

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

**MARY HOPWOOD**, Plaintiff,  
on behalf of herself and others  
similarly situated,

v.

Case No. 2:12-cv-04238-BCW

**STATE OF MISSOURI**,  
by and through Chris Koster,  
Missouri Attorney General

**AMENDED VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND  
INJUNCTIVE RELIEF  
(TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT  
INJUNCTION)**

**COMES NOW**, Plaintiff(s), through counsel, and for their Complaint states:

STATEMENT OF JURISDICTION AND VENUE

This action seeks to enjoin the State of Missouri from enforcing § 392.415 RSMo. enacted by House Bill 1108 which goes into effect at 12:01 a.m. August 28, 2012 and seeks a declaratory judgment that this new section 392.415 RSMo. violates the Supremacy Clause and also violates 18 U.S.C.A. § 253. This Court has federal question jurisdiction under 28 U.S.C.A. § 1331. This action requests a declaratory judgment as allowed by F.R.C.P. 57, a temporary restraining order, preliminary and permanent injunction, as allowed by F.R.C.P. 65, with respect to the enforcement of a void Missouri law. Venue is proper in the Western District of Missouri because the acts complained of occurred within this District.

GENERAL ALLEGATIONS

1. Plaintiff is a citizen and resident of the State of Missouri and a subscriber to cell phone service from Verizon, a telecommunications provider regulated by the Federal Communications Commission that is subject to the law at issue.

2. Defendant Chris Koster is the Attorney General is the Chief Law Enforcement Officer of the State of Missouri and he is sued in his official capacity.
3. Venue is proper in the Western District of Missouri.
4. Missouri has passed House Bill No. 1108 which takes effect at 12:00 a.m. 8/28/12 which provides, Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Chapter 392, RSMo, is amended by adding thereto one new section, to be known as section 392.415, to read as follows:

392.415. 1. Upon request, a telecommunications carrier or commercial mobile service provider as identified in 47 U.S.C. Section 332(d)(1) and 47 CFR Parts 22 or 24 shall provide call location information concerning the user of a telecommunications service or a wireless communications service, in an emergency situation to a law enforcement official or agency in order to respond to a call for emergency service by a subscriber, customer, or user of such service, or to provide caller location information (or do a ping locate) in an emergency situation that involves danger of death or serious physical injury to any person where disclosure of communications relating to the emergency is required without delay.

2. No cause of action shall lie in any court of law against any telecommunications carrier or telecommunications service or commercial mobile service provider, or against any telecommunications service or wireless communications service, or its officers, employees, agents, or other specified persons, for providing any information, facilities, or assistance to a law enforcement official or agency in accordance with the terms of this section. Notwithstanding any other provision of law, nothing in this section prohibits a telecommunications carrier or commercial mobile service provider from establishing protocols by which such carrier or provider could voluntarily disclose call location information.

5. Article 6 Clause 2 of the US Constitution provides, "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."
6. The Supremacy Clause prohibits state laws that conflict with federal law where Congress has expressed an intent to regulate in an area.

7. Congress has expressed its intent to preempt state laws governing telecommunication.
8. Congress has expressed its intent to preempt state laws governing the privacy and disclosure of electronic and telecommunications records and data.
9. Federal law can preempt state law without an express statement by Congress when the federal statute implies an intention to preempt state law or when state law directly conflicts with federal law.
10. Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute.
11. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . .," or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."
12. Congress has regulated in the area of telephone privacy.
13. In 1986, Congress passed the Electronic Communications Privacy Act ("ECPA") in response to concerns that the Fourth Amendment did not apply to data stored by third parties.
14. By amending federal statutes relating to usage of wiretaps and pen register/trap and trace devices, and by creating new statutory authority to protect stored communications, Congress created statutory privacy rights for customers of every cell phone company and other telecommunication service providers.
15. Today, the ECPA is comprised of three statutes: the Wiretap Act, 18 U.S.C. § 2510 et seq., the Pen Register and Trap and Trace Devices Act ("PRTTDA Act"), 18 U.S.C. § 3121, et seq., and the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 et seq.

