

IN THE  
SUPREME COURT OF OHIO

FRANCIS M. HYLE, GREEN TWP.  
LAW DIRECTOR  
Plaintiff-Appellee  
vs.  
GERRY R. PORTER, JR.  
Defendant-Appellant

: NO. 2006-2187  
: On Appeal from the Hamilton  
County Court of Appeals, First  
Appellate District  
: Court of Appeals  
Case Number C-050768  
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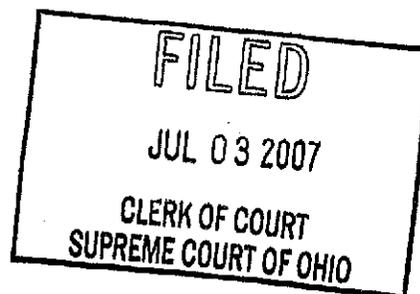
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## STATEMENT OF FACTS

Since 1991, the defendant-appellant Gerry R. Porter, Jr. and his wife Amanda Porter have owned a single family home located at 3691 Lakewood Drive in Green Township, Hamilton County, Ohio. (T.p. 43; T.p. 66) While living in that home, Porter committed at least two separate sexually oriented offenses against young females. (T.p. 44-48)

In 1995, Porter was convicted of Sexual Imposition (a third degree misdemeanor) for touching the breasts of Danielle Porter, his younger half-sister.<sup>1</sup> (T.p. 46) This offense occurred at Porter's home. (T.p. 52)

In 1999, Porter was convicted of Sexual Battery (a third degree felony) for engaging in sexual intercourse with his fourteen-year-old daughter, Kathleen Wetzel. (T.p. 47-48) Porter testified that Kathleen had lived with her biological mother until she "came knocking on the door" of his house when she was fourteen years old. (T.p. 47) Porter was indicted for Sexual Battery and Rape. He entered a guilty plea to Sexual Battery and the Rape was dismissed. (State's Exhibits 4 and 7) Porter was sentenced to 150 days confinement in the Talbert House and to five years of community control. He was ordered to stay away from his daughter. (State's Exhibit 7) He was also notified of his duty to register as a sexually oriented offender. (State's Exhibit 6) Porter subsequently registered as a sexually oriented offender with the Hamilton County Sheriff's Office. (T.p. 13)

On July 28, 2005, pursuant to R.C. 2950.031 (Ohio's residency restriction for registered sex offenders) the Green Township Law Director Francis M. Hyle and the

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<sup>1</sup>Although the record is silent as to Danielle Porter's age, it does reveal that she is substantially younger than Porter. (T.p. 52; T.p. 85)

Hamilton County Prosecuting Attorney Joseph T. Deters filed an action for injunctive relief against Porter in the Hamilton County Court of Common Pleas. The trial court consolidated the preliminary injunction hearing with a trial on the merits. Prior to the evidentiary portion of the hearing, Porter presented arguments as to the constitutionality of R.C. 2950.031. The trial court took the constitutional arguments under submission and proceeded with the evidentiary hearing.

In addition to the evidence regarding Porter's sexually oriented offense convictions, the state presented evidence regarding the distance between Porter's residence located at 3691 Lakewood Drive and St. Jude School located at 5940 Bridgetown Road. (T.p.15; State's Exhibit 1) Principal Robert Huber testified that St. Jude School is owned by the Parish of St. Jude as well as the Archdiocese of Cincinnati. The school operates under the standards set by the Board of Education to serve grades one through eight. (T.p. 16) Huber also identified the location of St. Jude School and specifically pointed out the entrance to the school. (T.p. 15; State's Exhibit 1)

To obtain an accurate measurement of the distance between Porter's residence and St. Jude School, surveyors used the Leica GPS System 1200. (T.p. 26) The Leica GPS System 1200 has been using the Ministry of Defense's Global Positioning Satellite System (GPS) for surveying purposes since 1989. (T.p. 21) The system has the ability to track twelve of the available thirty satellites. It needs five satellites to initialize and four to continue rating. The known position of these satellites is very accurate. For surveying purposes, the technicians triangulate from the satellites by putting a base station GPS unit in a known position to broadcast a signal to two rotary units that a technician takes out into the field. (T.p. 22) The system can be calibrated to the known rate of error and the distance

can be read to sub-centimeters (ten millimeters or better). (T.p. 23; State's Exhibits 8 and 9) Although the system started out for military applications, it has been generally accepted for civilian purposes such as in navigation and infrastructure. (T.p. 23)

