

NO. 07-1427

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 88450

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STATE OF OHIO,

Plaintiff-Appellee

-vs-

ANDREW FERGUSON,

Defendant-Appellant

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**MERIT BRIEF OF APPELLEE**

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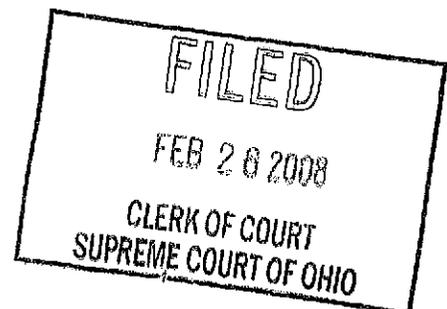
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## STATEMENT OF THE CASE AND FACTS

On June 6, 1990, the Cuyahoga County Grand Jury returned a five-count indictment against Andrew Ferguson. Included in the five counts were three counts of rape, one count of kidnapping, and one count of felonious assault. This matter quickly proceeded to a bench trial on August 27, 1990. After the conclusion of evidence and arguments of the parties, the trial court found Ferguson guilty of three counts of rape and one count of kidnapping. On September 17, 1990, the trial court imposed sentence on Appellant. It incarcerated Appellant for a term of fifteen to twenty-five years, combined on the four counts. To date, Ferguson is still serving his sentence.

On June 13, 2006, following the State's request for classification of Appellant as a sexual predator, the trial court conducted a sexual predator classification hearing. The court relied on Ferguson's prior rape conviction and the results of the actuarial assessments administered by the court psychiatric clinic, which demonstrated a moderate to high risk for reoffending, in finding him likely to commit another sexually oriented offense.

Following the trial court's classification of Ferguson as a sexual predator, he timely appealed this decision to the Eighth District Court of Appeals. On appeal, he raised three assignments of error. He claimed that the trial court failed to conduct a statutorily-required analysis under R.C. 2950.09(B)(3), and it further failed to find him a habitual sex offender. Ferguson also claimed that Senate Bill 5's amendments violate the Ohio and United States Constitutions as ex post facto and retroactive legislation. The Eighth District ultimately affirmed the trial court's classification of Ferguson as a

sexual predator, finding no error with the proceedings of the trial court. *State v. Ferguson*, Cuyahoga App. No. 88450, 2007-Ohio-2777, ¶ 1.

Ferguson requested the jurisdiction of this Court on various issues, including the constitutionality of Senate Bill 5, effective July 31, 2003, which amended Megan's Law.<sup>1</sup> The stated intent of Megan's Law was "to protect the safety and general welfare of the people of this state." R.C. §2950.02(B). Further, "[i]f the public is provided adequate notice and information about sexual predators, habitual sex offenders, and certain other offenders who commit sexually oriented offenses, members of the public and communities can develop constructive plans to prepare themselves and their children for the sexual predator's, habitual sex offender's, or other offender's release from imprisonment, a prison term, or other confinement. This allows members of the public and communities to meet with members of law enforcement agencies to prepare and obtain information about the rights and responsibilities of the public and the communities and to provide education and counseling to their children." R.C. §2950.02(A)(1). Clearly, the General Assembly's aim was ensuring the safety and welfare of the children of the State of Ohio against the potential for recidivism. And it has been recognized by this Court. *State v. Cook*, 83 Ohio St.3d 404, 422 ("The fact that released sex offenders have a high rate of recidivism demands that steps be taken to protect members of the public against those most likely to reoffend. This is the role of R.C. Chapter 2950. Registration allows local law enforcement to collect and maintain a bank of information on offenders. This enables law enforcement to monitor offenders,

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<sup>1</sup> Megan's Law was succeeded by the Adam Walsh Act, Senate Bill 10, effective in its entirety on January 1, 2008.

thereby lowering recidivism. Notification provisions allow dissemination of relevant information to the public for its protection.”).

Senate Bill 5 further cemented this concept. The amendments enlarged the registration requirements and made final sexual predator determinations. It also created a buffer zone between sex offenders and children – forbidding sex offenders from residing within 1000 feet of a school. In amending Megan’s Law, by instituting residency restrictions for all sex offenders, Senate Bill 5 did not criminalize the mere act of residing within a 1000-foot radius of a school. Rather, it allowed for injunctive relief by certain entities, which would require the sex offender to move from within this radius.<sup>2</sup>

Ferguson claims that these amendments violate the United States Constitution prohibition against ex post facto legislation, and the Ohio Constitution’s broader prohibition against retroactive legislation. For the reasons set forth herein, the State submits that Ferguson’s federal constitutional claim must be rejected.

