IN THE THIRD JUDICIAL DISTRICT OF KANSAS
DIVISION 6

JOHN DOE,

Plaintiff,

v.

KIRK THOMPSON, DIRECTOR OF THE KANSAS BUREAU OF INVESTIGATION, AND FRANK DENNING, JOHNSON COUNTY, KANSAS SHERIFF,

Defendants.

Case No. 12-C-168

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

No material fact in the Plaintiff's motion for summary judgment was controverted in the Defendants' response. This case is properly decided on summary judgment. The Plaintiff submits this reply in support of his motion.

REPLY TO DEFENDANTS' RESPONSE TO STATEMENT OF UNCONTROVERTED FACTS

The Parties

1. Plaintiff John Doe[1] registers pursuant to the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, as required by the Kansas Bureau of Investigation ("KBI") and the Johnson County Sheriff's Office.

[1] The Court permitted the Plaintiff to proceed by pseudonym in a Memorandum Decision and Order filed April 30, 2012.

Defendants' response: Objection: Plaintiff provides no citation to the record to establish whether he is currently registered, in violation of Sup. Ct. R. 141. Otherwise uncontroverted.

Plaintiff's reply: The fact is uncontroverted and defendants ask for no relief for the technical violation of Rule 141. Plaintiff's exhibits 4 and 6, as well as Defendants' statements of uncontroverted facts 11 through 15, establish the fact.

2. Defendant Kirk Thompson is the director of the KBI. The KBI is the executive agency tasked with enforcing the KORA. The KBI is responsible for maintaining and publishing the state's database of registered offenders.

Defendants' Response: Uncontroverted.

3. Defendant Frank Denning is the Sheriff of Johnson County, Kansas. Kansas sheriffs are tasked with enforcing the reporting and registration requirements of offenders who live, work, or go to school in their jurisdictions. The information they collect is transmitted to the KBI's Topeka office.

Defendants' Response: Uncontroverted.

4. Mr. Doe resides and works in Johnson County, Kansas. *See* Ex. 1, Registration Form, dated 9/26/2011 [AG 122-23[2]].

Defendants' Response: Uncontroverted.

5. The KBI's main office is located in Topeka, Shawnee County, Kansas. *See* Ex. 2, Notice of Amendments to the Kansas Offender Registration Act, dated 6/15/2011 [AG 145-48].

Defendants' Response: Uncontroverted.

6. Sheriff Denning's office is located in Johnson County, Kansas.

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[2] This is the Bates-stamped number placed on this document by the Attorney General for documents produced in response to the Plaintiff's discovery requests. Because most of the discovery documents in this case contain Mr. Doe's real name, they have been redacted.

Defendants' Response: Uncontroverted.

Mr. Doe's underlying criminal case

7. On November 23, 2002, the state of Kansas filed a criminal complaint against Mr. Doe alleging one count of indecent liberties with a child, in violation of K.S.A. § 21-3503(a)(1). The complaint alleged that the offense occurred in Johnson County, Kansas, between December 24, 2001 and April 2, 2002. Ex. 3, Complaint and Amended Complaint [AG 8–10].

Defendants' Response: Uncontroverted.

8. Mr. Doe entered into a plea agreement with the state. Pursuant to the agreement, Mr. Doe pled guilty to one count of indecent liberties on February 19, 2003. That is Mr. Doe's date of conviction. Ex. 4, Journal Entry of Judgment, dated 4/3/2003 [AG 6-10].

Defendants' Response: Uncontroverted.

9. Mr. Doe recalls discussing with his attorney that he would be required to submit to a ten-year registration period as a result of a conviction of the crime with which he was charged. The duration of registration and the attendant restrictions at the time were important considerations in Mr. Doe's decision to plead guilty. Had he known that the registration period would increase to 25 years and include the more burdensome current requirements, he likely would not have agreed to plead as charged. Ex. 5, John Doe Affidavit, at ¶ 43.

Defendants' Response: Objection: Defendants have moved to strike Plaintiff's speculation in ¶43 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).

Plaintiff's Reply: The Plaintiff incorporates by reference his response to the motion to strike.

10. Mr. Doe was sentenced on April 3, 2003. His sentence was 32 months of prison, suspended in favor of 36 months of probation, plus costs and fees. His journal entry of judgment does not include any reference to registration requirements. Ex. 4, Journal Entry of Judgment, dated 4/2/2003 [AG 6-10].

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

Plaintiff's Reply: The parties agree that sentencing was April 3, 2003.

Mr. Doe's registration

11. Mr. Doe first registered with the Sheriff of Johnson County on April 22, 2003. *See* Ex. 6, Registration Form, dated 4/22/2003, stamped received by the KBI 5/8/2003 [AG 1-2].

Defendants' Response: Uncontroverted.

12. On May 9, 2003, the KBI sent a letter to the Johnson County District Court clerk requesting the journal entry of judgment and complaint from Mr. Doe's case to determine the registration requirements applicable to him and whether public disclosure was permissible. Ex. 7, Letter from the KBI to Johnson County Court, dated 5/9/2003 [AG 4-5].

Defendants' Response: Uncontroverted.

13. The KBI determined registration was required and began sending verification forms to Mr. Doe every 90 days with instructions to complete and return them within ten days, as required by the statute in effect from 2003–2007. *See* Ex. 8, Verification Forms [AG 11-19, 21-38].

Defendants' Response: Uncontroverted.

14. Under the law in effect when Mr. Doe was sentenced, Mr. Doe's registration obligations and public disclosure of his registered information would end on April 3, 2013.

Defendants' Response: 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.

Plaintiff's Reply: The Defendants are correct. The statute reads, "liability for registration terminates, if not confined, at the expiration of 10 years from the date of conviction."

15. On or about September 2, 2006, Mr. Doe received an additional document with his mail-in verification form. It was a "Notice to Registered Offenders," informing recipients that a new law went into effect on June 1, 2006, and highlighting the following changes in the registration scheme:
    a. "Registered offenders are required to annually renew a driver's license or state issued identification card on the offender's birthday."
    b. "Registered offenders shall register in person to the sheriff's office of the county of residence twice a year."
    c. "The crime of failure to register has been increased from a severity level 10 nonperson felony to a severity level 5 person felony."

    This notice was to become an "addendum" to the on-file registration form, and Mr. Doe was told that this notice "must be signed" by him and returned to the KBI. Mr. Doe signed and returned it. Ex. 9, Notice to Registered Offenders, dated 6/1/2006, signed and dated by Mr. Doe, 9/2/2006 [AG 45].

Defendants' Response: Uncontroverted.

16. On September 13, 2006, Mr. Doe received a letter re-iterating the additional registration duties listed above. Ex. 10, Letter from the KBI to Mr. Doe, dated 9/13/2006 [AG 48].

Defendants' Response: 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).

Plaintiff's Reply: Nothing material is controverted. The text of the letter speaks for itself.

17. On June 11, 2007, Mr. Doe received another letter from the KBI. The letter detailed changes to the registration requirements to become effective July 1, 2007. The changes, among others, included:
    a. "You are no longer required to return a 90 day verification letter to the KBI."
    b. "You are required to report three times a year in person to the sheriff's office in each county where you are required to register (reside, work or attend school)."
    c. "You are required to immediately renew any Kansas driver's license or state identification card issued to you, and must annually renew such license or identification card on or before your birthday. The driver's license or identification card will indicate that you are a 'Registered Offender.'"

    Other requirements previously in place remained in force as well. Mr. Doe was directed to address any questions he might have to his local sheriff's office. Ex. 11, Notice to Registered Offenders, dated 6/11/2007 [AG 58].

Defendants' Response: 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).

Plaintiff's Reply: Nothing material is controverted. The text of the letter speaks for itself.

18. The KBI mailed periodic registration reminders to tell Mr. Doe that he must register in person with the Johnson County Sheriff until approximately February 1, 2009, when the KBI informed Mr. Doe and other offenders that it would no longer remind them when to register. *See, e.g.*, Ex. 12, Registration Reminder, dated 10/1/2007 [AG 64]; *see also* Ex. 13, Notice to Registered Offenders, undated [AG 90].

Defendants' Response: Uncontroverted.

19. On June 15, 2011, the KBI sent out a letter to all registered offenders, including Mr. Doe, detailing changes to the registration law to become effective July 1, 2011. Authority to apply the changes to Mr. Doe was stated as follows:

Dear Registered Offender:

This is a courtesy letter to let you know the Kansas Offender Registration Act has been amended by the Kansas Legislature and signed into law by the Governor. Effective July 1, 2011, numerous changes will apply to offenders required to register pursuant to the Kansas Offender Registration Act, K.S.A. 22-4901, et seq. Full details can be found in the bill through which the changes were enacted, 2011 Senate Bill 37, available online at:

http://www.kslegislature.org/li/b2011_12/year1/measures/documents/sb37_enrolled.pdf.