Robert Brown and Saidou Wane are surveyors with the Metropolitan Sewer District of Hamilton County. (T.p. 26; T.p. 37) They used the Lecia GPS System 1200 to measure the distance between St. Jude School and the Porter residence. (T.p. 27; T.p. 39; State's Exhibits 2 and 3) They also used an ariel photographic map from the Cincinnati Area Geographic Information System (CAGIS) to show the distance between the land parcels. (T.p. 28; State's Exhibit 1) The distance between St. Jude School and Porter's residence was calculated at 983 feet with a rate of error of plus or minus 2.5 feet. (T.p. 29) The 2.5 feet rate of error was factored in due to the trees in Porter's backyard. (T.p. 30; T.p. 40; State's Exhibit 3)

The trial court granted a permanent injunction against Porter and filed "Findings of Fact and Conclusions of Law." In a separate entry, the trial court also found R.C. 2950.031 constitutional. Based on Porter's prior criminal convictions, the facts and circumstances surrounding those convictions, and his proximity to St. Jude School, the trial court found that Porter's risk to the public outweighed any hardship presented to Porter.

Porter appealed the trial court's decision to the First Appellate District claiming constitutional infirmities in R.C. 2950.031 and an error in the state's use of rebuttal testimony. Initially, Porter only raised constitutional challenges as to the Ex Post Facto and Due Process Clauses of the United States Constitution. Porter subsequently supplemented his appeal with a claim that R.C. 2950.031 violates Ohio's constitutional prohibition against

retroactive laws. The First District Court of Appeals affirmed the judgment of the trial court. *Hyle v. Porter*, 1<sup>st</sup> Dist. No. C-050768, 2006-Ohio-5454.

The case is now before this Court upon the certification of a conflict between the First and Second Appellate Districts. Although both districts agree that the legislature intended R.C. 2950.031 to be applied retroactively, the districts disagree with regard to whether the statute is substantive or remedial. The First District Court of Appeals found that the statute is remedial since it prohibits an offender from “residing” within 1,000 feet of a school but it does not prohibit an offender from “owning, renting, or leasing” the property. *Hyle v. Porter*, 1<sup>st</sup> Dist. No. C-050768, 2006-Ohio-5454, at ¶24. In contrast, the Second District Court of Appeals held that since the statute would require a sex offender who owned his home prior to July 31, 2003 (the effective date of R.C. 2950.031) to “leave” his home, the statute affects a substantive right. *Nasal v. Dover*, 169 Ohio App.3d 262, 2006-Ohio-5584, 862 N.E.2d 571, at ¶23.

This Court has ordered the following issue to be briefed by the parties in *Hyle v. Porter*: “Whether R.C. 2950.031 – Ohio’s residency-restriction statute prohibiting certain sexually oriented offenders from living within 1,000 feet of a school – can be applied to an offender who had bought his home and committed his offense before July 31, 2003 (the effective date of the statute).”

## ARGUMENT

**Proposition of Law No. 1: R.C. 2950.031(Ohio's residency-restriction statute) which prohibits certain sexually oriented offenders from living within 1,000 feet of a school is not unconstitutionally retroactive as applied to an offender who had bought his home and committed his offense prior to the effective date of the statute.**

Porter claims that R.C. 2950.031 should not be applied to him because he bought his home and committed his sex offenses prior to the effective date of the statute. He first asserts that the General Assembly did not intend R.C. 2950.031 to apply retrospectively. Alternatively, Porter contends that if the General Assembly did intend the statute to apply retrospectively then such application is substantive and violates Ohio's constitutional ban on retroactive laws.

When faced with constitutional challenges, this Court has held on numerous occasions that legislative enactments are entitled to a strong presumption of constitutionality. See *State v. Collier* (1991), 62 Ohio St.3d 267, 581 N.E.2d 552; *State v. Young* (1988), 37 Ohio St.3d 249, 525 N.E.2d 1363; *Beatty v. Akron City Hospital* (1981), 67 Ohio St.2d 483, 424 N.E.2d 586; and *State ex rel. Jackman v. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 224 N.E.2d 906. When challenged as unconstitutional, a court must apply all presumptions and rules of construction so as to uphold the statute if at all possible. *State v. Dorso* (1983), 4 Ohio St.3d 60, 446 N.E.2d 449. Furthermore, this strong presumption of constitutionality is rebuttable only by proving the existence of a

constitutional infirmity “beyond a reasonable doubt.” *State v. Gill* (1992), 63 Ohio St.3d 53, 584 N.E.2d 1200; *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59.