## **ARGUMENT**

**PROPOSITION OF LAW I:** R.C. 2950.01 et seq., as applied to persons who committed their sexually oriented offenses prior to July 31, 2003, violates Art. 1, Sec., 10, of the United States Constitution as ex post facto legislation, and violates Art. II, Sec. 28 of the Ohio Constitution as retroactive legislation.

As set forth herein, the State submits that this Court’s recent decision in *Hyle v. Porter*, \_\_\_ Ohio St.3d \_\_\_, 2008-Ohio-542, is controlling on the issue of retroactivity. And while this Court truncated its analysis after determining that R.C. §2950.031 was not

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<sup>2</sup> R.C. 2950.031(B) mandates that only “the prosecuting attorney, village solicitor, city or township director of law, similar chief legal officer of a municipal corporation or township, or official designated as a prosecutor in a municipal corporation” seek injunctive relief.

expressly made retrospective, without addressing the ex post facto claim, the State submits the following argument that the Buffer Zone Law – Senate Bill 5 – is not constitutionally violative as ex post facto legislation.

A. Ex Post Facto, Generally

Ferguson errs in contending that the residency restrictions and increased registration obligations constitute an ex post facto law. The Ex Post Facto Clause states that “[n]o State shall \* \* \* pass any \* \* \* ex post facto Law.” An ex post facto law literally means “[a]fter the fact; by an act or fact occurring after some previous act or fact, and relating thereto.” *State v. Cook* (1998), 83 Ohio St.3d 404, 414. “To violate the ex post facto clause, the law must be retrospective, such that it applies to events occurring before its enactment. It must also disadvantage the person affected by altering the definition of criminal conduct or increasing the punishment for the crime.” *State v. Glaude* (Sept. 2, 1999), Eighth App. No. 73757, citing *Lynce v. Mathis* (1997), 519 U.S. 433. In effect, the Ex Post Facto Clause bars a law “that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed \* \* \*.” *Calder v. Bull* (1798), 3 U.S. 386, 390. In the present case, the legislature intended the residency restrictions and increased registration requirements, under Senate Bill 5, to be civil in nature. Furthermore, these additional requirements do not act as “punishment.”

To determine whether the amendments to Chapter 2950 violate the Ex Post Facto Clause, the intent-effects test must be applied. First, the court must consider whether the legislature designated the law as civil or punitive, either expressly or impliedly. *United States v. Ward* (1980), 448 U.S. 242, 248. And the court must defer to the legislative intent. Therefore, “only the clearest proof will suffice to override legislative intent and

transform what has been denominated a civil remedy into a criminal penalty. *Smith v. Doe* (2003), 538 U.S. 84, 92, citing *Hudson v. United States* (1997), 522 U.S. 93, 100. If the legislature intended for the law to be civil, then the court must determine whether the law is "so punitive either in purpose or effect" so as to negate the non-punitive intent behind the law's enactment. *Ward*, 448 U.S. at 249.

B. Intent

Initially, the General Assembly expressly stated its intent that these measures would be non-punitive and would be meant to serve the non-criminal purposes of aiding law enforcement, providing helpful information to the public, and protecting the public. R.C. §2950.02(A) & (B). Moreover, Ferguson cannot show by the "clearest proof" that the purpose or effect of notification is so punitive as to negate the General Assembly's intent that notification be treated as remedial.

Examining the legislative intent, the initial placement of the statutes in R.C. Title 29, the title containing the criminal code, is not dispositive of the question of legislative intent. The location and labels of the statute do not by themselves designate the nature of the statute. *Smith v. Doe*, 538 U.S. at 94. See, also, *Lee v. Alabama* (Ala. 2004), 895 So.2d 1038, 1042. Rather than defining behavior as a crime and setting a punishment, the statute instead does not impose any criminal sanctions against sex offenders for living within one thousand feet of a school. It merely empowers designated individuals to file injunction actions to force sex offenders to move out of the buffer zone. The General Assembly's intention that Ohio's Buffer Zone Law be a civil statute is demonstrated by its inclusion in Chapter 2950 of the Ohio Revised Code, Ohio's sex offender registration system, a system that the Court has already found to be a civil

statute because it serves the remedial purpose of protecting the local community. *State v. Cook* (1998), 83 Ohio St. 3d 404, 417, 1998-Ohio-291. In *Cook*, this Court held that the purpose behind R.C. Chapter 2950 is to promote public safety and to “bolster the public’s confidence in Ohio’s criminal and mental health systems” and reiterated that protecting the public and preventing crimes are the types of purposes that the United States Supreme Court has found regulatory and not punitive. *Id.* These same civil purposes apply to the Buffer Zone Law as well.