This letter serves as notification of the key changes and statutory obligations. The Kansas Offender Registration Act is a regulatory scheme that is civil and nonpunitive, and therefore all provisions are retroactive and apply to offenders, regardless of when their underlying offense(s) occurred. *Smith v. Doe*, 538 U.S. 84 (2003).

Ex. 2, Notice of Amendments to the Kansas Offender Registration Act, dated 6/15/2011 [AG 145-48]. The letter then outlined the new requirements, including the following, which applied to Mr. Doe:

All offenders currently residing, working or attending school in the State of Kansas and all offenders who are about to be released to reside, work or attend school in the State of Kansas are required to:

1) Register in person with the registering law enforcement agency within three business days of coming into any county or location of jurisdiction in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school.

2) Report in person four times each year to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment or is attending school, in the month of the offender's birthday and every third, sixth and ninth month occurring before and after the month of the birthday.
   - Offenders whose birthday is in January, April, July, or October are required to report to the registering law enforcement agency in January, April, July, and October.
   - Offenders whose birthday is in February, May, August, or November are required to report to the registering law enforcement agency in February, May, August, and November.
   - Offenders whose birthday is in March, June, September, or December are required to report to the registering law enforcement agency in March, June, September, and December.

3) If transient, report in person to the registering law enforcement agency of such county or location of jurisdiction in which the offender is physically present within three business days of arrival in the county or location of jurisdiction. Transient offenders are required to register in person with the registering law enforcement agency every 30 days, or more often at the discretion of the registering law enforcement agency and provide a list of places where the offender has slept and otherwise frequented during the period of time since the last date of registration and provide a list of places where the offender may be contacted and where the offender intends to sleep and otherwise frequent during the period of time prior to the next required date of registration.

4) Register in person within three days upon beginning, changing or terminating the offender's residence location, employment status, school attendance or other information, to the registering law enforcement agency or agencies where last registered, and also to provide written notice to the Kansas bureau of investigation.

5) If required by out-of-state law, also register in any out-of-state jurisdiction, where the offender resides, maintains employment or attends school.

6) If receiving inpatient treatment at any treatment facility, inform the treatment facility of the offender's status as an offender and inform the registering law enforcement agency of the county or location of jurisdiction in which the treatment facility is located of the offender's presence at the treatment facility and the expected duration of the treatment.

7) Notify the registering law enforcement agency and the Kansas bureau of investigation 21 days prior to any travel outside of the United States.

8) If maintaining primary residence in this state, surrender all driver's licenses and identification cards from other states, territories and the District of Columbia, except if the offender is presently serving and maintaining active duty in any branch of the United States military or if the offender is an immediate family member of a person presently serving and maintaining active duty in any branch of the United States military.

Penalties for failing to comply with the Kansas Offender Registration Act

Violation of the Kansas offender registration act is, upon a first conviction, a severity level 6, person felony; upon a second conviction, a severity level 5, person felony; and upon a third or subsequent conviction, a severity level 3, person felony; and aggravated violation (failing to register for more than 180 consecutive days) of the Kansas offender registration act is a severity level 3, person felony.

Duration of Registration – Adult Offenders

For adult offenders convicted in Kansas of the following offenses, the duration of registration shall be, 25 years from the date of conviction or date of release from incarceration, whichever date is most recent:

e) Indecent liberties with a child, as defined in K.S.A. 21-3503

Additional fields collected on the registration form include the following:

1) Current residential address, any anticipated future residence, any temporary lodging information including, if transient, where the offender has stayed and frequented since last reporting for registration.
2) All telephone numbers at which the offender may be contacted, including all mobile telephone numbers.
3) All vehicle information, including the license plate number, registration number of and any other identifier and description of any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment, and information concerning the location or locations such vehicle or vehicles are habitually parked or otherwise kept.
4) License plate number, registration number or other identifier and description of any aircraft or watercraft owned or operated by the offender, and information concerning the location or locations such aircraft or watercraft are habitually parked, docked or otherwise kept.
5) All professional licenses, designations and certifications.
6) Palm prints.
7) E-mail addresses and online identities used, as well as membership in online social networks.
8) All travel and immigration documents.

All other requirements of the Kansas Offender Registration Act remain in effect.

Ex. 2, Notice of Amendments to the Kansas Offender Registration Act, dated 6/15/2011 [AG 145-48].

Defendants' Response: 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.

Plaintiff's Reply: Nothing material is controverted. The text of the letter speaks for itself.

20. As announced in the June 15, 2011, letter from the KBI, the KBI posits that Mr. Doe is subject to the terms of the 2011 KORA amendments. Under this scheme, his

registration information will be publicly available through April 3, 2028. If he fails to comply with the terms of the 2011 KORA, the KBI and the Johnson County Sheriff will inform prosecutors. He would then be subject to criminal prosecution.

Defendants' Response: 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.

Plaintiff's Reply: Nothing material is controverted. The Plaintiff accepts the Defendants' date for termination of registration. With respect to the objections, the statement is an application of the KORA to other uncontroverted facts. Whether defendants would report a failure to register is not material, the parties agree that Mr. Doe would be subject to criminal prosecution and the decision of whether to initiate a prosecution is discretionary.

<u>The KORA's transformation</u>

21. The KORA has been amended eleven times since it was originally adopted and six times since Mr. Doe's conviction.

Defendants' Response: 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.

Plaintiff's Reply: Defendants' summary of the law is accurate.

22. In 1993, the Kansas Legislature enacted the Kansas Habitual Sex Offender Registration Act (KHSORA). As the name implied, the KHSORA applied only to those convicted of a second or subsequent sexually violent crime. Only nine offenses required registration (rape, indecent liberties with a child, aggravated indecent liberties, criminal sodomy, aggravated criminal sodomy, indecent solicitation of a child, sexual exploitation of a child, aggravated sexual battery, court finding, beyond a reasonable doubt, that any other offense was sexually motivated). 1993 Kan. Sess. Laws 253, attached hereto as Ex. 14, the text of which is incorporated into these facts by reference.

a. Failure to register was a class A non-person misdemeanor.
b. A repeat violent sex offender had 30 days to register after his second or subsequent conviction and was required to notify the sheriff's office within 10 days of changing his or her address.
c. A repeat violent sex offender registered in his or her county of residence.
d. The period of registration for repeat violent sex offenders was ten years.
e. A repeat violent sex offender had to provide his name, date of birth, date of conviction, county of conviction, photograph, fingerprints, and social security number to the sheriff. This information was disclosed only to the KBI and other law enforcement agencies.
f. A repeat violent sex offender could apply for a court order relieving him of the duty of further registration. The offender had to show by a preponderance of evidence that he was rehabilitated.
g. The records of registration were NOT actively disclosed to the public and they were NOT open for public inspection. Only law enforcement could access registry information.

Defendants' Response: 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).

Plaintiff's Reply: There is no dispute of fact. The text of the law, attached and incorporated by reference as an exhibit to the motion, is controlling.

23. In 1994, the KHSORA became the Kansas Sex Offender Registration Act (KSORA). The KSORA expanded the prior registration scheme to first-time sex offenders for the nine offenses enumerated in the KHSORA. 1994 Kan. Sess. Laws 107, attached hereto as Ex. 15, the text of which is incorporated into these facts by reference.
    a. The time period in which sex offenders were required to register was tightened to 15 days.
    b. Second or subsequent convictions required lifetime registration.
    c. The registration records were made available for public inspection at local sheriff's offices. The records were NOT subject to the Open Records Act.

Defendants' Response: 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 sheriffs 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).

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling. Plaintiff acknowledges that there appears to be an error in the Lexis-Nexis document, which explains the discrepancy.

24. In 1997, the KSORA was amended to become the Kansas Offender Registration Act (KORA). More offenses required registration. The act required registration for those defined as "sex offenders," "violent offenders," and others convicted of a list of specified crimes. 1997 Kan. Sess. Laws 181, attached hereto as Ex. 16, the text of which is incorporated into these facts by reference.

a. Added to the list of sex offenders were those convicted of sexual battery and aggravated incest. Thus, eleven sex offenses required registration. Violent offenders were defined to include individuals convicted of five various homicide offenses, conspiracy to commit any of those offenses, or the attempt or solicitation of any of those offenses. Individuals convicted of any of ten various offenses when the victim was less than 18 years old triggered registration.

b. Change-of-address notification was required to be sent to the KBI, in addition to the registrant's local sheriff's office.

c. A periodic paper reporting provision was added. Before this, there was no reporting requirement whatsoever—just the initial registration and change-of-address updates. The reporting provision required offenders to mail in verification forms every 90 days.

d. More information was required to be disclosed, including race, sex, age, hair color, eye color, scars, blood type, occupation, employer name, driver's license, vehicle information, documentation of mental health treatment, anticipated future residences, and DNA samples.

e. Offenders could still apply to a court for relief from the duty to register. However, an offender had to register for at least ten years before applying for relief. Thus, only those convicted of a second or subsequent sex offense could get off the list early, since first-time offenders only registered for ten years. Relief from the duty to register required proof by a preponderance of the evidence that the offender was rehabilitated, and the court also had to hear a report from a board of experts in sex offender treatment that the offender was unlikely to engage in predatory sexually violent crimes.

f. Information on the registry was made subject to the open records act, but it was still accessible only by asking for it at a sheriff's office or by making a record request of the KBI.

