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

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

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants Kirk Thompson, Director of the Kansas Bureau of Investigation ("KBI"), and Frank Denning, Sheriff of Johnson County, Kansas, (collectively, "Defendants") oppose Plaintiff's motion for summary judgment and hereby file this response brief in opposition.

RESPONSE TO PLAINTIFF'S STATEMENT OF UNCONTROVERTED FACTS

1. Objection: Plaintiff provides no citation to the record to establish whether he is currently registered, in violation of Sup. Ct. R. 141. Otherwise uncontroverted.
2. Uncontroverted.
3. Uncontroverted.
4. Uncontroverted.
5. Uncontroverted.
6. Uncontroverted.

7. Uncontroverted.

8. Uncontroverted.

9. Objection: Defendants have moved to strike Plaintiff's speculation in ¶43 of his affidavit that he "likely would not have agreed to plead as charged" for failing to provide specific supporting facts, for being completely undermined by the fact that Plaintiff voluntarily went to a police station and knowingly confessed to committing the crime, and for engaging in supported speculation about an alternative situation. *See* Defendants' Memorandum in Support of Joint Motion to Strike ("Def. Memo in Support of Mtn to Strike"), p. 36. *See also* Defendants' Joint Memorandum in Support of Summary Judgment ("Defendants' Summary Judgment Memorandum" or "Def. Memo in Support of SJ"), Ex. D-1, *Kansas Standard Offense Report*, pp. 3-5).

10. Controverted: The date on Plaintiff's Ex. 4, the Journal Entry of Judgment, is not April 2, 2003, but is instead April 3, 2003. Otherwise uncontroverted.

11. Uncontroverted.

12. Uncontroverted.

13. Uncontroverted.

14. Controverted: Before the 2011 amendments to KORA took effect, KORA required that Plaintiff register for 10 years from the date of his conviction, which was February 19, 2003. Ten years from that date is February 19, 2013. *See* Defendant's Statement of Uncontroverted Material Facts ¶15 in Def. Memo in Support of SJ.

15. Uncontroverted.

16. Controverted: Plaintiff's Ex. 10, a letter from the KBI to Plaintiff, dated September 13, 2006, does not reiterate or list all of the requirements listed in Plaintiff's Ex. 9 as Plaintiff states.

Moreover the letter is dated September 13, 2006, and could not have been received by Plaintiff the same date it was mailed. (Plaintiff's Ex. 10, KBI Letter).

17. Controverted: Plaintiff's Ex. 11, a notice from the KBI, dated June 11, 2007, did not state that Plaintiff could only contact the county sheriff. It stated: "Should you have any questions regarding your obligations, please contact your attorney or the Sheriff of the county in which you are registered." (Plaintiff's Ex. 11, *Notice to Registered Offenders*). Moreover the Notice is dated June 11, 2007, and could not have been received by Plaintiff the same date it was mailed. (Plaintiff's Ex. 11).

18. Uncontroverted.

19. Plaintiff omitted significant portions of the quoted text from the supporting exhibit, Plaintiff's Ex. 2, a notice from the KBI dated June 15, 2011. Otherwise uncontroverted.

20. Objections: (1) Plaintiff cites no admissible evidentiary support for these "facts" and they should not be considered by the Court per Sup. Ct. R. 141. Further, the statements are not material facts but legal argument and should be disregarded. (2) Defendants object that the statement, "[i]f [Plaintiff] fails to comply with the terms of the 2011 KORA, the KBI and the Johnson County Sheriff will inform prosecutors," is mere speculation and unsupported by any specific facts to establish Plaintiff's competency on these matters. Plaintiff has no personal knowledge of what will occur in the future, or what the future policies of the KBI or the Johnson County Sheriff will be regarding Plaintiff's registration status. (3) Further, Defendants object that the statement, "[Plaintiff] would then be subject to criminal prosecution," is unsupported legal argument, a conclusory legal opinion, and speculation. It is correct that if Plaintiff fails to comply in the future with certain portions of KORA – which

is entirely in Plaintiff's control – he might be prosecuted, but prosecutorial decisions are entirely discretionary.

Controverted: Pursuant to the 2011 amendments to KORA, Plaintiff is required to register for 25 years from the date of his conviction, that is, until February 19, 2028. Otherwise uncontroverted.

21. Controverted. According to the Kansas Session Laws, the law now known as KORA has been amended 21 times since its original enactment in 1993, and 14 times since Plaintiff's conviction.

22. Controverted: (1) Subparagraph 22(g): To the extent that the statement "[t]he records of registration were NOT actively disclosed to the public" seeks to imply that registration records are somehow now "actively disclosed." This is not accurate. The records are passively available to the public via personal inspection or access to the internet. *See* K.S.A. §22-4909. (2) Plaintiff's paraphrasing of the statute is incomplete, and the actual text is controlling as to the contents of the law. Plaintiff failed to list "aggravated indecent solicitation of a child" as one of the offenses requiring registration in 1993 Kan. Sess. Laws 253 §18(b)(7).

23. Objection: This paragraph merely paraphrases the 1994 amendments to the law now known as KORA, and the amendments speak for themselves. Therefore this paragraph constitutes inadmissible legal argument and should not be considered by the Court.