The specific statute at issue in this case, R.C. 2950.031 (A), provides: “No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises.” In determining whether R.C. 2950.031 “can be applied to an offender who had bought his home and committed his offense before July 31, 2003 (the effective date of the statute),” it is necessary to analyze the statute under the Ex Post Facto Clause of the United States Constitution as well as the prohibition against retroactive laws in the Ohio Constitution.

### ***I. Ex Post Facto Analysis***

Section 10, Article I of the United States Constitution provides that “[n]o State shall . . . pass any ex post facto law.” This constitutional prohibition is directed at those legislative enactments which would punish as a crime an act previously committed, which was innocent when done, or legislative enactments which would make more burdensome the punishment for a crime after its commission, or which would deprive one charged with a crime of any defense available according to the law at the time when the act was committed. See *Collins v. Youngblood* (1990), 467 U.S. 37, 110 S.Ct. 2715; *Beazell v. Ohio* (1925), 269 U.S. 167, 46 S.Ct. 68.

The U.S. Supreme Court has continually held that in order to challenge a statute as an ex post facto law it must first be determined that the statute is a penal law. *U.S. v. Lovett*

(1946), 328 U.S. 303, 66 S.Ct. 1073; *Calder v. Bull* (1798), 3 U.S. 386, 1 L.Ed. 648. Early on, a penal law was defined as that which imposes a disability for the “purposes of punishment” whereas a non-penal law was defined as that which imposes a disability, not to punish, but to “accomplish some other legitimate governmental purpose.” *Trop v. Dulles* (1958), 356 U.S. 86, 78 S.Ct. 590. In analyzing a New York statute making a person ineligible to solicit funds on behalf of a labor union if that person has been convicted of a felony, the U.S. Supreme Court said: “The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation . . . .” *DeVeau v. Braisted* (1960), 363 U.S. 144, 80 S.Ct. 1146. The Supreme Court would not substitute its judgment for that of the state legislature regarding the “social surgery required by a situation as gangrenous as exposure of the New York waterfront had revealed.” *Id.* at 158.

Similarly in the present case, although the restriction on Porter’s residency is based partially on conduct committed before the effective date of R.C. 2950.031, the residency restriction does not serve to punish Porter for his prior conviction. On the contrary, the statute regulates a present and future situation much like the rest of R.C. Chapter 2950 does. The state’s interest in protecting school children from known sexual offenders is a relevant incident to the regulation of this concern.

All of the courts who have considered the issue have conducted the well-established constitutional analysis and agree that Ohio’s residency restriction for registered sex offenders (R.C. 2950.031) does not have a punitive purpose or effect and, therefore, does

not violate the federal constitutional ban against ex post facto legislation. *Coston v. Petro* (2005), 398 F.Supp.2d 878; *State v. Mutter*, 2<sup>nd</sup> Dist. No. 21374, 2007-Ohio-1052; *State ex rel. Yost v. Slack*, 5<sup>th</sup> Dist. No. 06CAE030022, 2007-Ohio-1077; *Hyle v. Porter*, 1<sup>st</sup> Dist. No. C-050768, 2006-Ohio-5454; *State v. Cupp*, 2<sup>nd</sup> Dist. No. 21176 & 21348, 2006-Ohio-1808.

## **II. Retroactive Analysis**

Section 28, Article II of the Ohio Constitution provides, “[t]he General Assembly shall have no power to pass retroactive laws.” Although from a definitional sense the term “retroactive” would appear to be synonymous with “ex post facto,” in the constitutional sense they are different. The two clauses differ in application in that Ohio’s constitutional prohibition against retroactive laws affects all laws not only penal laws. The Ohio Constitution thus protects “against the state’s imposing new duties and obligations upon a person’s past conduct and transactions.” *Personal Service Ins. Co. v. Manome* (1986), 22 Ohio St.3d 107, 109, 489 N.E.2d 785, 787.