In addition to including the Buffer Zone Law in R.C. Chapter 2950, the General Assembly further indicated that it intended the Buffer Zone Law to be a civil statute in Section 9, S.B.5, which states that the statute was passed “for the immediate preservation of the public peace, health, and safety” while also complying with the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act so that the State of Ohio would receive federal funding.

Finally, the fact that the statute gives county prosecutors, among others, authority to bring an injunction action to evict sex offenders who reside within 1,000 feet of a school does not change the civil and remedial nature of the statute. In Ohio, county prosecutors have civil as well as criminal authority;<sup>3</sup> the statute does not authorize any criminal enforcement or sanction and the county prosecuting attorneys are only one

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<sup>3</sup> R.C. §309.09(A) sets forth the authority of the county prosecutor:

The prosecuting attorney shall be the legal advisor of the board of county commissioners, board of elections, and all other county officers and boards, including all tax-supported public libraries, and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. The prosecuting attorney shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.

group among many other officials and individuals who are authorized to bring such an injunction action.

As the United States Supreme Court held, “[b]y contemplating ‘distinctly civil procedures,’ the legislature ‘indicated clearly that it intended a civil, not a criminal sanction.’” *Smith v. Doe*, 538 U.S. at 96, quoting *United States v. Ursery* (1996), 518 U.S. 267, 289. Because the Buffer Zone Law does not impose criminal sanctions and was added to the statutory scheme regulating sexual offender registration, a statute that was already determined to be of a civil nature, the General Assembly intended the Buffer Zone Law as a civil, regulatory non-punitive statutory scheme.

### C. Effect

Since the intent of the legislature in passing the Buffer Zone Law is civil, the court must then determine if the statute is so punitive in either its purpose or effect to negate its civil label. In determining whether the statute is so punitive, such that it overcomes the “civil” label, the court must consider five factors. “The factors most relevant to [an ex post facto] analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history as punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose.” *Smith v. Doe*, 538 U.S. at 96. As set forth herein, Ferguson has not offered the clearest proof to prove that the effects of the test are not so punitive to overcome the civil label.

#### 1. Historical Assessment

The registration, notification and residency mechanisms of sex offender laws are not rooted historically as a traditional means of punishment. These restrictions are

relatively new and unique. *Smith v. Doe*, 538 U.S. at 97; *Doe v. Miller* (C.A. 8 2005), 405 F.3d 700, 719-720. And as the United States Supreme Court held, this fact “suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing.” *Id.*

Further, the increased registration obligations and residency restrictions do not mirror colonial punishments, as Ferguson insinuates. While a sex offender is required to provide additional information to a sheriff – the name and address of an employer or a institution of higher education – this information is not automatically disseminated to co-workers, fellow students, or the general public in its vicinity. Rather these individuals must actively seek this information. A sex offender is not standing in public announcing these facts, unlike colonial times. “Humiliated offenders were required ‘to stand in public with signs, cataloguing their offenses.’” *Smith v. Doe*, 538 U.S. at 97 (citation omitted). Publicity and any dishonor that may come from dissemination of this information was not the ultimate goal of the General Assembly. And the information which a sex offender must supply does, by no means, equate to a public shaming. *Id.* at 98. It results in the accurate dissemination of relevant information to further assist the public and protect it. *Cook* at 422.

Additionally, the residency restrictions imposed by S.B.5 are not designed to banish sex offenders from the community. Rather, the restrictions place certain, minimal restrictions on the places where a sex offender may reside within a community without completely banishing or restricting him from the community. See *Smith v. Doe*, 538 U.S. at 98. (“The aim [of banishment] was to make these offenders suffer permanent stigmas, which in effect cast the person out of the community.”)

Consequently, this stigma adversely impacts every other aspect of an offender's life. *Iowa v. Seering* (Iowa, 2005) 701 N.W.2d 655, 667 (citation omitted). But limiting a sex offender's residency from within 1,000 feet of a school does not act as an automatic expulsion from the community, since it does not restrict a sex offenders' freedom to travel outside of this barrier.

Since the additional requirements imposed under S.B.5, are neither traditional forms of punishment, nor analogous to these forms, this factor is non-punitive in nature.