Controverted: Plaintiff's paraphrased argument is controverted by the actual text of the amendment itself. (1994 Kan. Sess. Laws Ch. 107). Plaintiff incorrectly summarizes the 1994 amendments where he states that "The [registration] records were NOT subject to the Open Records Act." (capitalization in original). In 1994, the Kansas Legislature amended

K.S.A. 22-4909 to provide that "The statements or any other information required by this act shall be open to inspection in the sheriff's office by the public and specifically are subject to the provisions of the Kansas open records act, K.S.A. 45-215 *et seq.*, and amendments thereto." *See* 1994 Kan. Sess. Laws Ch. 107, §7, p. 427 (attached as Defendants' Ex. 1). Plaintiff's Ex. 15, which is a copy of the session laws provided by LEXIS-NEXIS, incorrectly omits the deletion of the word "not" preceding the phrase "subject to the provisions of the Kansas open records act." Also in 1994, the Kansas Legislature amended the Kansas Open Records Act to include a provision that provides as follows: "(c) The information provided to the law enforcement agency pursuant to the sex offender registration act, K.S.A. 22-4901, *et seq.*, and amendments thereto, shall be subject to disclosure to any person." 1994 Kan. Sess. Laws Ch. 107, §8, p. 430 (amending K.S.A. 45-221(a)(29)) (also attached as Defendants' Ex. 1).

24. Objection: This paragraph simply paraphrases the 1997 amendments to the law now known as KORA, and the amendments speak for themselves. Therefore this paragraph constitutes inadmissible legal argument and should not be considered by the Court.

Controverted: Plaintiff's paraphrased argument is controverted by the actual text of the amendment itself. (1997 Kan. Sess. Laws Ch. 181). Plaintiff's subparagraph 24(d): Disclosure of the items "race, sex, age, hair color, eye color, scars, blood type, occupation, employer name, driver's license, vehicle information, . . . and DNA samples" was not added to the statute in 1997. Instead, the requirement to disclose these items was added in 1996. *See* 1996 Kan. Sess. Laws Ch. 224, §5, p. 1242 (attached as Defendants' Ex. 2).

Plaintiff's subparagraph 24(f): The offender registry information was directed to be made available to the public in 1994, not 1997. *See* response above to Plaintiff's ¶23.

25. Objection: This paragraph merely paraphrases the 1999 amendments to the law now known as KORA, and the amendments speak for themselves. Therefore, this paragraph constitutes inadmissible legal argument and should not be considered by the Court.

26. Objection: This paragraph paraphrases the 2001 amendments to the law now known as KORA, and the amendments speak for themselves. This paragraph constitutes inadmissible legal argument and should not be considered by the Court.

27. Objection: This paragraph paraphrases the 2002 amendments to the law now known as KORA, and the amendments speak for themselves. This paragraph constitutes inadmissible legal argument and should not be considered by the Court.

28. Objection: This paragraph paraphrases the 2003 amendments to the law now known as KORA, and the amendments speak for themselves. This paragraph constitutes inadmissible legal argument and should not be considered by the Court.

29. Objection: This paragraph paraphrases the 2006 amendments to the law now known as KORA, and the amendments speak for themselves. This paragraph constitutes inadmissible legal argument and should not be considered by the Court. Defendants further state that KORA was amended twice in 2006. *See* 2006 Kan. Sess. Laws Ch. 214, §§6-10 (attached as Defendants' Ex. 3). Among other changes, in-person reporting twice a year was added for all offenders. *See* 2006 Kan. Sess. Laws Ch. 214, §7, p. 1846 (amending K.S.A. 4904(d)) (Defendants' Ex. 3).

30. Objection: This paragraph paraphrases the 2007 amendments to the law now known as KORA, and the amendments speak for themselves. This paragraph constitutes inadmissible legal argument and should not be considered by the Court.

Controverted: Plaintiff's paraphrased argument is controverted by the actual text of the amendment itself. (2007 Kan. Sess. Laws Ch. 183). Plaintiff's main paragraph: Crimes committed with a deadly weapon were added to the list of offenses covered by KORA in 2006, not 2007. *See* 2006 Kan. Sess. Laws Ch. 214, §6, p. 1841 (Defendants' Ex. 3).

Plaintiff's subparagraph 30(a): The requirement to report the offender's "address, school information, employment information, and vehicle registration" was already required information on the 90-day verification forms, and had been so required since 2001. *See* 2001 Kan. Sess. Laws Ch. 208, §11 (amending K.S.A. 22-4904(c)(3)) (which can be located at page 258 of Plaintiff's corrected exhibits, in Plaintiff's Ex. 18).

31. Objection: This paragraph paraphrases the 2008 amendments to the law now known as KORA, and the amendments speak for themselves. This paragraph constitutes inadimissible legal argument which should not be considered by the Court.

32. Objection: This paragraph paraphrases the 2009 amendments to the law now known as KORA, and the amendments speak for themselves. This paragraph constitutes inadmissible legal argument which should not be considered by the Court.

33. Objections: (1) This paragraph paraphrases and selectively quotes Plaintiff's Ex. 26, an inadmissible, unsworn statement by Sergeant Al Deathe, Douglas County Sheriff's Office, presented to the Kansas Legislature on February 17, 2011. The unsupported paragraph constitutes legal argument and should not be considered by the Court. Plaintiff's argumentative description of the exhibit is not binding on Defendants. (2) Defendants further object that the unsworn statement of Sergeant Deathe does not present any admissible evidence to support Plaintiff's assertions in this paragraph. The statement is neither an affidavit nor a declaration sworn under oath as required by K.S.A. 60-418. Thus, it is not

admissible as the testimony of Sergeant Deathe. (3) Defendants further object that the statement "The federal law requires that states comply with its mandate or lose 10% of the federal Byrne grant money that funds various state programs," is unsupported by any citation to the record and unsupported by any admissible evidence, in violation of Supreme Court Rule 141(a)(1) and 141(a)(2). Even if Sergeant Deathe's unsworn statement were considered to be admissible evidence (*see* Objection #2), none of the text in the statement quantifies the exact amount of potential future funding losses. (4) Defendants further object that the statement, "In fact, the legislative history shows the *only* reason the Kansas Legislature enacted the 2011 amendments was to comply with the Adam Walsh Act" (italics in original), is a legal conclusion that is completely inadmissible. It is merely legal argument inappropriate for Plaintiff's Statement of Uncontroverted Facts. Plaintiff relies on Sergeant Deathe's statement to support this argument, but the statement is not competent evidence of the Legislature's intent. Statements submitted to legislative committees merely amount to the views of those persons, and are not, without an express adoption of those statements, competent evidence to show the "only reason" that either the committee or the Legislature intended to approve of the legislation. *Cf. Kosak v. United States*, 465 U.S. 848, 863, 104 S. Ct. 1519, 1528 (1984) ("The intent of a lobbyist – no matter how public spirited he may have been – should not be attributed to the Congress without positive evidence that elected legislators were aware of and shared the lobbyist's intent.") (Stevens, J., dissenting).