Defendants' Response: 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). Plaintiffs 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.

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

25. In 1999, the KORA was amended again. A definition of aggravated offense was added, which classified sex offenses involving victims under age 14 as aggravated. Such aggravated offenses required lifetime registration on the first offense. 1999 Kan. Sess. Laws 164, attached hereto as Ex. 17, the text of which is incorporated into these facts by reference.
    a. Failure to register became a severity level 10 non-person felony.
    b. An offender was required to register within ten days of moving to a new county and was required to inform the sheriff and the KBI if he or she moved to a new state.
    c. The ability to apply for relief from registration was further limited. Repeat offenders could never apply for relief. Nor could those convicted of aggravated offenses.

Defendants' Response: 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.

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

26. In 2001, the KORA was amended again. The legislature added a definition of "sexually violent predator," as another class of offenders triggering registration (and

has more legal repercussions beyond registration). 2001 Kan. Sess. Laws 208, attached hereto as Ex. 18, the text of which is incorporated into these facts by reference.

a. Non-resident students or workers who were offenders were required to register in Kansas when present in the state for more than 14 days consecutively or 30 days total per year.
b. Registration became required not only in the county of residence, but also in counties where registrants worked and attended school. Offenders were required to register within 10 days of entering a county.
c. The mailed reporting forms required more information, including schools attended, employment changes, and vehicle registration changes.
d. More information was authorized to be disclosed upon a public records request, including skin tone, name of employer, place of employment, and school.
e. The sheriff or the KBI was authorized to sponsor or create a website that made information on the offender registry available to the public.
f. No offenders could apply for relief from the duty to register.

Defendants' Response: 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.

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

27. In 2002, the KORA was amended to include juveniles adjudicated of a sexually violent crime. Such juveniles were required to register until age 18 or five years following adjudication. 2002 Kan. Sess. Laws 55 (HB 2399), attached hereto as Ex. 19, the text of which is incorporated into these facts by reference, and 2002 Kan. Sess. Laws 163 (SB 434), attached hereto as Ex. 20, the text of which is incorporated into these facts by reference.

Defendants' Response: 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.

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

28. In 2003, the KORA was amended to comply with federal laws. The major change was that an offender's attendance at any college or secondary school for more than 14 consecutive days or more than 30 days annually triggered registration. Additionally, the definition of "offender" was expanded to include anyone required to register in any state, federal, military jurisdiction, or anyone who was otherwise required to register. 2003 Kan. Sess. Laws 123, attached hereto as Ex. 21, the text of which is incorporated into these facts by reference.

Defendants' Response: 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.

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

29. In 2006, the KORA was again amended. The major change made failure to register a severity level 5 person felony. Conviction for failure to register garnered a presumed imprisonment sentence. Also, upon the thirty-first consecutive day of failing to register, another separate level 5 offense occurred. 2006 Kan. Sess. Laws 212, attached hereto as Ex. 22, the text of which is incorporated into these facts by reference.

Defendants' Response: 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).

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

30. In 2007, the KORA was amended in many ways. More offenses triggered a registration requirement, including person felonies for which the court finds on the record that the crimes were committed with a deadly weapon, aggravated trafficking, and various drug offenses. 2007 Kan. Sess. Laws 183, attached hereto as Ex. 23, the text of which is incorporated into these facts by reference.

a. Significantly, in-person reporting became required for all offenders, three times per year at the a sheriff's office. At each reporting, registered offenders were required to verify the following information: address, school information, employment information, and vehicle registration. A photograph was taken and the offender was required to pay $20 per visit.

b. First-time sex offenses triggered lifetime registration when the victim was less than 14 years old.

c. If an offender moved to Kansas from another jurisdiction, that offender was required to register for the longer of Kansas's required registration period for the offense or the registration period of the state where the offender was previously registered.

d. More information was required to be disclosed, including the license plate numbers of vehicles, email addresses, and online identifiers used by the offender.

Defendants' Response: 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).

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling. The point of the Plaintiff's summary was to note the in-person registration and that updated information was required each time an offender reported in person. In-person reporting was required twice per year under the 2006 amendment; the 2007 amendment required in-person reporting three times per year.

31. In 2008, the KORA was again amended. The principle amendment added electronic solicitation to the list of "sexually violent" crimes triggering registration. 2008 Kan.

Sess. Laws 74, attached hereto as Ex. 24, the text of which is incorporated into these facts by reference.

Defendants' Response: Objection: This paragraph paraphrases the 2008 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.

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

32. In 2009, the KORA was amended, adding manufacture or attempted manufacture of controlled substance analogs to the list of drug offenses triggering registration requirements. 2009 Kan. Sess. Laws 32, attached hereto as Ex. 25, the text of which is incorporated into these facts by reference.

Defendants' Response: 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 Count.

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

33. In 2011, the Kansas Legislature enacted extensive amendments to the KORA in order for the state to become compliant with the federal Sex Offender Registration and Notification Act ("SORNA"), part of the Adam Walsh Act, 42 U.S.C. 16901, *et seq.* The federal law requires that states comply with its mandate or lose 10% of the federal Byrne grant money that funds various state programs. Kansas chose to comply. In fact, the legislative history shows the *only* reason the Kansas Legislature enacted the 2011 amendments was to comply with the Adam Walsh Act. The chair of the Offender Registration Working Group, a multi-disciplinary group that drafted the proposals for amending the law for the legislative committees, described the bills in his testimony:

> This bill will hopefully bring the State of Kansas into "substantial compliance" with the Federal Crime Act known as The Adam Walsh Act. The Offender Registration Working Group has been working towards gaining compliance for the State of Kansas for the past three years. During the past three years Kansas has been given two extensions to extend the

deadline for compliance. As of June 30th, Kansas will start to lose funding awarded through Burn [*sic*] Grants if "substantial compliance" is not met. HB 2322 blends requirements of the Walsh Act with all the additional requirements the State of Kansas has added over the past three years.

. . .

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 the law.

Ex. 26, Testimony of Sgt. Al Deathe, Feb. 17, 2011, attached, the full text of which is incorporated into these facts by reference.

Defendants' Response: Objections: (1) This paragraph paraphrases and selectively quotes Plaintiff's Ex. 26, an inadmissible, unsworn statement by Sergeant Al Deathe, Douglas County Sheriffs 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).

Plaintiff's Reply: The Defendants do not dispute the facts. Their response is limited to objections. The ten percent loss of funds is a federal statutory mandate that can be found at 42 U.S.C. §16925(a). Sergeant Deathe's testimony is part of legislative history, as the Defendants acknowledge. It is admissible as relevant to show the intent of the legislature, although admittedly not entirely dispositive of the legislature's intent. In this case, however, the Defendants do not point to anything to suggest the legislature's intent was otherwise. This is likely because there is nothing in the legislative history to support a different conclusion. The Defendants' best evidence objection, for the reasons fully set out in the Plaintiff's response to the motion to strike, misses the mark.

34. The KBI's representative submitted written testimony outlining the changes required by federal law to receive the grant money. All substantive changes were compelled by federal law. Modifications for ease of administration by the the KBI were also added, but they did not change the substantive requirements for offenders from prior law. Exhibit 28 is the testimony of the KBI Special Agent-in-Charge David Hutchings, and he testified, in pertinent part, as follows:

> The bill would accomplish several things. It reorganizes portions of the Act so that requirements are categorized more efficiently. It also brings us to substantial compliance with the Federal Adam Walsh Sex Offender Registration and Notification Act and makes several other changes that were proposed through the working group:
>
> . . .
>
> 4.) Changes to 22-4902 define "out of state."
> This was done to comply with the Adam Walsh Act. . . .
> 7.) Changes to 22-4902 define "reside" and "residence."
> This was a product of the ORWG [Offender Registration Working Group] and necessary for AWA. . . .
> 8.) Changes to 22-4902 define "transient."
> This is a product of the ORWG and necessary for Adam Walsh. . . .

19.) Changes to 22-4904 would require the court to document the age of the victim.
This is a product of the ORWG and is necessary for the effective management of offenders as required by Kansas law. It is also a requirement of Adam Walsh.

. . . .

24.) Changes to 22-4904 would require registering law enforcement agency to enter NCIC [National Crime Information Center] information.
This is a product of the ORWG. It is necessary for the efficient management of offenders under Kansas law and is a requirement of Adam Walsh.

. . . .

[27.)] Changes to 22-4905 would require the offender to report 4 times a year and to register and report any changes within 3 days.
This is a product of ORWG and is a requirement of Adam Walsh. . .

.