16. Together these statutes provide different levels of protection for customer records and information from disclosure to the government.

17. Appropriately, the more customers' privacy rights are implicated, the more stringent the requirement for the government agency seeking disclosure. For instance:

- a. Basic subscriber information, which is strictly limited to six specific categories of information (name, address, local/long distance records (or records of session times and duration), length/type of service, telephone/subscriber number and means and source of payment), is the only information that can be disclosed to law enforcement pursuant to an administrative, grand jury or trial subpoena. 18 U.S.C. § 2703(c)(2).
- b. All non-content records or other information pertaining to a subscriber (including basic subscriber information) can be disclosed to law enforcement pursuant to a court order based on "specific and articulable facts showing that there are reasonable grounds to believe that ...the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).
- c. The stored content of a customer's communications (e.g., text messages), can only be disclosed to law enforcement pursuant to a warrant or court order based on probable cause. 18 U.S.C. §§ 2703(a) & (b). (4) A wiretap can only be established pursuant to a court order based on probable cause. 18 U.S.C. § 2702(b)(2) & 18 U.S.C. § 2518(3).

18. As part of the ECPA, Congress passed 18 U.S.C.A. § 2702 et seq. which makes it unlawful to access a telephone subscriber's electronic records or communications.

19. 18 U.S.C.A. § 2702 gives a telephone provider discretion to provide the "contents of a communication" to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.
20. 18 U.S.C.A. § 2702 gives providers discretion to provide "a record or other information pertaining to a subscriber to or customer of such service" to law enforcement upon proper request.
21. Disclosure under 18 U.S.C.A. § 2702 is completely discretionary within certain limits set by Congress.
22. Under 18 U.S.C.A. § 2702 a provider "may divulge" records or information "to a governmental entity, if the provider, in *good faith*, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency."
23. Congress wrote "discretion" and "good faith" into the law and placed the discretion totally under the authority of the provider.
24. Congress characterizes (b)(8) disclosures as "voluntary disclosures" by the provider. 18 U.S.C.A. § 2702(d)(2)(a).
25. Missouri's law violates the Supremacy Clause in that:
  - a. It eliminates any exercise of discretion by the telecommunications provider;
  - b. It eliminates the requirement of a telecommunications provider to engage in even the slightest good faith evaluation of the request from law enforcement;
  - c. It imposes unfunded state mandates upon the provider that it conduct "ping locates"

- d. It changes the circumstances for which the exception of the privacy requirements of Stored Communications Act apply;
- e. It completely eliminates the ability of a Missouri citizen to file a civil action against a provider who receives and complies with a request from law enforcement.
- f. It frustrates what seems to be the evident congressional intention to establish a uniform federal regime controlling when telecommunication records are disclosed and by whom.
- g. It frustrates the clear congressional intention to give a citizen the right to a civil action for violation of the privacy of their phone records.
- h. It makes it impossible for a phone company/provider to comply with the federal act which says they may disclose records and location information and the putative state law which says they must disclose such information.

26. In addition, Missouri's definition of "emergency" is different than the federal definition as follows:

- a. The federal statute would prohibit disclosure altogether unless there is an "emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency."
- b. Missouri's state law mandates disclosure if there is "an emergency situation" and the officer demands the information "to respond to a call for emergency service by a subscriber, customer, or user of such service, or to provide caller location information (or do a ping locate) in an emergency situation that involves danger

of death or serious physical injury to any person where disclosure of communications relating to the emergency is required without delay."

- c. Missouri's new statute has two parts -- (1) it mandates disclosure in an emergency situation to respond to a call for emergency service; and (2) it mandates disclosure of caller location information and purports to require the provider to "do a ping locate" in an emergency situation that involves danger of death or serious physical injury.