### **A. Retroactive Intent**

“The issue of whether a statute may constitutionally be applied retrospectively does not arise until there has been a prior determination that the General Assembly has specified that the statute so apply.” *Van Fossen v. Babcock & Wilcox Company* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, at paragraphs one and two of the syllabus. Since R.C. 1.48 provides, “A statute is presumed to be prospective in its operation unless expressly made retrospective,” constitutional analysis for retroactivity “requires an initial determination of legislative intent.” *State v. LaSalle*, 96 Ohio St.3d 178, 772 N.E.2d 1172, at ¶ 14. “A statute is not retroactive merely because it draws on antecedent facts as a criterion in its

operation." *United Engineering & Foundry Co. v. Bowers* (1960), 171 Ohio St. 279, 282, 169 N.E.2d 697, 700; see also *State ex rel. Bouse v. Cickelli* (1956), 165 Ohio St. 191, 134 N.E.2d 834.

Both the First and Second Appellate Districts found clear evidence of the General Assembly's intent to apply R.C. 2950.031 retrospectively. The First District Court of Appeals found "the threshold requirement for the rule's retroactive application is an offender's registration under the 1997 amendment." *Hyle v. Porter*, at ¶23. Whereas, the Second District Court of Appeals relied upon the General Assembly's use of alternative tenses and phrases in the actual language of R.C. 2950.031. *Nasal v. Dover*, at ¶ 17 and ¶18. Specifically, R.C. 2950.031 applies to a "person who **has been convicted** of, **is convicted** of, **has pleaded** guilty to, or **pleads** guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child victim oriented offense." (Emphasis added.) R.C. 2950.031(A). It also applies to those registered offenders who "**establish** a residence or **occupy** residential premises." (Emphasis added.) R.C. 2950.0301(A).

To fully understand the First District's analysis in finding retroactive intent, it is helpful to review the history of R.C. Chapter 2950. In the Ohio Supreme Court's very first decision regarding R.C. Chapter 2950, it relied on four specific areas of the statute to find "a clearly expressed legislative intent that R.C. Chapter 2950 be applied retrospectively." *State v. Cook*, 83 Ohio St.3d 404, 410, 1998-Ohio-291, 700 N.E.2d 570, 577. The following is a summary of those four areas:

First, R.C. 2950.09(C)(1) applied to those sex offenders who were convicted and sentenced prior to the effective date of the statute and are still imprisoned when the statute became effective. Second, the registration and verification requirements may

be applied to certain sex offenders whose crimes occurred before the effective date. See, *e.g.*, R.C. 2950.04(A). Third, the community notification provisions apply regardless of when the offense was committed. R.C. 2950.11(A). Finally, failure to comply with the registration and verification requirements constitutes a crime regardless of when the underlying offense was committed. R.C. 2950.06(G)(1) and 2950.99.

*Id.*

The State of Ohio has actually had registration requirements for certain sex offenders since October 4, 1963.<sup>2</sup> In *Cook*, this Court was analyzing the Am.Sub.H.B. No. 180 ("H.B. 180") version of R.C. Chapter 2950, effective January 1, 1997 and July 1, 1997. H.B. 180 was the first version to include the above mentioned indications that the statute should be applied retrospectively. Since *Cook*, a number of amendments and modifications have been made to various portions of R.C. Chapter 2950. In each of those amendments or modifications, the language found by this Court in *Cook* to express the General Assembly's intent that it be applied retrospectively has remained the same. Through these various amendments and modifications, the General Assembly has also clearly expressed its intent when certain amendments or modifications are to be applied prospectively. For example, in Am.Sub.S.B. No. 3 ("S.B. 3") effective January 1, 2002, the sex offender registration for juveniles was made applicable only for those offenses committed on or after January 1, 2002, the effective date of S.B. 3. Additionally, in the Am.Sub.S.B. No. 175 ("S.B.175") version of R.C. Chapter 2950, effective May 7, 2002, the General Assembly wrote "[r]egardless of when the sexually oriented offense was committed, the offender is to be sentenced on or after the effective date of this amendment [5-7-02] for a sexually oriented offense, and that offender was acquitted of a sexually violent predator specification that was

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<sup>2</sup>See Former R.C. Section 2950.01-2950.99, amended and repealed by 1996 H 180 eff. 1-1-97 and 7-1-97.

included in the indictment . . . .” Finally, in the amendment at issue in the present case, Am.Sub.S.B. No. 5 (“S.B.5”), effective July 31, 2003, the General Assembly created a new category of “child-oriented offenses” to be applied to those offenders being sentenced for one of the defined “child-oriented offenses” on or after July 31, 2003, the effective date of S.B.5. Therefore, due to the retroactive nature of R.C. Chapter 2950 in its entirety, without additional language from the General Assembly indicating that a certain amendment is to be applied only from the effective date of that amendment and without any change to the statutory language relied upon in *Cook*, amendments and modifications to R.C. Chapter 2950 are clearly intended to be applied retrospectively.

