex offenders like Plaintiff should be tracked for a longer period. Plaintiff's own conduct over an 18-year period supports this approach. Plaintiff admitted to a fondling incident in "1984 or 1985" that was "almost exactly like" the fondling incidents nearly 20 years later, in 2001 and 2002, for which he was convicted. *See Defendants' Joint Memorandum in Support of Summary Judgment*, p. 3 (Facts ¶9). The 2011 KORA amendment requiring that Plaintiff report to law enforcement agencies for 25 years is a procedural change well within the Legislature's constitutional powers. The same is true of the in-person reporting that has been required since 2006. In sum, there is no federal constitutional violation caused by requiring that Plaintiff periodically register in person for 25 years, pursuant to the 2011 amendments to KORA.

The second central issue in this case is Plaintiff's desire to keep his registration information away from the public. Here, too, Plaintiff's attack on the post-2003 KORA amendments misses the mark. These amendments made no substantive changes to KORA's public access provisions. Since 1994, public access has always been achieved passively, using the internet or in-person visits to law enforcement agency offices. The public must seek out specific information collected by the law enforcement agencies. *Smith v. Doe* teaches that this sort of public access to an offender registry is not punitive. *See Smith v. Doe*, 538 U.S. 84, 99, 123 S. Ct. 1140 (2003) ("The purpose and principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.").

Even if the *Smith v. Doe* holding could be avoided and any part of the *Myers* public notification holding has survived, Plaintiff was on notice when he was convicted in 2003 that his information would be made public for an extensive period of time. Any sex offender convicted of the crime of indecent liberties with a child aged 14 years has been on notice of public access to registry information since 1994, when the Kansas Sex Offender Registration Act became effective. As amended, KORA has always permitted this access. And no doubts could have remained on the subject after the *Myers* decision in 1996, when the Kansas Supreme Court announced that sex offenders had notice from 1994 onward of the potential for public access. *See State v. Myers*, 260 Kan. 669, 699, 923 P.2d 1024 (1996) (“Would-be sex offenders have been on notice since April 14, 1994, when KSORA became law, that if they commit certain crimes they will be subject to public disclosure under K.S.A. 22-4909.”). For all of Plaintiff’s protestations, nothing has changed since *Myers* that would justify granting Plaintiff any relief.

Indeed, the constitutional landscape in which Plaintiff attempts to bring his claim has been further clarified by *Smith v. Doe* and the other cases cited in Defendants’ other briefs, which firmly establish that Plaintiff has no claim. That is because it is the fact of Plaintiff’s criminal conviction – rather than the registry that provides access to this conviction information – that is the primary source of any difficulties he experiences in society.

Moreover, even if it remained possible after *Smith v. Doe* for Plaintiff to assert a claim that public access to an offender registry could result in punitive effects separate from an offender’s conviction, Plaintiff has failed to offer any probative, admissible evidence to support those allegations in this case. Instead, Plaintiff offered only hearsay, speculation, and unsupported conclusions. *See Defendants’ Memorandum in Support of Joint Motion to Strike.*

One final point deserves reply. Plaintiff's Response confirms that he raises only an *Ex Post Facto* claim under the United States Constitution. In response to Defendants' argument that K.S.A. §22-4908 eliminates court discretion regarding registration obligations, Plaintiff asserts that his *Ex Post Facto* arguments cannot be barred. *See* Pl. Resp., p.3. In an abundance of caution, Defendants have raised the defense of section 22-4908 to eliminate any non-constitutional claim by Plaintiff that courts have discretion in applying the duties imposed under KORA. It is now clear from the summary judgment briefing that Plaintiff's entire attempt to evade KORA rests on his *Ex Post Facto* arguments and that he makes no other claim.

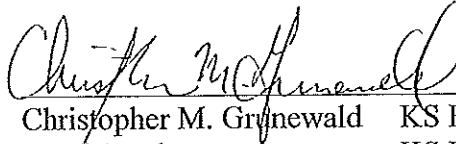
CONCLUSION

For the reasons stated above, in Defendants' Summary Judgment Memorandum, and in Defendants' response in opposition to Plaintiff's motion for summary judgment, Defendants respectfully request that the Court grant summary judgment in favor of Defendants and against Plaintiff on all of Plaintiff's claims.

Defendants also respectfully request the opportunity for oral argument on the pending cross-motions for summary judgment.

Respectfully Submitted,

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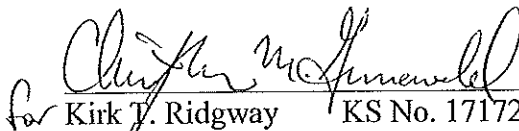
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Defendants' Joint Reply in Support of Summary Judgment and Request for Oral Argument was sent by U.S. mail, postage prepaid, this 4th day of January, 2013 addressed to:

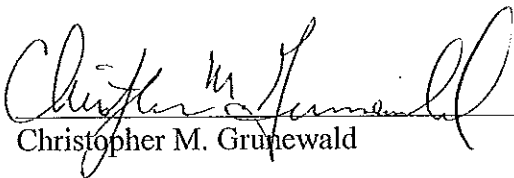
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