## 2. Affirmative Disability or Restraint

Ferguson argues that the Buffer Zone Law acts as a disability or restraint because it is comparable to parole, probation, and supervised release. The court is required, under this prong, to determine "how the effects of the [amendments] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith v. Doe*, 538 U.S. at 99-100.

The restraint posed upon a sex offender is minimal; it is not a physical restraint, such as imprisonment. Nor does it even approximate the involuntary commitment of mentally ill sex offenders, which has been held to be non-punitive. *Kansas v. Hendricks* (1997), 521 U.S. 346, 363-365. And the inability to reside within one thousand feet of a school is even less severe than "occupational debarment" again another non-punitive measure. *Smith v. Doe*, 538 U.S. at 100.

Furthermore, the act of periodically updating residential and employment information does not equate within the onerous obligations of probation and other forms of conditional release. Therein, defendants must maintain employment, submit to random drug testing, and permit warrantless searches of their residences, in addition to

reporting on a regular basis to a probation or parole officer. Under S.B.5, a sex offender is merely required to provide an additional piece of information during his regular reporting cycle. Similarly, the United States Supreme Court, in *Smith v. Doe*, juxtaposed registration requirements against supervised release holding: “[p]robation and supervised release entails a series of mandatory conditions and allow the supervising officer to such the revocation of probation or release in case of infraction. *Id.* at 101. But Alaska’s Megan’s Law, which the Court reviewed, went even further than Ohio’s forcing sex offenders to inform authorities about changes in facial features, the failure to comport with this requirement resulted in criminal prosecution. *Id.* at 101-102.

Accordingly, the disability or restraint placed on Ferguson is minor and indirect, and cannot, therefore, be considered punitive.

### 3. Promotes Punishment Via Deterrence and Retribution

The primary objectives of criminal punishment are deterrence and retribution. *Kansas v. Hendricks*, 521 U.S. 346, 361-362. “Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior.” *Cook* at 420 (citation omitted). On the other hand, “[r]etribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing justice.” *Id.* While all laws, to some extent, may result in a deterrent effect, that is not the primary purpose of the Buffer Zone Law. “Any number of government programs might deter crime without imposing punishment.” *Smith v. Doe*, 538 U.S. at 102. And “[t]o hold that the mere presence of a deterrent purpose renders \* \* \* sanctions ‘criminal’ \* \* \* would severely undermine the government’s ability to engage in effective regulation \* \* \*.” *Hudson*, 522 U.S. at 105.

Rather, the Buffer Zone Law protects children from future acts by reducing the opportunity for sex offenders to re-offend. This task is accomplished by restricting a sex offender's residence from within 1000 feet of a school. Much like the Iowa statute in *Doe v. Miller*, the Buffer Zone Law is "designed to reduce the likelihood of re-offense by limiting the offender's temptation and reducing the opportunity to commit new crimes. *Doe v. Miller*, 405 F.3d at 720. Therefore, this law acts as a remedial measure rather than a deterrent.

In accordance with its remedial nature, the amendments present no criminal repercussions. In its place, civil remedies were instituted by the legislature in passing the Buffer Zone Law, whereby only an enumerated entity may seek injunctive relief. This civil remedy does not ostracize a sex offender from the community, it simply forbids them from living within a certain distance of a school. In essence, the law curtails the negative consequences inflicted upon sex offenders from the community as a whole, and therefore, does not serve as retribution.

Finally, the repeal of a sexual predator's right to seek review of the trial court's classification is neither a deterrent nor retribution. The factors upon which a trial court relied in classifying a sex offender as a sexual predator under former R.C. 2950.09(B)(3) were static. As a result, these factors will never change with time. So lifetime classification, without the chance of removal, is not retribution, and therefore does not make a law punitive.

#### 4. Rational Connection to Non-Punitive Purpose

In analyzing an ex post facto claim, the statute must have some rationale connection to a non-punitive purpose. However, the statute does not require such "a

close or perfect fit with the non-punitive aim it seeks to advance.” *Smith v. Doe*, 538 U.S. at 103. The amendments in question were passed for the “preservation of the public peace, health, and safety.” S.B. 5, Section 9. It thereby furthers the stated intent of Megan’s Law, which seeks to protect the health and well-being of the general public, with a specific focus on children.