34. Objections: (1) This paragraph paraphrases and selectively quotes Plaintiff's Ex. 27, an unsworn statement by David Hutchings, Special Agent in Charge, KBI, presented to the Kansas Legislature on March 3, 2011. The unsupported paragraph constitutes legal argument and should not be considered by the Court. Plaintiff's argumentative description of the

exhibit is not binding on Defendants. (2) Defendants further object that the unsworn statement of Special Agent in Charge Hutchings does not present any admissible evidence to support Plaintiff's assertions in this paragraph. The statement is neither an affidavit nor a declaration sworn under oath as required by K.S.A. 60-418. Thus, it is not admissible as the testimony of Special Agent in Charge Hutchings.

35. Objection: This paragraph paraphrases the 2011 amendments to the law now known as KORA, and the amendments speak for themselves. This paragraph constitutes inadmissible legal argument and should not be considered by the Court.

Controverted: Plaintiff's paraphrased argument is controverted by the actual text of the amendment itself. (2001 Kan. Sess. Laws Ch. 95). Plaintiff's subparagraph 35(d)(v): The requirements at each in-person reporting for offenders to submit "an updated photograph" and "pay [a] $20 reporting fee" were added in 2006, not 2011. *See* 2006 Kan. Sess. Laws Ch. 214, §7, p. 1846 (amending K.S.A. 22-4904(e), (f)) (attached as Defendants' Ex. 3).

Plaintiff's subparagraph 35(e)(iv): Plaintiff omitted "aggravated criminal sodomy" from the list (located in Plaintiff's corrected exhibits at page 435, in Plaintiff's Ex. 28).

Plaintiff's subparagraph 35(f): Plaintiff incorrectly lists items that were already required under the law:

- "city, state, country of birth" ("place of birth" required in 1996, *see* 1996 Kan. Sess. Laws Ch. 224, §5, p. 1242, attached as Defendants' Ex. 1);
- "date of convictions" (required in original 1993 act, *see* p. 167 of Plaintiff's corrected exhibits);
- "sex and date of birth" of victims (required in 1996, *see* 1996 Kan. Sess. Laws Ch. 224, §5, p. 1242, attached as Defendants' Ex. 1);

- "anticipated future residence information" (required in 1997, *see* p. 187 of Plaintiff's corrected exhibits);
- "identifiers and descriptions of vehicles" ("vehicle information" required in 1996, *see* 1996 Kan. Sess. Laws Ch. 224, §5, p. 1242, attached as Defendants' Ex. 1);
- "schools [and] satellite schools" ("school" required in 2001, *see* p. 261 of Plaintiff's corrected exhibits); and
- "online identities" (required in 2007, *see* p. 323 of Plaintiff's corrected exhibits).

Plaintiff's subparagraph 35(h): The Kansas Statutes Annotated does not contain "§22-6614a."

36. Uncontroverted. However, Plaintiff's subjective feelings about the registration process do not establish a material fact. Moreover, they are about mere inconveniences of everyday life (e.g., driving to downtown Olathe, Kansas [from an un-described starting point]; finding limited parking; entering the front door of a building and providing identification; going through [an un-described] security screening, having his picture taken).

37. Objection: Defendants object to the statement that Plaintiff's driver's license is "a cause of considerable embarrassment." The cited testimony in ¶¶36-37 of Plaintiff's affidavit (Pl. Ex. 5) does not state he is embarrassed. At most, Plaintiff merely testified that he is "concerned" that people will "deny [him] services" and "discriminate against [him]," on the basis of unspecified and conclusory "daily" use of his license. (Pl. Ex. 5 ¶37). Even then, this supporting testimony should be struck. *See* Defendant's Joint Memorandum in Support of Motion to Strike ("Def. Motion to Strike"), p. 36. Defendants also point out that the prominent phrase "REGISTERED OFFENDER" is no longer on his driver's license, merely

an "RO ########" designation buried in the descriptive information section of his license. (Pl. Ex. 5-A).

38. Uncontroverted.

39. Uncontroverted to the extent that Plaintiff's information is accessible only if a member of the public searches by his name, by his city or by address.

40. Controverted: The correct website address for the KBI's offender registry is http://www.kbi.ks.gov/registeredofffender/. Otherwise uncontroverted.

41. Objections: (1) Defendants have moved to strike this paragraph as it is based entirely upon hearsay and other inadmissible statements. Defendants have moved to strike nearly all of the testimony quoted from Plaintiff's affidavit (Pl. Ex. 5). *See* Def. Memo in Support of Mtn to Strike, pp. 15-16, 50. (2) The only testimony remaining – "I began a small business that has met the needs of my family" – should be struck as irrelevant because this testimony does not help prove any material facts. If anything, it establishes that Plaintiff's offense, conviction, and registration status has not prevented him from engaging in business, and providing for his family.