27. Missouri's act purports to "immunize" providers who comply with a law enforcement demand for stored communication information. This conflicts with Congress's intent to regulate in the area of remedies for violations of subscriber's cell phone privacy.
28. Congress has created a right to a civil action against a provider who is aggrieved by any violation of the Stored Communications Act and vests such subscriber with the ability to seek injunctive relief, recover damages not less than \$1,000, punitive damages, court costs and reasonable attorney's fees and litigation costs. 18 U.S.C.A. § 2702(b)(8).
29. In addition, Congress provides that the provider may be subject to administrative discipline. 18 U.S.C.A. § 2702(d). Thus, if a provider voluntarily provides information where it has not made a "good faith" determination that there is "an emergency involving the danger of death or serious physical injury to a person that requires disclosure without delay of INFORMATION RELATING TO THE EMERGENCY," it may be subject to damages for violation of the subscriber's privacy.
30. Missouri's legislation takes away that civil remedy.
31. Under the federal law, a subscriber aggrieved by a violation of 18 U.S.C.A. § 2702(d) would have to prove: (1) There was a request from law enforcement for emergency

information; (2) the provider disclosed the information; (3) the disclosure was in bad faith.

32. Under Missouri's law, once the subscriber proves the first element of an 18 U.S.C. § 2702(d) action, he has pled himself out of court.

#### CLASS ALLEGATIONS

33. Plaintiff incorporates all preceding allegations by reference as if set forth more fully in this count.

34. Plaintiff brings this action against Defendant individually and on behalf of all individuals who are cellular subscribers in the State of Missouri.

35. This class also includes all other legal representatives, heirs, or beneficiaries ("Representative Claimants"), and any other persons asserting the right to sue defendants independently or derivatively by reason of their personal relationship with an individual who has been the object of Defendants' illegal law, including without limitation, spouses, parents, children, dependents, relatives and/or intestate beneficiaries, or "significant others," ("Derivative Claimants").

36. Plaintiff is a member of the class she seeks to represent.

37. Millions of Missourians are currently cell phone subscribers.

38. There are questions of law and fact common to the class including, but not limited to:

- a. Whether the law at issue is illegal and/or unconstitutional;
- b. Whether the law at issue is void in whole or in part;
- c. Whether Plaintiff's rights under the U.S. Constitution have been violated or abridged by the law.
- d. Whether Defendant should be enjoined from enforcing the law at issue.



39. These and other questions of law and/or fact are common to the class and predominate over any questions affecting only individual class members.
40. Plaintiff's claims are typical of the claims of the respective class she seeks to represent, in that Plaintiff and all members of the proposed class are current cellphone subscribers.
41. Plaintiff will fairly and adequately represent and protect the interests of the members of the class she represents.
42. The representative Plaintiff has retained counsel competent and experienced to represent her and the members of the proposed class. Counsel for Plaintiff has been named class counsel in several certified class actions.
43. Prosecuting separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members establishing incompatible standards of conduct for Defendants.
44. Defendant has acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.
45. This class action is superior to other available remedies for the fair and efficient adjudication of this controversy because the damages suffered by individual class members may be relatively small, thus few, if any, individual class members will be able to afford to seek legal redress individually.

**COUNT I -- TEMPORARY RESTRAINING ORDER,  
PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION**

46. Plaintiff incorporates the foregoing paragraphs by reference as if set forth more fully herein.
47. Plaintiff moves for a temporary restraining order pursuant to Rule 65 and seeks an ex parte emergency order thereon.

48. Plaintiff seeks temporary and preliminary relief to prevent her from suffering HB 1108, a void Missouri law, which allows her cell phone provider to provide information protected by the Electronic Communications Privacy Act.
49. HB 1108 is void in that it is barred by the Supremacy Clause.
50. Based on the laws of the United States of America and the State of Missouri, Plaintiff believes that it is highly likely that the claims of Plaintiffs will succeed and that this Court should issue an Order enjoining Defendant from taking any action to utilize or enforce the statute pending final disposition of this cause.
51. Plaintiff seeks injunctive relief because there is a reasonable likelihood that she or the class she seeks to represent will be faced with enforcement of the law at issue before she can obtain relief in a trial on the merits.
52. A temporary restraining order and/or preliminary injunction will allow this Court to preserve the status quo until the Court adjudicates the merits of the claim for a permanent injunction. Under the law of this Circuit, Plaintiffs are entitled to a preliminary injunction upon the Court balancing the following factors: (1) probability of success on the merits; (2) a threat of irreparable harm absent the injunction; (3) that the harm to Plaintiffs outweighs any injury that the injunction will impose upon the Defendant; and (4) that the injunction is not contrary to the public interest. All four of those factors support a preliminary injunction herein.
53. Plaintiff's counsel certified that on 8/27/12 he attempted to contact the defendant via telephone to notify him of this Complaint and the restraining order sought therein. Counsel was transferred to four separate secretaries, neither of which allowed counsel to speak with the Defendant. The director of litigation for the Attorney General was equally