28.) Changes to 22-4905 would allow for different requirements for the registration of transients who cannot comply otherwise. . . .
This is a product of ORWG. Adam Walsh also required that a strategy be in place to address transient offenders.
29.) Changes to 22-4905 would require the offender, if receiving inpatient treatment, to notify the treatment facility of the offender's status as an offender.
This is a product of ORWG. It is necessary for the efficient management of offenders under Kansas law and is a requirement of Adam Walsh.
30.) Changes to 22-4905 would require the offender to report any change in required information within three days.
This is a product of the ORWG and is a requirement of Adam Walsh.

. . .

33.) Changes to 22-4906 would change all 10 year registration durations to 15 years and change some 10 year durations to life.
This is product of ORWG and is a requirement of Adam Walsh which requires a tiered duration of registration of 15 years, 25 years, and lifetime registration. The ORWG prefers to manage the program within a two-tier system.

34.) Changes to 22-4906 would require lifetime registration for kidnapping and aggravated kidnapping.
This is a product of the ORWG and is a requirement of Adam Walsh.
. . . .
36.) Changes to 22-4906 would require registration for juvenile offenders less than 14 yoa to register until 18 or for 5 years.
This is product of the ORWG and is an attempt to comply with Adam Walsh.
37.) Changes to 22-4906 would require a juvenile offender 14 or more yoa to register for 15 years.
This is a product of the ORWG and is an attempt to comply with Adam Walsh.
38.) Changes to 22-4906 would require a juvenile offender 14 or more yoa adjudicate of an off-grid felony or a felony ranked in severity level 1 of the nondrug grid to register for life.
This is a product of the ORWG and is a requirement of Adam Walsh.
39.) Changes to 22-4906 to eliminate court discretion to not require registration of a juvenile offender.
This is a product of the ORWG and is an attempt to comply with Adam Walsh. . . .
41.) Changes to 22-4907 would add alias information and more detailed information about conviction data to the information required to be reported by the offender.
This is a product of the ORWG and is a requirement of Adam Walsh.
42.) Rescinds 22-4912[3]

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[3] Before it was repealed, section 22-4912 read, in part, as follows:

"Any offender who was required to be registered pursuant to the [KORA], prior to July 1, 1999, and who would not have been required to be registered pursuant to the [KORA] on and after July 1, 1999, as a result of enactment of this act, shall be entitled to be relieved of the requirement to be registered. Such offender may apply to the sentencing court for an order relieving the offender of the duty of registration. The court shall hold a hearing on the application at which the applicant shall present evidence verifying that such applicant no longer satisfies the definition of offender pursuant to K.S.A. 22-4902 and amendments thereto."

> This is a requirement of Adam Walsh per the Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) Office.
>
> The SMART Office has stated that implementation of this set of revisions will place Kansas in the required status of substantial compliance with the Adam Walsh Act.

Ex. 27, Testimony of David Hutchings, March 3, 2011, attached, the full text of which is incorporated into these facts by reference.

Defendants' Response: 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.

Plaintiff's Reply: The Defendants do not dispute the facts. Their response is limited to objections. The testimony of David Hutchings is part of legislative history, as the Defendants acknowledge. It is admissible as relevant to show the intent of the legislature, although admittedly not entirely dispositive of the legislature's intent. In this case, however, the Defendants do not point to anything to suggest the legislature's intent was otherwise. This is likely because there is nothing in the legislative history to support a different conclusion. The document also constitutes a party admission with respect to the KBI. The Defendants' best evidence objection, for the reasons fully set out in the Plaintiff's response to the motion to strike, misses the mark.

35. The Governor signed into law Senate Bill 37, Ex. 28, 2011 Kan. Sess. Laws 95, making its provisions effective July 1, 2011.

As quoted in *State v. Evans*, 44 Kan. App. 2d 945, 947 (Kan. Ct. App. 2010).

a. It restructured offender classifications into three categories: drug offender, sex offender, and violent offender. Each category is defined by a list of offenses. K.S.A. § 22-4902.

b. It changed the penalties for failure to register: An offender's first failure to register became a level 6 person felony. An offender's second failure to register became a level 5 person felony. An offender's third failure to register became a level 3 person felony, and continued failure to register of more than 180 days became a level 3 person felony in the first instance. K.S.A. § 22-4903.

c. The requirements of registration are now an integral part of a defendant's sentencing hearing. Courts must inform offenders of the procedure required to register. If the sentence is probation, the court must complete the initial registration forms, have the offender read and sign them, and order the offender to report within three days in the counties where he lives, works, and goes to school. K.S.A. § 22-4904.

d. Statutory duties of a registered offender are now:
   i. register within 3 days of coming into any county where the offender intends to reside, maintain employment, or attend school. K.S.A. § 22-4905(a)
   ii. report in-person four times per year in each county where registered K.S.A. § 22-4905(b)
   iii. if transient, report in-person every 30 days. K.S.A. § 22-4905(e)
   iv. report and re-register in-person upon any change of residence, employment, or school within three days of such change, and provide written notice to the KBI of such change. K.S.A. § 22-4905(g)
   v. at each in-person reporting, submit to an updated photograph, check of scars, marks, and tattoos, pay $20 reporting fee, and verify all other information. K.S.A. § 22-4905(j)-(k).

e. Registration durations now accord with the federally-mandated three-tiered system:
   i. 15 years is required for the following first-time offenses: sexual battery when one party is less than 18, adultery when one party is less than 18, patronizing prostitute less than 18, lewd and lascivious where one party less than 18, capital murder, first degree murder, second degree murder, voluntary manslaughter, involuntary manslaughter, criminal restraint when victim less than 18, offense with court-finding that sexually-motivated, offense with court-finding that deadly weapon used, inchoate offenses of all of the above;

ii. 25 years for the following first-time offenses: criminal sodomy when victim is less than 18, indecent solicitation of a child, electronic solicitation, aggravated incest, indecent liberties with a child, unlawful sexual relations, sexual exploitation of a child if victim is age 14–18, aggravated sexual battery, promoting prostitution if victim is age 14–18, inchoate offenses of all of the above;

iii. lifetime registration is required for a second or subsequent offense of any of the above;

iv. lifetime registration is required for a first offense of the following: rape, aggravated indecent solicitation of a child, aggravated indecent liberties with a child, criminal sodomy when victim is less than 14, aggravated human trafficking, sexual exploitation of a child when victim is less than 14, promoting prostitution when victim is less than 14, kidnapping, aggravated kidnapping, offender determined to be a sexually violent predator, inchoate offenses of any of the above. K.S.A. § 22-4906

f. More information must be disclosed on registration forms, which must now be drafted by the KBI, including: alias names, city, state, country of birth, and alias dates of birth, title and statute number of offense of conviction, date of convictions, court case numbers, sex and date of birth (or purported date of birth) of victims, anticipated future residence information, phone number of employers and anticipated employers, photocopies of driver's license and identification cards, identifiers and descriptions of vehicles, identifiers and descriptions of watercraft/aircraft, professional licenses, designations, certifications, palm prints, schools, satellite schools, addresses and phone numbers of schools attending, online identities, social networks, online names, travel and immigration documents, and probation/parole officer information. K.S.A. § 22-4907.

g. The registry website must now include more information for public notification: classification as sex, violent, or drug offender, name and aliases, address of residence, temporary lodging information, employer address, address where a student, license plate numbers of cars, aircraft, watercraft, physical description, photograph, and all professional licenses. K.S.A. § 22-4909

h. No expungement is permitted for any registered offender during the duration of their registration. K.S.A. § 22-6614a(d).

i. The prohibition on early relief from the requirement remains intact. K.S.A. § 22-4908.

Defendants' Response: 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 m 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, *seep.* 323 of Plaintiff's corrected exhibits).
Plaintiff's subparagraph 35(h): The Kansas Statutes Annotated does not contain "§22-6614a."

Plaintiff's Reply: There is no dispute of fact. The text of the law is controlling.

<u>Effects of registration and public notification on Mr. Doe and his family</u>

36. Mr. Doe describes the registration process as "burdensome and chastening." Ex. 5, John Doe Affidavit, at ¶ 42. In his sworn declaration, he describes the ordeal:
I now am required to register at the Sheriff's office a minimum of 4 times a year. This process includes:

a) driving to the Sheriff's office in Downtown Olathe, Kansas;
b) finding parking, which is limited;
c) entering the front door, stating the purpose for my visit, providing my driver's licence, and waiting for an officer to print a sheet with my information on it;
d) going through a security screening;
e) waiting for an officer to begin processing (Sometimes this can be immediate, and sometimes I have waited hours.);
f) having my picture taken in the waiting room;
g) going into the office and paying $20.00, disclosing any changes to my information, reviewing and signing that I agree to all of the KORA requirements; and
h) exiting through the secured door.

The administration of KORA is now conducted by the Johnson County Sheriff's Office by uniformed Sheriff's officers. The registration process is very similar to the process that was conducted when I turned myself in at the Johnson County jail for processing on my underlying crime. Additionally, the current process is similar to my probation experience, except that the security around registrants is much higher.
Ex. 5, John Doe Affidavit, at ¶ 40-41.