42. Objections: (1) Defendants have moved to strike this paragraph as it is based entirely upon hearsay and other inadmissible statements. Defendants have moved to strike nearly all of the testimony quoted from Plaintiff's affidavit (Pl. Ex. 5). *See* Def. Motion to Strike, pp. 17-18, 50. (2) The only quoted testimony remaining in this paragraph – regarding searching for a new place to live, and landlords refusing to rent to Plaintiff – should be struck from this paragraph as irrelevant because this testimony does not help prove any material facts. Because Plaintiff offers no admissible and competent evidence for the reasons that some

unidentified landlords refused to rent to Plaintiff, it does not help prove that Plaintiff's registration status is the source of that difficulty rather than some other fact.

43. Objection: (1) This paragraph does not contain any material facts and does not help prove any material facts, and is therefore irrelevant and should be struck. Plaintiff states that he has endured threatening conduct, but he does not state the reasons for that conduct. (2) To the extent that Plaintiff seeks to imply that the conduct is related to Plaintiff's registration status, Plaintiff offers no admissible evidence to support that statement in violation of Sup. Ct. R. 141(d), and therefore this paragraph should be struck. There is no basis to conclude that the offender registry is the source of the note. The entire contents of the note state, "Go to hell pervert your not welcome here! [sic] Sincerely, Robin-Hood P.S. your now Bubba's bitch. [sic]" Pl. Ex. 5B. The contents of the note do not make it more probable that the offender registry led to the note rather than some other reason, such as perverted behavior by the Plaintiff that was recently observed by the note's author. Nothing in the contents of the note indicates that Plaintiff's registration information was a source and motivation for the note, let alone the sole source and motivation. Plaintiff testified only that the note was left at his home by an unknown person or by unknown persons. Plaintiff has not presented any facts to establish Plaintiff is competent to testify to the knowledge or source of knowledge of the unidentified person or persons responsible for the note.

Controverted: Plaintiff's argumentative facts are simply not supported by the affidavit. Specifically, the note (Plaintiff's Ex. 5B) contains no direct or indirect threats to Plaintiff or his family.

44. Uncontroverted. However, Plaintiff's fails to establish a material fact where there is no evidence (and no supporting facts set out in the affidavit) to show that the school restrictions

are caused solely by his registration requirements, as opposed to him committing the underlying crime. Plaintiff's supporting affidavit is completely conclusory as to the cause of his school restrictions.

45. Objections: (1) Defendants have moved to strike this paragraph as it is based entirely upon hearsay and other inadmissible statements. Defendants have moved to strike nearly all of the testimony quoted from Plaintiff's affidavit (Pl. Ex. 5). *See* Def. Motion to Strike, pp. 28-33, 50. (2) The only quoted testimony remaining in this paragraph – regarding a principal holding a meeting with Plaintiff, and Plaintiff being upset – should be struck from this paragraph as irrelevant because this testimony does not help prove any material facts. Because Plaintiff offers no admissible and competent evidence for what happened at the school outside of Plaintiff's presence, the hearsay statements do not help prove that Plaintiff's registration status is the source of that difficulty rather than some other fact.

46. Objection: Defendants have moved to strike this paragraph as it is based upon hearsay and other inadmissible statements. Defendants have moved to strike the inadmissible testimony relied upon from Plaintiff's affidavit (Pl. Ex. 5). *See* Def. Motion to Strike, pp. 33-35, 50. Because Plaintiff offers no admissible and competent evidence for the reasons that he was denied access to a hospital, it does not help prove that Plaintiff's registration status is the source of that difficulty rather than some other fact.

Controverted: There is simply no averment in the affidavit about Plaintiff being "instructed to leave the premises of various public places." Plaintiff only testifies to a single, isolated incident in the past 9¾ years of registration. (Plaintiff's Ex. 5, p.6).

47. Objections: (1) Defendants have moved to strike this paragraph as it is based on hearsay and other inadmissible evidence. Defendants have moved to strike the inadmissible testimony from Plaintiff's underlying affidavit (Pl. Ex. 5). *See* Def. Motion to Strike, pp. 22-25, 51.

Controverted: Even if any of Plaintiff's testimony about the neighbors was found to be admissible, Plaintiff did not testify that the police officer was "in a marked patrol car." Further, Plaintiff's affidavit does not state that "[n]eighbors notice the police presence." Plaintiff did not testify that any police visits are "far from discrete." These embellishments should be struck from Plaintiff's facts.

48. Objection: Defendants have moved to strike this paragraph as it is based on inadmissible statements. Defendants have moved to strike nearly all of the testimony quoted from Plaintiff's underlying affidavit (Pl. Ex. 5). *See* Def. Motion to Strike, pp. 19-20, 51. To the extent that the Court considers the supporting statements as admissible, Defendants point out that Plaintiff's subjective feelings do not establish material fact, especially where: (1) Plaintiff offers no testimony confirming he has completed any sort of accredited rehabilitation treatment; (2) Plaintiff offers no testimony from a qualified expert witness that he has been "fully rehabilitated;" and (3) Plaintiff has confessed to three incidents of molesting young girls since "1984 or 1985" (Def. Memo in Support of SJ, Exh. D-1, pp. 3, 4).

49. Objections: Defendants have moved to strike this paragraph, on the basis that Plaintiff failed to provide any specific citations to evidence in the record in violation of Supreme Court Rule 141(a), and on the basis that Defendants have moved to strike the testimony relied upon from Jane Doe's affidavit (Pl. Ex. 29). *See* Def. Motion to Strike, pp. 37-50, 51. Without specific

admissible facts in support, Plaintiff's Paragraph 49 is an unsupported conclusion amounting to legal argument which should not be considered by the Court.

50. Objection: Defendants have moved to strike this paragraph as it is based on inadmissible statements. Defendants have moved to strike the underlying inadmissible testimony relied in Jane Doe's affidavit (Pl. Ex. 29). *See* Def. Motion to Strike, pp. 43-44, 51.

51. Objection: Defendants have moved to strike this paragraph based upon hearsay and other inadmissible statements. Defendants have moved to strike the underlying inadmissible testimony in Jane Doe's affidavit (Pl. Ex. 29). *See* Def. Motion to Strike, pp. 44, 51.