In support of his claim that the General Assembly did not intend for R.C. 2950.031 to apply retroactively, Porter relies on Section 8 of S.B.5 which provides “Sections 1923.01, 1923.02, 1923.051, 5321.01, and 5321.03 of the Revised Code, as amended by this act, and sections 2950.031 and 5321.051 of the Revised Code, as enacted by this act, **apply to rental agreements entered into on or after the effective date of this act** [July 31, 2003].” (Emphasis Added.) Porter reasons that “if our lawmakers strove to not disturb vested leasehold rights, it is inconceivable that they would permit vested homeowner’s rights to be impaired.” (Appellant’s Merit Brief, p. 7)

Porter’s argument is flawed. First, Section 8 of S.B. 5 actually supports the argument that when it comes to amending or modifying R.C. Chapter 2950, the General Assembly will clearly indicate when it intends an amendment or modification to apply prospectively. Second, the fact that the General Assembly made a specific indication as to the prospective application of R.C. 2950.031 only for rental agreements reveals its intent that R.C. 2950.031 apply retrospectively in all other regards. Third, the General Assembly’s prospective

application of R.C. 2950.031 as to rental agreements is understandable given the fundamental difference between a rental agreement and ownership. A rental agreement involves the landlord's right to contract as much as it does the tenant's. The General Assembly obviously sought to protect the landlord. A "rental agreement" is defined as "any agreement or lease, written or oral, which establishes or modifies the terms, conditions, rules or any other provisions concerning the use and **occupancy** of residential premises by one of the parties." (Emphasis added.) R.C. 5321.01 (D). Whereas ownership entails "the bundle of venerable rights associated with property" but it is not a contract to occupy the property for residential purposes. See *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 38. Therefore, Section 8 of S.B. 5 does not support Porter's argument that the General Assembly intended R.C. 2950.031 to apply prospectively to everyone.

The General Assembly's retroactive intent in R.C. 2950.031 is clear. Specifically, the statutory language "**has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty**" can only be read to mean that the General Assembly intended R.C. 2950.031 to apply to individuals like Porter who "has been convicted" of a sexually oriented offense prior to the effective date of the statute. The un-codified proviso in Section 8 clearly indicates an exception to the retrospective application of R.C. 2950.031 as to rental agreements only. And finally, the retroactive nature of R.C. Chapter 2950 as a whole supports the General Assembly's retroactive intent.

### ***B. Substantive vs. Remedial***

Now that it has been established that the law applies retroactively, Ohio constitutional analysis requires a determination as to whether the legislation is substantive

or remedial. *Van Fossen v. Babcock & Wilcox Company*, at paragraph three of the syllabus. A statute is substantive when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. *Id.*, citing *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 303, 21 N.E. 630, 633. Remedial laws affect only the remedy provided and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. *Id.*, citing *Smith v. New York Central R.R. Co.* (1930), 122 Ohio St. 45, 170 N.E. 637; *Gilpin v. Williams* (1874), 25 Ohio St. 283; *Templeton v. Kraner* (1874), 24 Ohio St. 554; and *Rairden v. Holden* (1864), 15 Ohio St. 207.

Porter claims that the R.C. 2950.031 residency restriction is substantive because it takes away his “vested right” to reside in the house that he owns. While Porter compares himself to the property owners in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, the First District Court of Appeals made the proper distinction in that Porter’s “case does not concern a total divestiture of Porter’s property rights.” *Hyle v. Porter* at ¶ 24. Another important distinction between Porter and the property owners in *Norwood v. Horney* is the fact that Porter is a convicted sex offender. “The rights related to property, i.e., to acquire, use, enjoy, and dispose of property . . . are among the most revered in our law and traditions.” *Norwood v. Horney*, at ¶ 34, citing *Buchanan v. Warley* (1917), 245 U.S. 60, 74, 38 S.Ct. 16. But, there are laws too numerous to count that regulate those property rights without taking them away. For example, “[t]he requirement that a household sewer be directly connected to a sanitary sewerage system whenever such a system becomes accessible ‘reflects a broad-based policy determination that individual household sewage disposal systems are inherently more dangerous to the public health than