Defendants' Response: 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. Mr. Doe is required to renew his driver's license every year. Ex. 5, John Doe Affidavit, at ¶ 35. Other Kansas residents renew every four to six years. K.S.A. 8-247. Mr. Doe's driver's license prominently displays his registered offender number, a cause of considerable embarrassment when Mr. Doe must present his license for identification purposes. Ex. 5, John Doe Affidavit, at ¶ 36 - 37; Ex. 5A, copy of Mr. Doe's driver's license.

Defendants' Response: 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).

Plaintiff's Reply: The Plaintiff incorporates by reference his response to the Defendants' motion to strike.

38. Because of the KORA provision that requires registrants to inform local sheriffs when they leave the country, Mr. Doe was required to inform the Johnson County Sheriff's Office when he went on a mission trip to Mexico. Ex. 5, John Doe Affidavit, at ¶ 34.

Defendants' Response: Uncontroverted.

39. Mr. Doe's registration information is made available by the Johnson County Sheriff through an "interactive map" that allows the public to search by address and look at offenders living and working near the address. *See* www.jocosheriff.org, and select "Registered offenders" on the "Public Information" menu. The web site allows a user who reaches the interactive map to "Share & Bookmark," with a drop-down menu that offers icons for "Email, Google, Delicious, Stumble Upon, Windows Live, Facebook, Twitter, MySpace, Digg, and Reddit." *Id.*

Defendants' Response: 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.

Plaintiff's Reply: The existence of the website and its content are not in dispute. The site's function is what it is, and readily determined. The Plaintiff's information is accessible even when members of the public use search criteria not specifically applicable to the Plaintiff. When a searching party enters an address located near one of the Plaintiff's registered addresses, his information is made available when the searching party places his mouse over the colored dot on the map corresponding to the Plaintiff's address or when the searching party clicks on his name, which appears

in a list below the map.

40. The KBI makes the same information about Mr. Doe and other offenders available online in a slightly different format. *See* www.accesskansas.org/kbi/offender registry. The "interactive map" feature of the KBI website requires entering a location (either by zip code or city), selecting an offender, then using the map under the "location" tab to scan the community. The user can "click and drag" to move the map across the area and then select individual offenders, identified as drug, sex, or violent offenders by unique shapes and colors on the map. The KBI also supplies information about Kansas registered offenders, including Mr. Doe, via email to anyone who signs up for email notification using its 'Community Notification system.' *See id,* Community Notifications tab.

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

Plaintiff's Reply: The address provided by the Plaintiff was accurate. It has since changed to the address provided by the Defendants. When the address provided by the Plaintiff is typed into a web browser, a KBI webpage arises noting that "This application has been relocated" and providing the web address supplied by the Defendants.

41. Since his sentencing and registration, Mr. Doe has suffered negative repercussions in his work and career. He declares:

> Someone who saw my profile on the registry website informed my manager that I was listed as a sex offender. I was then summoned to my manager's office, terminated, and escorted from the building. My manager . . . said that my listing on the Offender Registry would expose the company to public relations liabilities and issues related to employees' concerns for workplace safety.
>
> Subsequently, I attempted to gain employment commensurate with my education, skills and abilities, but I was rejected as soon as I disclosed my registration status to prospective employers. . . . Some prospective employers even told me to come back when I was "off the list."
>
> With no place to turn in the job market, I began a small business that has met

the needs of my family. . . .
Ex. 5, John Doe Affidavit, at ¶ 9-12.

Defendants' Response: 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.

Plaintiff's Reply: The Plaintiff incorporates by reference his response to the motion to strike.

42. Since his sentencing and registration, Mr. Doe's access to suitable housing has been impaired. He declares:

> Shortly after my conviction and initial registration, attorneys representing the townhome complex where my family and I lived sent me a letter stating that my lease would not be renewed. . . .
>
> I had to search for a new place to live. . . . [L]andlords repeatedly refused to rent to me. The landlords that reviewed my applications told me that they had no issues with my felony conviction. They said they did not want to rent to me because of my registration. Many explained that, when the map on the Offender Registry website indicates that a sex offender lives on their property, current tenants will leave and potential tenants will avoid the area.

Ex. 5, John Doe Affidavit, at ¶ 15-16.

Defendants' Response: 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.

Plaintiff's Reply: The Plaintiff incorporates by reference his response to the motion to strike.

43. Mr. Doe has endured threatening conduct directed at him while in his home with his family. Ex. 5, John Doe Affidavit, at ¶ 23; Ex. 5B, threatening note left at the Does' home.

Defendants' Response: 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.

Plaintiff's Reply: The note and its description in the affidavit were referenced and incorporated by reference. There are no factual disputes concerning the same. The Defendants make argument about the significance of the facts, but do not attempt to

controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference.

44. Mr. Doe is prevented from participating in his children's school activities like other parents can because the school restricts his entry on its premises. Ex. 5, John Doe Affidavit, at ¶ 28.

Defendants' Response: 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.

Plaintiff's Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference.

45. Parents who have developed opinions about Mr. Doe strictly based on his registry listing have worked to exclude him from all school matters. In his sworn affidavit, Mr. Doe recounts a conversation he had with the school principal when parents were outraged to learn that the principal invited him to serve on the school's site council:

> . . . [The principal] informed me that several parents objected to my inclusion on the site council. He said they demanded my removal and threatened to make the entire school community aware that a school official had invited a registered sex offender to serve if I was permitted to remain on the council. He asked the parents to provide me the opportunity to address their concerns, but they all refused. He stated he was unprepared for the intense anger the parents expressed, and it made him fearful for the safety and welfare of my children. . . .
>
> The principal said he was sick that he had to submit to the hysterics of a few people whose only information came from the registry website. He informed me that, to ensure the safety and welfare of my family, I would no longer be permitted to serve on the site council.

Ex. 5, John Doe Affidavit, at ¶ 31-32.

Defendants' Response: 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 Plaintiffs 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.

Plaintiff's Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference.

46. Mr. Doe has been instructed to leave the premises of various public places, including Children's Mercy Hospital, because of his status as a registered offender. Ex. 5, John Doe Affidavit, at ¶ 33.

Defendants' Response: 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 9 3/4 years of registration. (Plaintiff's Ex. 5, p.6).

Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference.

47. Mr. Doe must endure "compliance checks" by local police during which a police officer in a marked patrol car comes to his house, knocks on his door, and checks to

make sure that he is registered and that his information is accurate. Police come at least twice a year, and the checks are far from discrete. Neighbors notice the police presence. Ex. 5, John Doe Affidavit, at ¶ 25-27.

Defendants' Response: 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 Plaintiffs 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, Plaintiffs 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.

Plaintiff's Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference. The Plaintiff further notes that the affidavit states that uniformed police officers arrive in "a police car." It also states that, in reaction to the police visits, Mr. Doe's neighbors "question the trust [he] has been working to build with them" and that "[t]he community naturally perceives police visits as indicators that something is wrong." The "far from discrete" statement derives from the statement about neighbors losing trust upon seeing uniformed police officers emerging from a police car and approaching the Plaintiff's front door.

48. Mr. Doe has suffered emotionally from being on the registry. He declares:

> Over the past nine years since my conviction, I have worked diligently to ensure that the behaviors that led to my crime were addressed and that I could be fully rehabilitated. My success in addressing those behaviors provides me with confidence that I do not pose a threat to the community. However, the persistent reminders of my registration—encountering people who know me only by the information displayed on the Offender Registry, appearing before law enforcement at least 6 times per year (4 registrations; 2 compliance checks)—cause me to feel a strong sense of shame. Without means to address the public regarding my rehabilitation and actual risk to the community, I often feel hopeless.
> Ex. 5, John Doe Affidavit, at ¶ 21.

Defendants' Response: 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).

Plaintiff's Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference.

49. The emotional impact reverberates throughout his family. *See generally* Ex. 29, Jane Doe Affidavit.

Defendants' Response: 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.

Plaintiff's Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference. The specific statement of fact is meant to be a summary that incorporates by reference the facts in Mrs. Doe's affidavit in place of restating all of the facts.

50. Mrs. Doe communicates that her "entire family lives under the 'sex offender' label." She feels that her family is shunned because of her husband's presence on the Offender Registry, noting that she is rarely granted the opportunity to address the

concerns of people who only know her husband from the registry website. Ex. 29, Jane Doe Affidavit, at ¶ 9-10.

Defendants' Response: 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.

Plaintiff's Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference.

51. Observing strangers' emotionally-charged reactions to her husband's presence on the Offender Registry and past home vandalism cause Mrs. Doe to fear for the safety of her entire family. Ex. 29, Jane Doe Affidavit, at ¶ 11.

Defendants' Response: 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.

Plaintiff's Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference.

52. Mr. Doe's school-aged children feel the effects of his registration and public notification. They are confused by the regular compliance checks conducted by police at their home. They are teased about their father and excluded by classmates at school. The children attend therapy to manage the psychological and emotional consequences they experience as a result of public access to their father's registration information. Ex. 5, John Doe Affidavit, at ¶ 4-8; Ex. 29, Jane Doe Affidavit, at ¶ 12-16.