52. Objection: Defendants have moved to strike this paragraph based upon hearsay and other in admissible statements. Defendants have moved to strike the underlying inadmissible testimony in Plaintiff's affidavit (Pl. Ex. 5) and Jane Doe's affidavit (Pl. Ex. 29). *See* Def. Motion to Strike, pp. 10-14, 45-48, 51.

Controverted: Plaintiff does not establish a material fact where he does not testify in his underlying affidavit that his children have been "excluded by classmates at school." Therefore this unsupported allegation should not be considered by the Court. Similarly, Jane Doe does not aver in her underlying affidavit that Plaintif's children: (1) actually attend therapy for the purpose of "manag[ing] the psychological and emotional consequences they experience"; or (2) that his children actually incur any "psychological and emotional consequences" as a result of public access to their father's registration information."

53. Uncontroverted.

54. Uncontroverted.

55. Uncontroverted.

56. Uncontroverted.

57. Uncontroverted.

58. Uncontroverted.

59. Uncontroverted.

60. Objection: This paragraph paraphrases the *Smith v. Doe* decision, and the decision speaks for itself. This paragraph constitutes inadmissible legal argument and should not be considered by the Court.

61. Objection: This paragraph paraphrases several Alaska statutory provisions, which are allegedly copied in Plaintiff's Ex. 32, and the statutes speak for themselves. This paragraph constitutes inadmissible legal argument and should not be considered by the Court.

62. Objection: This paragraph paraphrases *State v. Myers*, and the decision speaks for itself. This paragraph constitutes inadmissible legal argument and should not be considered by the Court.

63. Objections: (1) This paragraph states a legal conclusion that "*State v. Myers* precludes [Defendants] from disclosing information about some offenders to the public." Legal conclusions are not binding on Defendants. Defendants further state that, as a matter of federal law, to the extent that the decision of the Kansas Supreme Court in *State v. Myers* has been superseded by the decision of the United States Supreme Court in *Smith v. Doe*, then *State v. Myers* is no longer good law. This paragraph constitutes inadmissible legal argument and should not be considered by the Court. (2) Interrogatory responses stating legal conclusions are not admissible as facts. *See Klein v. Oppenheimer & Co., Inc.*, 281 Kan. 330, 366, 130 P.3d 569, 591 (2006) (disregarding citation to interrogatory responses that "state legal conclusions rather than facts").

SUMMARY OF THE ARGUMENT

Plaintiff's Memorandum in Support of Motion for Summary Judgment ("Plaintiff's Summary Judgment Memorandum" or "Plaintiff's Memo") asserts only an *Ex Post Facto* claim based on the United States Constitution and no other claim. As explained in Defendants' Summary Judgment Memorandum, both the registration and public notification provisions of KORA should be upheld against Plaintiff's attacks. Constitutionality of statutes is presumed, and courts must construe statutes as valid if there is any reasonable way to do so. KORA is neither punitive in purpose nor punitive in effect, and thus judgment should be entered against Plaintiff on his claims. Defendants hereby incorporate the arguments from Defendants' Summary Judgment Memorandum as if fully stated here. While Defendants assert that those arguments and authorities are sufficient opposition to defeat Plaintiff's motion for summary judgment, Defendants have prepared this response brief directed at the larger issues raised in Plaintiff's memorandum.

Ultimately, Plaintiff cannot prevail because, for all of the pages of material he submitted, his case suffers from two independent and fatal flaws. First, Plaintiff lacks any competent evidence of the burdens he claims to suffer. While Plaintiff asserts that he suffers from "stigma" resulting from his registration status, the evidence that he offers is inadmissible or irrelevant.

Second, even were his evidence admissible, competent, and relevant, Plaintiff cannot escape the binding United States Supreme Court precedent that conclusively rejected his argument regarding stigma and shaming. The United States Supreme Court's holding in *Smith v. Doe* disposes of Plaintiff's claim. Plaintiff makes three arguments to evade application of this precedent: that KORA's public notification is "shaming," that *State v. Myers* is still good law on that point, and that KORA is distinguishable from the Alaska statute upheld in *Smith v. Doe*. All

three arguments should be rejected. In all material respects, KORA's public notification provisions match those already upheld by the United States Supreme Court. For that reason, *State v. Myers* ceases to be controlling law on this point. And none of the differences between KORA and Alaska's offender registration regime that Plaintiff highlights convert KORA's provisions into punishment.

What remains of Plaintiff's Summary Judgment Memorandum amounts to policy arguments best left to the Legislature and citations to cases that are inapposite and unpersuasive. Plaintiff seeks to challenge the well-established conclusions regarding recidivism and the public safety purpose that both undergird KORA. Those arguments fail because Plaintiff doesn't offer any admissible support for those conclusions, and, in any event, the Legislature is the proper forum for these policy arguments. Finally, as to Plaintiff's reliance on several Kansas district court and out-of-state decisions, none of these cases are applicable or persuasive here.

ARGUMENT

Statutes are presumed to be constitutional. "[A]ll doubts must be resolved in [the statute's] favor," and thus, "if there is any way to construe the statute as constitutionally valid, that should be done." *State v. Chamberlain*, 280 Kan. 241, 246, 120 P.3d 319, 324 (2005) (internal quotation marks omitted). Plaintiff bears a heavy burden in pressing a constitutional attack, and he has not met that burden here.

I. Plaintiff fails to establish any competent evidence of "stigma" linked to KORA.

The Court should not consider any of the inadmissible hearsay and other statements that Plaintiff attempts to offer in support of his self-perceived stigma about himself and his family. Defendants have moved to strike these improper statements, including the hearsay, conclusory

allegations unsupported by specific facts or foundation, general law review articles, and other highly objectionable material. *See* Defendants' Joint Motion to Strike and supporting memorandum.