unavailable and senior "of counsel" litigator Ted Bruce was out and no one was able to articulate his available to take a phone call. Thus, Rule 65 has been complied with as to the sought after restraining order.

54. Plaintiff requests oral argument on her request for temporary restraining order.
55. Plaintiffs pray for a temporary restraining order and/or a preliminary injunction restraining and/or enjoining Defendants from the enforcement of the law until permanent injunctive relief and a declaratory judgment are entered and for such other and further relief as this Court shall deem just and equitable.
56. The Eleventh Amendment does not bar federal declaratory and injunctive relief against the State of Missouri.
57. Immediate and irreparable injury, loss or damage will result to the movant before the adverse party can be heard in opposition in that:
  - a. The offending act of the Missouri Legislature is set to take effect at 12:01 a.m. on 8/28/12 after which time any "law enforcement officer" or "law enforcement agency" will be able to access Plaintiff's location merely by claiming an "emergency exists."
  - b. Even though Congress vests Plaintiff with a remedy under 18 USC § 1702, Missouri's law eliminates her federal right to sue her provider for injunction.
  - c. Today is the last day for Plaintiff to sue her provider for an injunction/equitable relief.
58. No security is required for the issuance of the requested Temporary Restraining Order.

59. Plaintiff seeks to bind Defendant, the State of Missouri, its officers, agents, servants, employees and attorneys and every law enforcement agency and law enforcement agent from using and/or enforcing Mo. Rev. Stat. § 392.415.

**WHEREFORE**, Plaintiff prays this Court:

a. Enter a temporary restraining order barring Defendant, the State of Missouri, its officers, agents, servants, employees and attorneys and every law enforcement agency and law enforcement agent from enforcing the new Missouri Act.

b. Enter a preliminary injunction restraining order barring Defendant, the State of Missouri, its officers, agents, servants, employees and attorneys and every law enforcement agency and law enforcement agent from enforcing the new Missouri Act.

c. Enter a permanent injunction restraining order barring Defendant, the State of Missouri, its officers, agents, servants, employees and attorneys and every law enforcement agency and law enforcement agent from enforcing the new Missouri Act.

d. Enter a declaratory judgment that Missouri's Act is void

e. For Plaintiff's attorney's fees and costs under 42 U.S.C. 1988(6); and

f. For such other relief as the Court deems just and proper.

**COUNT II -- DECLARATORY JUDGMENT**

60. Plaintiff incorporates the foregoing paragraphs by reference as if set forth more fully herein.

61. There is a justiciable controversy between the parties.

62. Plaintiff has standing to assert the claims set forth herein.

63. Plaintiff has no adequate remedy at law.

64. Defendant contends the law in question is valid and enforceable.

65. Plaintiff contends that the Missouri law violates the Supremacy Clause of the U.S. Constitution and is therefore void and a nullity.

66. Plaintiff is entitled to her attorney's fees under 42 U.S.C. 1988(6) in that her fees in this action are ancillary to Plaintiff's request for a declaratory judgment that Missouri law violates federal law. See Missouri v. Agveii, 491 U.S. 274 (1989).

**WHEREFORE**, Plaintiff prays the Court:

- a. Enter a declaratory judgment that the law at issue is void and of no effect.
- b. For Plaintiff's costs and attorney's fees.
- c. For such other relief as the Court deems just and proper.

**COUNT III—42 U.S.C. § 1983**

67. Plaintiff incorporates the foregoing paragraphs by reference as if set forth more fully herein.

68. Plaintiff and all putative class members are persons within the meaning of 42 U.S.C. § 1983.

69. Defendant acted under color of state law when it enacted Missouri's cellular location disclosure law, Mo. Rev. Stat. § 392.415.