sanitary sewerage systems.” *Clark v. Greene County Combined Health District*, 108 Ohio St.3d 427, 2006-Ohio-1326, 844 N.E.2d 330, at ¶ 18, quoting *DeMoise v. Dowell* (1984), 10 Ohio St.3d 92, 95-96, 461 N.E.2d 1286. Also, “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . .” *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627, 765 N.E.2d 345, 350, quoting *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 211, 6990 N.E.2d 510. Porter assumes that his right to “use and enjoy” his property includes the unrestricted right to reside on that property. It does not appear, however, that any court other than Ohio’s Second District Court of Appeals has interpreted “the use and enjoyment of property” to specifically include the unrestricted right to reside there. *State v. Mutter*, 2<sup>nd</sup> Dist. No. 21374, 2007-Ohio-1052, at ¶ 20. Such an oversimplified interpretation of “use and enjoyment of property” cannot be reconciled with the plethora of zoning laws pertaining to residential property. For instance, zoning ordinances restricting dwelling occupancy based on square footage standards have been upheld against challenges that they discriminated against “families of four.” *Fair Housing Advocates Association, Inc. v. City of Richmond Heights, Ohio* (C.A. 6, 2000), 209 F.3d 626.

If Porter does not have a “vested right” to reside in the property he owns then the retroactive analysis this Court provided in *State v. Cook*, 83 Ohio St.3d 404, 412, 700 N.E.2d 570, 578, is applicable. In explaining that there are important public policy reasons for certain statutes to use past events to establish a person’s current status, this Court relied upon its earlier holding that “a later enactment will not burden or attach a new

disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration created at least a reasonable expectation of finality. . . . except with regard to constitutional protections against ex post facto laws . . . felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” *Id.* at 412, 100 N.E.2d at 578, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 282, 525 N.E.2d 805, 808. “[C]onvicted felons are properly subjected to many restrictions on their constitutional rights which would be objectionable if imposed on non-felons.” *Doe v. Petro* (S.D. Ohio, 2005), Case No. 1:05-CV-125, 2005 WL 1038846, at p. 1, citing *Jones v. Helms* (1981), 452 U.S. 412, 420-22, 101 S.Ct. 2434. It follows that convicted sex offenders, a particular class of felons, have no reasonable right to expect that their conduct will never be made the subject of future legislation.

Even if Porter does have a “vested right” to reside in the property he owns, it does not mean that his right thwarts the reasonable exercise of the police power for the public good.

This court has frequently held that an exercise of the police power may be valid even though it does interfere with property and with contract rights if such exercise of the police power bears a real and substantial relationship to the general welfare of the public and if it is not unreasonable or arbitrary. Furthermore, we have held that the determination by the legislative body, in its enactment of legislation, that there is such a relationship will not be disturbed unless clearly erroneous. *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103, 146 N.E.2d 854 (paragraph five of the syllabus); *Teegardin v. Foley* (1957), 166 Ohio St. 449, 143 N.E.2d 824; *Ghaster Properties, Inc., v. Preston, Dir.* (1964), 176 Ohio St. 425, 200 N.E.2d 328. See *Curtiss v. City of Cleveland* (1959), 170 Ohio St. 127, 163 N.E.2d 682.

*Porter v. City of Oberlin* (1965), 1 Ohio St.2d 143, 149, 205 N.E.2d 363, 367-368. In analyzing other constitutional challenges to R.C. 2950.031, the United States District Court said “the public interest is substantially in favor of § 2950.031 being enforced” because it

“was enacted to protect children, who are among the most vulnerable members of our society and who are least able to protect themselves.” *Doe v. Petro* (S.D. Ohio, 2005), Case No. 1:05-CV-125, 2005 WL 1038846, at p. 4. The same court also drew the “rational conclusion that the safety of children is promoted when sex offenders are prohibited from living near schools . . .” and that “safety is furthered by denying sex offenders of convenient safe havens near schools.” *Coston v. Petro* (S.D. Ohio, 2005), 398 F.Supp.2d 878, 886. The state’s interest in the safety of children near schools is fundamental given this state’s compulsory education laws. See R.C. Chapter 3321. Just as the state restricts how fast an automobile may travel in a school zone and increases the penalties for drug offenses committed within 1,000 feet of a school to protect school children, it may also rightfully restrict sex offenders from residing within 1,000 feet of a school.