Moreover, Plaintiff's underlying conviction – which is public information – is the source of Plaintiff's perceived difficulties. Even Plaintiff's proffered evidence is admissible, it does not establish a sufficient connection between his registration status and any stigma or shame felt by Plaintiff or his family to justify a conclusion that the 2011 amendments are unconstitutional.

II. Applying *Smith v. Doe* here, KORA is not punitive in purpose or effect.

A. Plaintiff's argument against unlimited public access to registry information depends on a finding that this constitutes "shaming," and *Smith v. Doe* forecloses that result here.

Plaintiff challenges the public notification provisions of KORA, asserting that they are punitive in effect because they result in "stigma" and their effects are "substantial." Plaintiff's Memo, pp. 50, 48. Ultimately, Plaintiff seeks to re-litigate the issue of whether unlimited public access via the Internet to offender information is akin to a historical "shaming" punishment.

The foundation of KORA's public notification provisions is a passive notification system, which provides unlimited public access to offender registry information via the Internet or via in-person visits to law enforcement agencies. *See* K.S.A. §22-4909. In *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140 (2003), the United States Supreme Court held that a sex offender registration regime that relied on passive notification to the entire public via the Internet was not punitive in purpose or effect. What Plaintiff would like is a second bite at the apple on this issue. It is plain that *Smith v. Doe* automatically forecloses of the majority of Plaintiff's argument.

The parties agree that United States Supreme Court examined the effect of the public notification provisions of Alaska's offender registration regime using the *Kennedy v. Mendoza-Martinez* factors. That said, the Court explained that only five of the seven factors have particular relevance when analyzing the effects of an offender registration regime. *See id.* at 97.

After determining that Alaska's offender registration statutory provisions had no punitive purpose, the Court examined the provisions' effects under the *Mendoza-Martinez* factors, including the first factor: "whether, in its necessary operation, the regulatory scheme: . . . has been regarded in our history and traditions as a punishment." *Id.* at 98. On the issue of public notification, the Court rejected the entire premise that a passive notification via the Internet could ever qualify as "public shaming." The Court held that "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id.* at 98.

Plaintiff tries to evade the holding in *Smith v. Doe* by arguing that KORA's current public notification provisions "are much more similar to colonial punishments meant to inflict public disgrace." Plaintiff's Memo, p. 56. Yet the respondents in *Smith v. Doe* raised this exact argument. *See id.* at 97 ("Respondents argue, however, that the Act – and, in particular, its notification provisions – resemble shaming punishments of the colonial period."). The Supreme Court examined the shaming argument in detail, and rejected it in full. As the Court explained:

> Any initial resemblance to early punishments is, however, misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community.
>
> . . . .
>
> *By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not*

> *treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.* On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

Id. at 98-99 (emphasis added). Plaintiff cannot overcome this ruling – it has been conclusively determined that dissemination of accurate, public conviction information in furtherance of a public safety purpose is not public shaming.

Just like the situation facing offenders subject to the Alaska statute upheld in *Smith v. Doe*, whatever negative repercussions are experienced by Plaintiff, they are a result of his conviction, which is undeniably a piece of publicly available information. *See* Def. Memo in Support of SJ, pp. 16-17. For purposes of examining whether an offender registration regime has a punitive effect under the federal *Ex Post Facto* Clause, *Smith v. Doe* definitively cut any possible tie between a registry that includes publicly available conviction information and a claim of punitive "stigma" or "shaming" resulting from public access to that conviction information.

For that reason, the bulk of Plaintiff's challenge fails at the outset. The KORA provisions establishing the passive notification system using law enforcement agency websites and in-person access to records are not "public shaming," are not punitive in effect, and are not unconstitutional – as applied to Plaintiff or as applied to covered offenders generally.

B. Plaintiff's arguments fail to resuscitate the *Myers* holding on public notification.

Plaintiff also attempts to breathe life back in to the *Myers* holding that KORA's public notification provisions have punitive effects by asserting that Defendants "acknowledge" *Myers* is controlling. Plaintiff's Summary Judgment Memorandum, p. 47 (citing Plaintiff's Facts ¶63). As explained above, Defendants object to paragraph 63 of Plaintiff's statement of uncontroverted facts because it asserts a legal conclusion. In any event, the Defendants have asserted consistently that KORA and its amendments apply to Plaintiff, and that Plaintiff has no *Ex Post Facto* claim. Defendants have never conceded that *Myers* prohibits application of the current version of KORA to Plaintiff. To be sure, from 1996 until 2003, *Myers* remained the law of the land in Kansas, and during that time, Kansas' law enforcement agencies implemented the Kansas' offender registration program consistent with that decision. As explained in Defendants' Summary Judgment Memorandum, the *Smith v. Doe* decision has overtaken the *Myers* holding on notification, and *Smith v. Doe* is indisputably controlling precedent on this issue of federal law.

C. Plaintiff's attempts to distinguish KORA from the Alaska statute upheld in *Smith v. Doe* should be rejected.

Plaintiff also argues that *Smith v. Doe* is not controlling because KORA's provisions are more burdensome than the Alaska statute. In particular, Plaintiff points to statutory requirements related to his driver's license, child custody proceedings, and in-person reporting, as well as the behavior of third-parties such as newspapers and private sector websites. None of these provisions or behavior justify a conclusion that the current version of KORA is punitive in effect.