The Buffer Zone Law amendments are specifically targeted at protecting children. By requiring sex offenders to also notify authorities of their place of employment or institution of higher learning (in addition to their residence), it better enables law enforcement to disseminate information and thereby, the public can develop plans to protect their children. R.C. 2950.02(A)(1). While the amendments still afford sex offenders unfettered access to gainful employment, it empowers another community in which a sex offender spends a significant amount of time on a weekly basis to target against recidivism. There are “grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is ‘frightening and high.’” *Smith v. Doe*, 538 U.S. at 103, quoting *McKune v. Lile* (2002), 536 U.S. 24, 34.

Protecting against the high risk of recidivism, continually noted by the United States Supreme Court, as well as this Court, also coincides with the 1000-foot residency restrictions. The buffer zone reduces access to children, thereby minimizing the opportunity and temptation for sex offenders to re-offend. Additionally, this restriction only places a prohibition on a sex offender’s abode; it does not interfere with a sex offender’s right to traverse within this buffer zone. See *Illinois v. Leroy* (2005), 357 Ill. App.3d 530, 541 (“[I]t is reasonable to conclude that restricting child sex

offenders from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age might also protect society.”); *Doe v. Miller*, 405 F.3d at 723 (holding that the “legislature’s decision to select a 2000-foot restriction, as opposed to the other distances that were considered are rejected, is reasonably related to its regulatory purpose.”).

Clearly, the Buffer Zone Law is rationally related to a legitimate, non-punitive objective.

#### 5. Excessive in Light of Its Purpose

Whether a statutory scheme is excessive “in not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective.” *Smith v Doe*, 538 U.S. at 105. Ohio’s Buffer Zone Law is a reasonable approach to the compelling interest of public welfare, including child safety. The law requires a sex offender to additionally report his or her place of employment and limits where a sex offender may live. And as previously stated, it does not limit the sex offender’s right to traverse 1000-foot radius for any reason, including employment.

In reviewing the Buffer Zone Law and its 1000-foot residency prohibition, the Clermont County Court of Common Pleas did not find the residency restrictions excessive. *State ex rel. White v. Billings*, Clermont Cmn. Pls. Case No. 2005 CVH 1328, 2006-Ohio-4743, ¶ 32 (finding “the absence of a particularized risk assessment [of all sex offenders] does not necessarily convert a regulatory law into a punitive measure.”). Federal cases reviewing similar restrictions have likewise been found as

not excessively restrictive. See *Illinois v. Leroy*, 357 Ill. App.3d at 541 (“Having concluded that prohibiting child sex offenders from living within 500 feet of a playground or facility providing programs or services exclusively directed toward persons under 18 years of age gears a reasonable relationship to the purpose of protecting children from known child sex offenders and sets forth a reasonable method of furthering that purpose, we decline to now find [the statute] excessive with regard to purpose.”).

As exhibited above, a requirement that limits where sex offenders, as a class, reside is not excessively restrictive. “The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specific crimes should entail particular regulatory consequences.” *Smith v. Doe*, 538 U.S. at 103. The State can therefore “legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness,” and “can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, non-private information about the registrants’ convictions \* \* \*.” *Id.* at 104. As such, the wholesale approach to restricting residency is not so excessive as to be punitive.

#### D. Summary

The Ohio General Assembly, in passing the Buffer Zone Law, intended, expressly and impliedly, it to be civil and non-criminal. In passing this law, it furthered the public policy of Megan’s Law – by serving the non-criminal purposes of aiding law enforcement, providing helpful information to the public, and protecting the public. Nor do the effects of this law rise to the level of criminal punishment, under the five factors of *Smith v. Doe*, *supra*. Additionally, this rationale coincides with Ohio courts or appeals

cases, which reached the same conclusion.<sup>4</sup> As such, Ferguson has not offered the clearest proof possible to negate the stated intent and effect of the law.

## CONCLUSION

For the foregoing reasons, the State of Ohio respectfully submits to this Honorable Court that Senate Bill 5 amendments, commonly known as the Buffer Zone Law, do not violate the ex post facto clause of the United States Constitution. Therefore, this Court should affirm the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

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## SERVICE

A copy of the foregoing Merit Brief of Appellee has been mailed this 25th day of February, 2008, to John T. Martin & CULLEN SWEENEY, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113.

  
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<sup>4</sup> *State ex. rel. Yost v. Slack*, Delaware App. No. 06CAE30022, 2007-Ohio-1077; *State v. Cupp*, Montgomery App. Nos. 21176 and 21348, 2006-Ohio-1808; *State v. Baron*, 156 Ohio App.3d 241, 2004-Ohio-747.