Defendants' Response: 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 Plaintiffs 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 Plaintiff'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."

Plaintiff's Reply: The Defendants make argument about the significance of the facts, but do not attempt to controvert the facts. The same arguments were made in the motion to strike and, to avoid further redundancy, the Plaintiff's response is incorporated by reference. Plaintiff notes that both affidavits make reference to exclusion of their children by classmates, Jane Doe Affidavit, ¶¶13-14, and John Doe Affidavit, ¶¶5,8. They also note that therapy is aimed at limiting the impact of such exclusion: "In other cases, children have excluded our children from social activities, making them feel isolated. These fears and anxieties are a constant part of their therapy sessions." Jane Doe Affidavit ¶14; "With assistance from our children's therapists and school, my wife and I simply seek to limit the psychological damages of the teasing and exclusion my children experience." John Doe Affidavit ¶8.

Position of the KBI & Johnson County Sheriff's Office on the Application and Implementation of SB37

53. The KBI asserts that all new requirements of SB37 (2011) apply retroactively. The June 15, 2011, KBI letter to all registered offenders, including Mr. Doe, indicated that the KBI believes that "all provisions are retroactive and apply to offenders, regardless of when their underlying offense(s) occurred." *See* Ex. 2, Notice of Amendments to Kansas Offender Registration Act, dated 6/15/2011.

Defendants' Response: Uncontroverted.

54. For authority that the SB37 provisions are retroactive, the KBI letter cited *Smith v. Doe*, 538 U.S. 84 (2003). Ex. 2, Notice of Amendments to Kansas Offender Registration Act, dated 6/15/2011.

Defendants' Response: Uncontroverted.

55. The KBI exerts no affirmative effort to identify unregistered offenders who have become subject to registration requirements as a result of SB37's retroactive application. Ex. 30, Deposition of Nicole Dekat, pp. 12-14. The KBI has made no effort to use historical registry data to identify, ensure, or verify the re-registration of offenders who completed their registration requirements under the old law but became subject to extended registration requirements under SB37. Ex. 30, Deposition of Nicole Dekat, pp. 24-26. Compliance is only demanded of these offenders when they come "back on the radar." Ex. 30, Deposition of Nicole Dekat, pp. 8, 13-14.

Defendants' Response: Uncontroverted.

56. The KBI does not use the Kansas criminal history database to identify all offenders subject to registration under the retroactive application of SB37. When asked why not, KBI Manager of the Offender Registration Unit Nicole Dekat responded that it was not feasible to do so because the database could not be queried for that information. Ex. 30, Deposition of Nicole Dekat, p. 15. Although she did not know how many records were included in the database, p. 37-38, Ms. Dekat asserted that performing a search of each individual would require resources that the KBI does not have. Ex. 30, Deposition of Nicole Dekat, pp. 27-28.

Defendants' Response: Uncontroverted.

57. The KBI instructs sheriffs' offices that all offenders convicted on or after April 14, 1994, are subject to registration under SB37. Ex. 30, Deposition of Nicole Dekat, pp. 11, 21-22. However, it does not verify that sheriffs' offices comply with that directive. Ex. 30, Deposition of Nicole Dekat, pp. 22-23.

Defendants' Response: Uncontroverted.

58. To identify offenders who must register in Johnson County, the Sheriff's Office's Offender Registration Unit does the following: (1) it consults a report from the KBI that lists offenders living, working, and attending school in Johnson County, according to KBI records, and notifies the county who should be coming in to register each month; (2) it collects forms from the Johnson County District Attorney's Office identifying new convictions for offenses requiring registration; and, (3) whenever someone is "booked" by the Johnson County Sheriff's Office, it consults Johnson County's internal registry to determine if that person has ever registered in Johnson County. Ex. 31, Deposition of Sheila Wacker, pp. 6-9, 19-20. That internal database

check does not reveal whether a person has ever registered in any other county. Ex. 31, Deposition of Sheila Wacker, pp. 21-23.

Defendants' Response: Uncontroverted.

59. The Johnson County Sheriff's Office does not use its internal database, which contains information on previous Johnson County registrants whose registration periods expired under old law but were extended by SB37, to identify non-compliant offenders. Ex. 31, Deposition of Sheila Wacker, p. 26.

Defendants' Response: Uncontroverted.

The United States Supreme Court decision in *Smith v. Doe*

60. In *Smith v. Doe*, 538 U.S. 84 (2003), the United States Supreme Court held that Alaska's registration law, as enacted in 1994, did not did not violate the prohibition against ex post facto punishment when retroactively applied because (1) the Alaska legislature's intent was to create a civil and non-punitive regime and, (2) under the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the plaintiffs failed to show that the statute's effects negated the Alaska Legislature's intent to establish a civil regulatory scheme.

Defendants' Response: 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.

Plaintiff's Reply: The Plaintiff summarized the relevant legal developments for the Court, including statutory changes and case law. He notes that the Defendants did the same in fact section of their summary judgment motion.

61. The law considered in *Smith v. Doe* was enacted in Alaska in 1994. Significant aspects of the 1994 Alaska law included:

a. Legislative findings that (1) sex offenders pose a high risk of re-offending after release from custody, (2) protecting the public from sex offenders is a primary governmental interest, (3) privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety, and (4) release of information about sex offenders to public agencies and the general public will assist in protecting public safety. Ex. 32, 1994 Alaska

Session Laws ch. 41, Sec. 1.

b. The Alaska registration provisions were codified in its criminal code, and provided that first-time sex offenders and child kidnappers must register for fifteen years by mailing in verification forms on an annual basis. Ex. 32, Alaska Statute 12.63.010(d)-(e); *see also* 13 Alaska Admin. Code 09.025(a)(5), (d), 13 Alaska Admin. Code 09.030(a).

c. The Alaska public notification provisions were codified in the chapter on Public Health, Safety & Housing and provided that Alaska's Department of Public Safety would maintain a central repository of registration information and make it available to the public in print or electronic form. Ex. 32, Alaska Statute 18.65.087(a). The Department was authorized to issue regulations regarding how the repository was maintained and how the information was released. *Id.* at Sec. 18.65.087(d); *see also* 13 Alaska Admin. Code Sec. 09.050(a).

Defendants' Response: 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.

Plaintiff's Reply: The terms of the Alaska law reviewed in *Smith v. Doe* are important and were provided for the Court's convenience.

Precedent in Kansas

62. In *State v. Myers*, 260 Kan. 669 (1996), the Kansas Supreme Court upheld the retroactive application of the registration requirement in the Kansas Sex Offender Registration Act. But it held that allowing public access to registered sex offender information was punishment, the retroactive imposition of which violated the Ex Post Facto Clause. Specifically, the Court held that "the unlimited public accessibility to the registered information and the lack of any initial individualized determination of the appropriateness and scope of disclosure is excessive, giving the law a punitive effect--notwithstanding its purpose, shown in the legislative history, to protect the public." *Id.* at 702.

Defendants' Response: 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.

Plaintiff's Reply: The Plaintiff summarized the relevant legal developments for the Court. He notes that the Defendants did the same in fact section of their summary judgment motion.

63. The KBI and the Johnson County Sheriff acknowledge that *State v. Myers* precludes them from disclosing information about some offenders to the public. *See* Ex. 33, Defendant Denning's Answers to Plaintiff's First Interrogatories, Answer No. 2, dated 6/19/2012; Ex. 34, Defendant Thompson's Responses to Plaintiff's First Interrogatories, Response No. 2, dated 6/18/2012.

Defendants' Response: 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 Comt 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").

Plaintiff's Reply: The party admissions referenced are that the Defendants consider the *Myers* decision to be controlling and abide by its terms. The Defendants take a different position in their briefs. In other words, the fact asserted is that the Defendants acknowledge and abide by *Myers* as controlling. The legal position of the Defendants is apparently different, given the arguments advanced in their briefing.

ARGUMENT & AUTHORITIES

The 2011 KORA imposes punishment on the offenders who must register pursuant to its terms and, thus, the ex post facto imposition of its requirements violates the Constitution. Rather than attempting to justify the massive overhaul of offender registration legislation in the years since the *Myers* decision, the Defendants seek to exclude evidence

of the substantial effects it has on registrants and disregard persuasive case law indicating the same. But, despite the Defendants' objections, evidence of the punitive impact of the 2011 KORA abounds, and the import of cases evaluating the 2011 KORA and similar statutes is undeniable.

In the face of this evidence and case law demonstrating the punitive nature of the 2011 KORA, the Defendants can only point to *Smith v. Doe*, 538 U.S. 84 (2003), a case evaluating a law passed in 1994 that bears little resemblance to the law before the Court in this case. The substantial distinctions between the law considered in *Smith v. Doe* and the 2011 KORA demonstrate that the Defendants' reliance on *Smith v. Doe* is inappropriate, and their attempts to quiet these distinctions miss the mark.