70. Defendant had no rational basis for enacting and enforcing Mo. Rev. Stat. § 392.415 because wireless providers already have discretion to disclose—and more often than not, do disclose—the location data at issue in § 392.415.

71. By enacting and enforcing Mo. Rev. Stat. § 392.415, Defendant has deprived Plaintiff and class members of their rights, privileges, and immunities secured by the United States Constitution and laws.

72. Specifically, Defendant violated Plaintiff's and class members' rights by enacting and enforcing legislation that abdicated rights granted to Plaintiff and class members under the ECPA and other federal law.
73. Until Mo. Rev. Stat. § 392.415 went into effect on August 28, 2012, Plaintiff and class members had the right to bring civil claims against wireless communication providers where those providers disclosed their customers' location data in bad faith.
74. Defendant eliminated that right.
75. Defendant violated Plaintiff's and class members' Fourteenth Amendment right to the equal protection of the laws in that Plaintiff and all other Missouri citizens are treated differently than citizens of other states who are subject to the ECPA and other applicable federal law.
76. Defendant further violated Plaintiff's and class members' Fourteenth Amendment rights by abridging their privileges and immunities specifically provided for by federal law, including their right to maintain a civil action against wireless providers who disclose location data and their right to privacy under the ECPA and other federal law.
77. Defendant has deprived Plaintiff and class members of their right to access the courts by granting wireless communications providers absolute immunity from civil claims arising out of the bad faith disclosure of customers' location data.
78. As a direct and proximate result of Defendant's enactment and enforcement of § 392.415, Plaintiff and class members have been and will be damaged because they have been deprived of the right to bring civil actions against wireless communications providers.
79. In spite of the clear discretion granted to wireless communications providers and clear right to maintain civil actions against those providers set forth in federal law, Defendant

enacted and has begun to enforce § 392.415, which is directly contrary to and opposes federal law.

80. Plaintiff and class members have no adequate remedy at law to remedy the constitutional and statutory violations described above.

81. Absent relief from this court, Plaintiff and class members will suffer immediate and irreparable injury, harm, and damage in the form of violations of their rights.

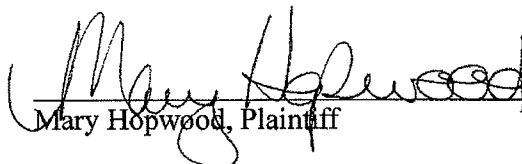
82. Plaintiff and class members have incurred and will incur litigation costs, including attorney fees in connection with this action.

83. Pursuant to 42 U.S.C. § 1988, Plaintiff and class members are entitled to recover their reasonable costs, including attorney fees.

**WHEREFORE**, Plaintiff prays this Court certify the class described above, declare Mo. Rev. Stat. § 392.415 void and unconstitutional, enter a preliminary and permanent injunction permanently prohibiting Defendant from enforcing § 392.415, award Plaintiff and the class their costs of litigation and reasonable attorney fees pursuant to 42 U.S.C. § 1988, and award Plaintiff and the class such other relief as the Court deems just and proper.

**VERIFICATION**

I do hereby affirm that the foregoing is true and correct to the best of my knowledge information and belief.

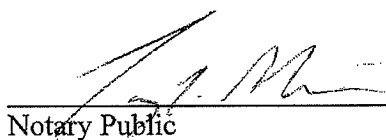
  
Mary Hopwood, Plaintiff

STATE OF MISSOURI     )  
  )     ss.  
COUNTY OF POLK     )

Now on this 12th day of September, 2012, before me personally appeared Mary Hopwood and upon her oath stated the forgoing was true and correct to her best knowledge information and belief and executed the above as her free act and deed.



Tammy L. Milburn   Comm#12451599  
Polk County         State of Missouri  
My Commission Expires June 18, 2016

  
Notary Public

My commission expires: 6-18-2016



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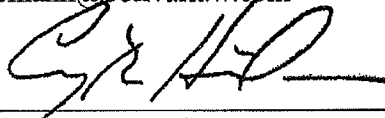
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