1. Plaintiff's driver's license is not a "visible badge of past criminality"

Plaintiff attempts to distinguish the Alaska regime from KORA by arguing that KORA includes a "'visible badge of past criminality'" because the driver's license of a registered offender includes the letters "RO" as part of a unique identifying number assigned to him by the State Department of Revenue Division of Vehicles. Plaintiff's Memo, p. 56; *see also* K.S.A. §8-243(d). Plaintiff further asserts that his driver's license "must be displayed" at "places that require proof of identity." Plaintiff's Memo, p. 56. Plaintiff's affidavit includes a copy of two driver's licenses. *See* Pl. Ex. 5A. According to Plaintiff, the license on the bottom is his current license. (Although a photocopy of a second, earlier-issued license is included at the top of Pl. Ex. 5A, Plaintiff neither argues that the top version was required by law nor alleges that he ever used that license.)

To begin with, Plaintiff does not bother to cite the statutory provision addressing driver's license contents and has not raised a specific challenge to it. Setting aside these facial deficiencies to Plaintiff's challenge, there are three reasons to reject Plaintiff's attempt to characterize his driver's license as a "badge of punishment."

First, the letters "RO" do not, by themselves, provide any plain, unambiguous link to the offender registry. The purpose of the assigned identifier is to "readily indicate to law enforcement officers that such person is a registered offender." K.S.A. §8-243(d). Lacking any additional context, to the uninformed viewer of Plaintiff's license, the letters "RO" are not a visible badge of anything.

Second, even were someone other than a law enforcement officer able to discern from the letter "RO" that Plaintiff was a registered offender, that, by itself, does not reveal anything specific about the conviction that resulted in requiring Plaintiff to register.

Finally, there is no basis for Plaintiff's bald assertion that he "must" use his driver's license as proof of his identity. KORA does not mandate that Plaintiff use his driver's license as proof of identification. While a driver's license is one method of identification, there are others, including a passport. Nor has Plaintiff offered any specific facts to support his conclusory assertion that he actually uses (voluntarily) this source of identification on any regular basis. *See supra* (objections to ¶¶36-37 of Plaintiff's statement of uncontroverted facts).

2. The statutory provisions regarding child custody proceedings do not impose any "affirmative disabilities or restraints," are not punitive, and are consistent with the rest of the notification scheme.

Plaintiff asserts that application of K.S.A. §23-3203(h) and (i) regarding child custody proceedings makes KORA unconstitutional. Similar to Plaintiff's complaint about the driver's license requirements, he has never previously identified these provisions related to domestic relations procedures as part of his challenge to KORA. In addition, Plaintiff's second citation is to the wrong provision – presumably he meant K.S.A. §23-3203(h) and (j), which are the two referring to KORA.

K.S.A. §23-3203 provides, in pertinent part:

> In determining the issue of child custody, residency and parenting time, the court shall consider all relevant factors, including but not limited to: . . . (h) whether a parent is subject to the registration requirements of [KORA]; . . . (j) whether a parent is residing with an individual who is subject to the registration requirements of [KORA]."

This provision imposes no disability on offenders – it does not mandate a certain outcome, and it does not limit consideration to the listed factors. Courts are directed to consider "all relevant factors," without requiring a particular result. And the factors are specifically "not limited to" those listed in the statute. Moreover, as a matter of public policy, surely a court should take into

account the criminal history of parents or others living where a child might be assigned as a result of a court proceeding. That is an especially relevant factor where the history may reveal crimes of a sexual nature directed at or involving children. That ensures a court can act in the best interests of the child and, if necessary, impose conditions necessary to safeguard the welfare of the child. Consideration of registration status as a "factor" is not aimed at punishing offenders, and it does not amount to punishment. Instead, its aim is child welfare and assuring that a court has all necessary information in providing for the best interests of the child. Furthermore, the Legislature has already classified sex offenders as worthy of being brought to the public's attention to promote public safety. Thus, it is natural that consideration should be given to that information in this forum as well.

3. In-person reporting requirements are not an "affirmative restraint," and, in any event, are an appropriate regulatory provision.

KORA imposes no physical restraints on offenders – they remain free to travel throughout the country and world. In citing to one "restraint" to which Plaintiff believes that he is subjected, he uses the example of having to notify the Johnson County Sheriff's office before he leaves for one of his trips out of the country. That does not suggest that Plaintiff's freedom to travel, even out of the country, is in any manner limited. To be sure, offenders must provide location information to law enforcement agencies regarding residence and travel, but KORA does not prohibit an offender's residence or travel choices. For that reason, reporting is not an affirmative restraint on those choices. Furthermore, as explained in Defendants' Summary Judgment Memorandum, the in-person reporting requirements in KORA represent a reasonable regulatory provision. *See* Def. Memo in Support of SJ, pp. 17-18. KORA is founded on the goal

of providing accurate information regarding offenders to the public, and in-person reporting furthers that goal. This requirement ensures that law enforcement agencies have current physical descriptions and confirm the location of offenders.

4. Third-party behavior involving various websites cannot be attributed to KORA and does not establish any constitutional burden.

Plaintiff also argues that KORA can be distinguished from the Alaska statute because of the potential for Plaintiff's registration information to be further disseminated by third parties such as online newspapers, websites or cellular phone applications that offer access to offender registration information, and social media sites, such as Facebook or Twitter.

As an initial matter, Plaintiff has failed to offer admissible evidence on the content of third-party websites or applications, such as newspapers or other entities that allegedly re-publish the offender registry information or offer the ability to "comment" on offenders. There is no competent evidence in the record on this point, and it would prejudice Defendants for the Court to rely on these unsupported statements. Thus, this portion of Plaintiff's argument should be struck or ignored. *See* Def. Memo in Support of Motion to Strike, pp. 52, 57-58.

Regardless of admissibility and prejudice, none of what Plaintiff tries to tie to KORA is contained within the statute. Therefore Plaintiff's gripes about the online version of The Topeka Capital Journal and other websites do not support his constitution claim. KORA contains no mandate to provide any comment section on any law enforcement agency's website, nor is there any link to, or control over, what third parties do with this publicly available information. Regardless of whether a local newspaper or other website chooses to provide a forum for

commenting, those choices cannot be attributed to the State for purposes of examining the constitutionality of KORA.