The Defendants discount the Plaintiff's arguments on the relationship of the 2011 KORA to a non-punitive purpose and its excessiveness in relationship to any such purpose as policy arguments that would be more appropriately addressed to the Legislature. But this contention ducks the fact that the United States Supreme Court and the Kansas Supreme Court have expressly identified those *Mendoza-Martinez* factors as among the most important considerations for courts in the evaluation of the Ex Post Facto challenges to offender registration legislation. Just as those courts were charged to consider these factors, so is this Court. When it does, it should conclude that the provisions are excessive and that the rational relationship is sorely lacking.

Ultimately, the transformation of the KORA has rendered a once regulatory statute into a punitive one. While the Legislature is free to determine whether it is appropriately applied prospectively, its retroactive application is not permissible under the Ex Post Facto Clause.

I. The Plaintiff has produced substantial, competent evidence of the punitive effects of the KORA; the Defendants' attempts to distance the effects Mr. Doe experiences from the registration and notification provisions of the KORA are counterproductive and unavailing.

Mr. Doe has produced substantial, competent evidence regarding every relevant *Mendoza-Martinez* factor. The barrage of objections leveled by the Defendants is mostly unsustainable. *See* Plaintiff's Response to Defendants' Motion to Strike. Moreover, the Defendants' profuse objections to the competency of the Plaintiff's evidence do not challenge the truth of the Plaintiff's assertions relevant to the Court's examination of the *Mendoza-Martinez* factors. Based on largely inapplicable technicalities, they seek only to preclude the Plaintiff from offering undisputed evidence of the punitive effects of the KORA.

The Defendants' argument in the alternative to their objections is that Mr. Doe has not demonstrated a causal connection between the KORA and the punitive effects he experiences. They simultaneously claim to be able to identify the sole cause of the difficulties Mr. Doe experiences: his underlying conviction. The fundamental problem with this position is that registration is justifiable only if it furthers the non-punitive objective of

furthering public safety by broadly disseminating information about registrants' criminal histories. *Smith v. Doe*, 538 U.S. at 102 (holding that the Alaska act has a valid, non-punitive purpose of public safety by "alerting the public to the danger of sex offenders in their community."). In other words, if the public is already well-informed about registrants' underlying convictions, then the KORA's restrictions are not rationally related to public safety and are certainly excessive. In short, the Defendants' argument, if accepted, amounts to the Defendants shooting their own feet. It also requires the Court to ignore the logical inference that people most likely gain information about registered offenders by the means most accessible—the registries published by the Defendants and republished by third parties—rather than by independently culling through court records.

II. The Supreme Court's 2003 decision regarding a 1994 version of Alaska's offender registration provides only the analytical framework for the Court's decision in this case, not the conclusion.

A. Part of the analysis of *Mendoza-Martinez* factor 2: The United States Supreme Court did not hold that pubic notification could never amount to shaming.

The second *Mendoza-Martinez* factor asks whether the KORA imposes sanctions that have historically been regarded as punishment. The Plaintiff's brief pointed out that the in-person reporting and requirements for production of vast amounts of information, records, DNA, and finger and palm prints resemble supervision associated with probation or parole. The Plaintiff also pointed out that the travel disclosure requirements (and the

practical limitation resulting from the requirement to be at a designated location at a designated time at least four times per year) are typical of those imposed on parolees and probationers. The Plaintiff further noted the extraordinary duration of registration, compared to probation or parole. The Defendants offered no response. As a final layer of analysis of this factor, the Plaintiff pointed out that changes in technology, including the explosion of "social media," a phrase not even coined when Supreme Court decided *Smith v. Doe*, has pushed notification further towards resembling historical public shaming. The Defendants focus exclusively on this final layer of analysis.

Contrary to the Defendants' assertions, the *Smith v. Doe* majority did not hold that Internet notifications schemes could never resemble historical, punitive shaming. Indeed, the majority determined that the notification provision in the 1994 version of Alaska's offender registration law did not resemble colonial shaming punishments. But it did not, as the Defendants posit, foreclose the possibility that changes in technology and the manner of Internet dissemination of registry information could change the analysis of this part of the second *Mendoza-Martinez* factor.

The facts before the Supreme Court in *Smith v. Doe* were not the same as those before this Court. For instance, in determining that Alaska's notification system was not punitive, the *Smith* court attributed significance to the fact that "The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his

record." *Smith v. Doe*, 538 U.S. at 99. Today, many third-party websites distributing registry information now facilitate commentary, and the Johnson County Sheriff's website invites users to share information via Facebook, Twitter, & Myspace. Although the Defendants lodged evidentiary objections to the websites noted by the Plaintiffs and pointed out that they do not operate those sites, they were silent regarding those links to Facebook, Twitter, & Myscape, social media designed for sharing and re-sharing commentary on data posted by users. The *Smith v. Doe* opinion does not describe the Alaska web site in great detail, but it summarized that the "process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Id.* at 100. This Court can look at the Defendant-run websites, take note of the links to social media offered by one of the sites, and reasonably determine that the facts and technology in *Smith v. Doe* do not resemble what is before this Court. On that basis, it may determine that changes in technology and the manner of Internet dissemination of registry information lead to a different conclusion than that reached in *Smith v. Doe* regarding the shame attendant to the dissemination of registry information.

B. *State v. Myers*'s holding regarding public notification remains controlling law in Kansas.

State v. Myers, 260 Kan. 669 (1996), remains controlling law in Kansas. The Plaintiff believes that the holding regarding registration requirements requires re-examination in light of the transformation of the KORA that has occurred since the Kansas Supreme Court

last considered it. The holding regarding public notification, however, remains sound. The substantial distinctions between the Alaskan registration scheme evaluation in *Smith v. Doe* and the 2011 KORA, outlined in full in the Plaintiff's motion for summary judgment and incorporated by reference, makes it clear that *Smith v. Doe* does not dictate a conclusion in this case. The Plaintiff acknowledges that, contrary to their contentions in interrogatories, the Defendants now assert that *Smith v. Doe* has "overtaken the *Myers* holding on notification." *See* Plaintiff's Summary Judgment Motion Ex. 33, Defendant Denning's Answers to Plaintiff's First Interrogatories, Answer No. 2, dated 6/19/2012 ("Availability of Plaintiff's information on the Sheriff's website and Dissemination of Plaintiff's information in response to Open Records Act requests is also limited or prohibited by *State v. Myers*, 260 Kan. 669 (1996), certiorari denied 521 U.S. 1118, K.S.A. §§22-4906 and 4909, and other applicable law if it is deemed non-public."); Plaintiff's Summary Judgment Motion Ex. 34, Defendant Thompson's Responses to Plaintiff's First Interrogatories, Response No. 2, dated 6/18/2012 ("Pursuant to *State v. Myers*, 260 Kan. 669 (1996), certain information for certain offenders - namely those whose offense committed before April 14, 1994- is not available to the public or subject to the Kansas Open Records Act."); *but see* Defendants' Joint Response in Opposition to Plaintiff's Motion for Summary Judgment, p. 22.

C. The KORA's distinguishing characteristics from the Alaska statute considered in *Smith v. Doe* are real and substantial.

The distinctions between the law considered in *Smith v. Doe* and the law at issue in this case are extremely important to the decision this Court is charged to make.

1. In-person reporting, four times per year, possibly in multiple jurisdictions.

The Defendants' response to the in-person reporting requirement is to point out that it does not restrict registrants' physical movement at other times during the year. It is true that, as long as a registrant physically reports to a jurisdiction's supervising officer four times per year at designated times and locations, in each jurisdiction in which an offender resides, works, or goes to school, the registrant is free to travel as he wishes so long as he complies with the travel disclosure requirements. The travel disclosure requirements include: notify the agency in the jurisdiction of the offender's residence and the Kansas bureau of investigation 21 days prior to any travel outside of the United States, per K.S.A. § 22-4905(o); provide notification of anticipated temporary lodging information including, but not limited to, address, telephone number and dates of travel for any place in which the offender is staying for seven or more days, per K.S.A. § 22-4907(a)(6); and provide copies of all travel and immigration documents, per K.S.A. § 22-4907(a)(20). It is important to note that an extended visit to a jurisdiction can amount to residence and require registration. If an offender intends to stays in any county "for seven or more consecutive days or parts of

days, or for seven or more non-consecutive days in a period of 30 consecutive days," he must register in that jurisdiction. K.S.A. § 22-4902(j). An offender may be deemed to reside in multiple jurisdictions and have to register in each jurisdiction. K.S.A. § 22-4902(k). An offender who lives in Lawrence, works in Topeka, and travels extensively within the state for work or pleasure may have to register in numerous jurisdictions and comply with in-person reporting requirements for each jurisdiction. Thus, travel by an offender, while permitted, is burdensome and carries with it the risk of prosecution for failure to identify and comply with all of the KORA travel disclosure requirements.