In the present case, Porter committed at least two sexually oriented offenses against young females in “his family home.” At least one of his victims was in the age range of a significant portion of the students at St. Jude School. Surely, the protection of this vulnerable population bears a real and substantial relationship to the general welfare of the public. To prohibit sexual offenders from residing within a designated distance of schools can by no means be called unreasonable or arbitrary. R.C. 2950.031 does not impair Porter’s right to own property, but imposes a reasonable restriction on the parameters of where he may reside.

To address current and ongoing situations with convicted sex offenders, states across this nation have enacted laws similar to and more expansive than that in R.C. 2950.031. Most notably is the “Sexually Violent Predator Act,” enacted in Kansas in 1994 which provides for the continued civil commitment of sex offenders who have completed their

terms of incarceration. *Kansas v. Hendricks* (1997), 521 U.S. 346, 117 S.Ct. 2072. Of the other states that have enacted residency restrictions against sex offenders within the community, the majority of them have made it a criminal offense for a sex offender to live within a designated distance of a school or other locations where children are likely to congregate.<sup>3</sup> R.C. 2950.031 does not provide a criminal penalty but requires Ohio courts to balance the equities among the parties to determine whether injunctive relief is appropriate. In balancing the equities, the courts are able to consider any extenuating circumstances or hardships injunctive relief may present to the sex offender. For an individual such as Porter who did not present any evidence that his circumstances are any different than they were when he committed his sex offenses in “the family home,” the court may appropriately deny such a sex offender a convenient “safe haven” near schools.

Accordingly, Porter has not overcome the strong presumption of R.C. 2950.031's constitutionality.

### CONCLUSION

R.C. 2950.031 is not unconstitutionally retroactive as applied to an offender who had bought his home and committed his offense prior to the effective date of the statute. The First District Court of Appeals' decision affirming the trial court's permanent injunction against Porter from residing in the property he owns within 1,000 feet of St. Jude School

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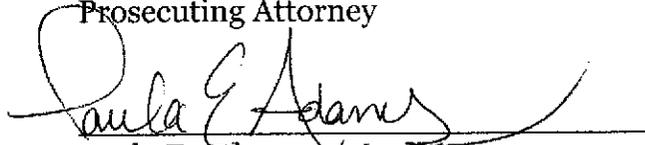
<sup>3</sup>See Ala.Code 15-20-26 (2005); Ark. Code Ann. 5-14-128 (2007); 720 Ill. Comp. Stat. 5/11-9.3 (2005); Iowa Code 292A.2A (2006); Ky. Rev. Stat. Ann. 17.545 (2006); La. Stat. Ann. 91.1 (2006); Mich. Comp. Laws 28.735 (2006); Mo. Rev. Stat. 566.147 (2006); Okla. Stat. tit. 57, 590 (2006); Tenn. Code Ann. 40-39-211 (2006).

was proper. R.C. 2950.031 withstands constitutional analysis under both the U.S. and Ohio Constitutions.

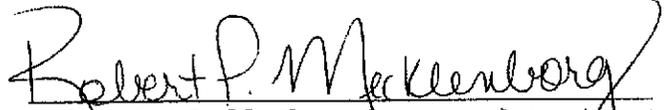
The decision below must be affirmed.

Respectfully,

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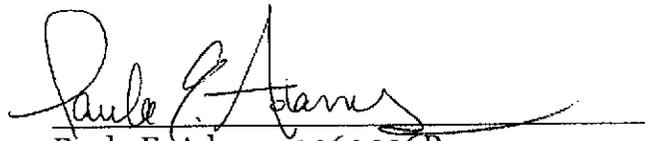


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### PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellee, by United States mail, addressed to David A. Singleton, Ohio Justice & Policy Center, 617 Vine Street, Suite 1309, Cincinnati, Ohio 45202, counsel of record, and Jenny E. Carroll, Lead Counsel for Amici Rosenthal Institute for Justice, University of Cincinnati College of Law, P.O. Box 210040, Cincinnati, Ohio 45221, and Jeffrey M. Gamso, Counsel for Amici ACLU, 4506 Chester Avenue, Cleveland, Ohio 44103-3621 this 5<sup>th</sup> day of July, 2007.



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