Importantly, all of what Plaintiff complains about was possible under KORA in 1996, and was possible under the Alaska statute upheld in *Smith v. Doe*. The United States Supreme Court concluded that unlimited public access, through a passive notification scheme using the Internet, was neither intended as punishment nor had a punitive effect. Plaintiff has offered nothing to support a different result here.

III. Plaintiff's challenges to research on recidivism and the public safety purpose of KORA are unsupported by evidence and also not properly litigated in this case, but are instead policy arguments properly left for the Legislature.

Plaintiff attempts to dispute the United States Supreme Court's conclusion that the risk of sex offender recidivism is "'frightening and high.'" *Smith v. Doe*, 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34, 122 S. Ct. 2017 (2002)). But on this issue, Plaintiff has never submitted any admissible evidence in this case that the recidivism risk or rates are not high, and has therefore denied the Defendants any opportunity to cross-examine and vigorously challenge those assertions. Defendants moved to strike the recidivism statistics that Plaintiff slipped into the body of his brief. *See* Def. Memo in Support of Mtn to Strike, p. 58.

Plaintiff also asserts that the 2011 amendments to KORA were enacted in pursuit of federal funding, and implies that this is not a valid public purpose. Plaintiff's Memo, pp. 67-68, 74. Plaintiff misses the mark for two reasons. First, the federal funds at issue are related to public safety. *See* 42 U.S.C. §§3750 (name of grant program is "Edward Byrne Memorial Justice Assistance Grant Program"); 3751(a)(1) (grants authorized for "criminal justice" purposes). Thus pursuit of the funding was itself in furtherance of public safety. Second, while the amendments

to KORA may have been aimed at helping Kansas obtain funding, the mechanism for accomplishing that goal was bringing state statutory provisions in line with existing federal provisions in the Adam Walsh Act, which, in turn, is directed at public safety. In other words, the pursuit of consistency with a federal public safety law only further links the amendments to public safety rather than a contrary purpose. Thus, passage of the amendments could not remove the public safety purpose underpinning KORA.

Essentially, Plaintiff would like to revisit the wisdom of KORA's approach of classifying sex offenders due to concern over recidivism and establish that KORA's approach does not serve a public safety purpose. The constitutional test is not the effectiveness of KORA. The Legislature has already made its policy choices, and those choices have been repeatedly upheld by the Kansas courts. Plaintiff would prefer different choices, but the proper forum for that effort is the Legislature, not the courts.

IV. The Kansas district court decisions and out-of-state decisions cited by Plaintiff are neither applicable nor persuasive.

Plaintiff attempts to rely on three Kansas district court decisions that appear to support Plaintiff's view of the law, but these decisions have no application here.

In the criminal cases, *State v. Broxterman* and *State v. Alexander*, the courts were reluctant to direct the defendants to comply with amendments to KORA that required a longer registration period, and so directed the defendants to register for the original, shorter period. *See* Plaintiff's Memo, p. 52-54; Pl. Ex. 35; Pl. Ex. 36. As explained in Defendants' Summary Judgment Memorandum (pp. 10-11), *State v. Evans*, 44 Kan. App. 2d 945, 948, 242 P.3d 220, 223 (2010), is directly on point, and mandates the opposite result reached by these courts.

In the criminal case *State v. O'Dell*, the court concluded that application of KORA to a drug offender would constitute an *Ex Post Facto* violation. *See* Plaintiff's Memo, p. 54; Pl. Ex. 37. The issue presented in that case is completely distinguishable. Unlike the statutory definition of "sex offender" or "violent offender," the definition of "drug offender" does not include a date after which a conviction would subject a defendant to application of KORA. *Compare* K.S.A. §§22-4902(b) ("sex offender") *and* 22-4902(e) ("violent offender") *with* 22-4902(f) ("drug offender"). Thus, the court examined whether a date of conviction should be implied as a limitation on the statute's reach to avoid a constitutional problem. Even so, the conclusion that registration amounts to punishment is directly contrary to both *Myers* and *Smith v. Doe*.

As for the out-of-court cases that Plaintiff relies on to support the idea that offender registration regimes similar to KORA are constitutionally deficient, those cases do not support that point. The cases can be set to the side for the simple reason that each of them relied on state constitutional provisions, and not the federal *Ex Post Facto* Clause. *See State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (holding that statute violates Section 28, Article II of the Ohio Constitution); *Wallace v. State*, 905 N.E.2d 371, 377, 384 (Ind. 2009) (holding that statute violates Section 24, Article I of the Indiana Constitution); *Doe v. State*, 189 P.3d 999, 1003, 1019 (Alaska 2008) (holding that statute violates Section 15, Article I of the Alaska Constitution). Plaintiff here has not raised any state-law claims, nor could he. The Kansas Constitution contains no parallel provision to the federal *Ex Post Facto* Clause. Whether out-of-state courts have determined that other states' offender registration regimes run afoul of different states' constitutional provisions has no bearing on the federal claim the Plaintiff raises here.

CONCLUSION

For the reasons stated above and in Defendants' Summary Judgment Memorandum, Defendants respectfully request that the Court deny Plaintiff's motion for summary judgment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Defendants' Joint Response in Opposition to Plaintiff's Motion for Summary Judgment was sent by U.S. mail, postage prepaid, this 14th day of December, 2012 addressed to:

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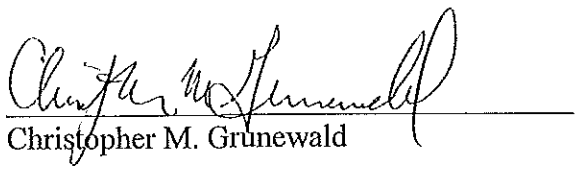

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