The in-person reporting requirement has changed the supervision of Kansas registrants into something akin to probation of probation or parole-like monitoring. Adding the requirement of in-person reporting inspired at least two other jurisdictions to hold that such pervasive supervision constitutes an affirmative restraint. *Doe v. Alaska*, 189 P.3d 999, 1009 (Alaska 2008); *Wallace v. Indiana*, 905 N.E.2d 371, 380-81 (Ind. 2009) (analogizing similar obligations to probation and parole and finding them to be affirmative restraints).

2. Drivers' license notation of registrant status.

The Defendants' arguments regarding the identifier "RO" on a registrants's state-issued identification card obscure the point that the markers of registration follow registrants beyond registry websites. Countless scenarios require the presentation of identification during in-person interactions, usually at first meeting, before the registrant

has the opportunity to make any other impression upon the person to whom he or she presents his or her identification card. The point is not that Mr. Doe might avoid these situations. It is that registered offenders—and only registered offenders, not felons generally—carry a distinct label on a primary source of identification. What is this if not a "badge of past criminality"?

3. **Child custody proceedings.**

The Defendants miss the mark again regarding the Plaintiff's argument pertaining to the mandatory consideration of registration in child custody proceedings. The Defendants argue that any court would consider the criminal histories of parents or others living where a child might reside in child custody proceedings. But the Kansas Legislature does not mandate it. The Kansas Legislature has mandated that courts consider registration status. K.S.A. § 23-3203(h)&(j). Furthermore, it requires only consideration of current registration status, not consideration of the underlying crime or whether a parent or one living with a potential guardian has ever been convicted of crime requiring registration. The effect is a disparate treatment of registered offenders by virtue of their registration status. And this disparate treatment deserves consideration because it was not required by the Alaska law considered in *Smith v. Doe.*

4. Third-party distribution of offender information.

The Plaintiff addressed the Defendants' claims regarding the admissibility of evidence in his response to the Defendants' motion to strike. He will not repeat them here, but incorporates them by reference.

The Plaintiff's notations regarding third party republication of registry information disseminated by the Defendants speak directly to the concerns expressed by the Kansas Supreme Court when it determined in *State v. Myers,* that public notification provisions of Kansas's offender registration law could not be applied retroactively without violating the Ex Post Facto Clause . 260 Kan. at 696 ("Although 22-4909 does not impose any affirmative dissemination requirements on the authorities, it imposes no restrictions on anyone who inspects the information. The information could be routinely published in the newspaper or otherwise voluntarily disseminated by anyone. The practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment. We find that the KSORA public disclosure provision does impose an affirmative disability or restraint. Unrestricted public access to the registered information leaves open the possibility that the registered offender will be subjected to public stigma and ostracism . . . ."). The concerns of the Kansas Supreme Court have now become the reality.

Republication of registry data by third parties was not discussed in *Smith v. Doe* , but the potential impact of allowing those viewing registry information to comment on what

they encountered was. *Smith v. Doe*, 538 U.S. at 99. The *Smith* court found importance in the lack of such a mechanism for commentary, something that is widely available on third-party websites now. *Id.* Moreover, its analysis that Alaska's scheme was "analogous to a visit to an official archive of criminal records" was based on the fact that "[a]n individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information." *Id.* The Plaintiff calls the Court's attention to third-party websites not for the implication that the State is directly responsible for the content of the sites or the opportunity for commentary on those sites, but to demonstrate that individuals seeking information on Kansas registrants need not take various steps analogous to an archives search to access it. Sources for the information are plentiful and the formats of these sources present the very concerns that have worried both the Kansas Supreme Court and the United States Supreme Court that public notification may go too far.

While the Defendants deny that third-party behavior can be attributed to them, they are remarkably silent about the "Share & Bookmark" function featured on the Johnson County Sheriff's registered offender site, which allows users to "share" registry information on Facebook, Twitter, and Myspace, among other electronic media. Noted in the Plaintiff's Motion for Summary Judgment, pp. 34 & 56. It is difficult to deny that offering such a function on one's website facilitates the third-party republication from which the

Defendants seek to distance themselves. These social media forums to which Defendant Denning's site facilitates "sharing" are undeniably intended to facilitate commentary between users. That is, after all, the essence of "social" media. Moreover, contrary to the Defendants assertions, these methods of republication were not possible under the KORA in 1996 or the Alaska statute upheld in *Smith v. Doe*. Myspace launched in August 2003, five months after *Smith v. Doe* was decided, Facebook launched in 2004, and Twitter launched in 2006. Since *Smith v. Doe* was decided, social media (and the development of smart phones that enable users to remain constantly connected) has transformed electronic information sharing—both by the number of people who can be targeted with a single message and the speed with which information can be transmitted.

III. The Court can and should consider the 1997 studies cited in *Smith v. Doe* as well as the significant developments in the last 16 years because they are important to the Court's determination of several *Mendoza-Martinez* factors.

Ironically, while challenging the Plaintiff's submission of studies and reports regarding recidivism risk and rates, the Defendants cite a statement from *Smith v. Doe* that relies on studies and reports. They simply omit that part of the citation. The Plaintiff acknowledges that the *Smith v. Doe* majority properly considered the studies, just as this Court can consider the body of science that has developed since the studies relied upon by the *Smith v. Doe* majority.

The Plaintiff's response to the Defendants' objections is set out in full in his response to their motion to strike, and he incorporates it here by reference. He adds only that the Defendants did not object to Plaintiff's Appendix I, which specifically addresses sex offender recidivism rates cited in *Smith v. Doe* and refutes them. Thus, the Plaintiff submits that, regardless of the Court's resolution of the Defendants' request to strike other material on the matter, the Court may still consider Plaintiff's Appendix I, and the Plaintiff's discussion of it, in rebuttal to the *Smith* court's report-based statements.

While money appeared to be the driving force behind the 2011 KORA amendments, Mr. Doe has never asserted that this marks an end for the Court's analysis. Regardless of the purpose of the amendments, this Court's responsibility, as outlined in *State v. Myers* and *Smith v. Doe*, is to evaluate whether the restrictions the KORA imposes on registered offenders is rationally related to that purpose and whether the restrictions are excessive in relation to that purpose. Even if the Court determines that public safety is the purpose behind the amendments, the Plaintiff has provided plenty to demonstrate that the amendments are not rationally related to increasing public safety—and may have the opposite effect—and that they are excessive in relation to that goal. These arguments are not merely matters of policy for the Legislature, but are considerations that the United States Supreme Court and the Kansas Supreme Court have identified as particularly important determinations to be made by courts when evaluating the ex post facto

imposition of offender registration legislation. *Smith v. Doe*, 538 U.S. at 96; *State v. Myers*, 260 Kan. at 695-700.

The Defendants focus on research and reports while remaining noticeably silent regarding other elements of the Plaintiff's argument on those important *Mendoza-Martinez* factors. Perhaps most notably, the Defendants ignore the Plaintiff's notation that they are making are making no effort to actively identify and register offenders who: (1) were never on the registry but are required to register under the current law; or (2) completed their initial registration period before the July 1, 2011, KORA amendment and have not re-entered the justice system. If the expanded provisions of the KORA are so important to protecting Kansas communities from danger, why do the Defendants make no affirmative effort to register these offenders? They cannot claim that current registrants present a greater risk to the community than offenders whose registration periods expired just prior to the enactment of the 2011 amendments. The Defendants offer no justification for the partial implementation of the KORA requirements on a retroactive basis.

IV. Decisions by judges in the Third Judicial District, considering the 2011 KORA amendments are more significantly persuasive than dated decisions by courts considering more lenient registration regimes. The same is true of other state court decisions considering the enactment of provisions virtually identical to those present in the 2011 KORA.

The Defendants urge the Court to disregard persuasive cases from other jurisdictions simply because the courts applied state constitutional provisions, rather than the federal Ex

Post Facto Clause. But the contemporary case law cited by the Plaintiff provides on-point analysis of the same heightened registration requirements present in the 2011 KORA. *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011), *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), and *Doe v. State*, 189 P.3d 999 (Alaska 2008) provide some of the most comprehensive examinations of offender registration legislation in the context of Ex Post Facto challenges in recent years. The laws considered in those cases parallel the 2011 KORA in ways that the laws considered in *State v. Myers* and *Smith v. Doe* do not. While the constitutional provisions at issue were state-based, the analytical framework employed in these cases mirrors that prescribed by the United States Supreme Court for the evaluation of federal Ex Post Facto Clause violations.

The same is true of the decisions by judges in the Third Judicial District of Kansas. The judges in *Broxterman, O'Dell,* and *Alexander* considered current KORA requirements and today's technology, and reached a different conclusion than the *Smith v. Doe* majority. Two of the judges expounded in some detail on their analysis of the law before this Court (remarkably different than the law before the *Smith v. Doe* court). The decisions should not be disregarded, but embraced. The Defendants miss with their suggestion that the *Evans* opinion compels a different conclusion. It merely regurgitated the holding in *Myers*, and it did so before the 2011 amendments to the KORA requirements were even presented to the Legislature.

Respectfully submitted,

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Certificate of Service

I certify that on January 4, 2013, a true and correct copy of this reply was hand-delivered to:

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