

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2008-2502
 :
 Plaintiff-Appellee, :
 :
 v. : On Appeal from the
 : Sixth Appellate District,
 CHRISTIAN N. BODYKE, : Huron County, Ohio
 : Case Nos. H-07-040, H-07-041,
 Defendant-Appellant. : H-07-042

**MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE OFFICE OF
THE OHIO PUBLIC DEFENDER AND THE OHIO ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS IN SUPPORT OF APPELLANT CHRISTIAN N. BODYKE**

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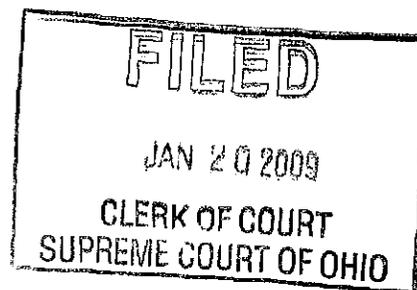
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INTEREST OF AMICI CURIAE

The Office of the Ohio Public Defender (OPD) is a state agency responsible for providing legal representation and other services to indigent criminal defendants convicted in state court. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and ensure the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. ~~In addition, the OPD seeks to promote the proper administration of criminal~~ justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

The Ohio Association of Criminal Defense Lawyers (OACDL) is a statewide association of over 600 public defenders and private attorneys who practice primarily in the field of criminal defense law. OACDL has an enduring interest in protecting the rights guaranteed to criminal defendants under the United States and Ohio Constitutions.

As Amici Curiae, the OPD and OACDL offer the Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio courts. Both the OPD and OACDL have an interest in this case insofar as it will determine the constitutionality of Ohio's most recent sex-offender classification law, Senate Bill 10. We believe that it is imperative to the protection of our clients' rights that this Court move swiftly to address the myriad constitutional challenges to Senate Bill 10 presented in this case. Moreover, prompt action from this Court is necessary to alleviate the substantial burden on lower courts as they struggle to interpret and apply Senate Bill 10 in a manner that comports with the state and federal constitutions.

STATEMENT OF SUBSTANTIAL CONSTITUTIONAL QUESTIONS

In 1963, Ohio enacted its first sex-offender registration statute. Remarkably, the original version of this statute adequately protected the citizens of this state, without substantial modification, for thirty-three years. In fact, between 1963 and 1996, R.C. Chapter 2950 was amended only three times, and the General Assembly never modified the provisions governing the duty to register, the duration of registration, or the registration requirements. See Former R.C. Chapter 2950, 130 Ohio Laws 669. By contrast, in the past twelve years, the General Assembly has enacted three different versions of the sex-offender classification law; each version more restrictive and punitive than the last.

In recent years, the laws purporting to protect society from these sex offenders have grown increasingly broad, and the restrictions have become more severe and applicable to more people. Taken together, the public outrage, political risk-aversion, and inaction from this Court have driven Ohio's sex-offender classification scheme to the outer boundaries of constitutionality. Unfortunately, the prior decisions from this Court with respect to sex-offender classification operate as an open invitation to the General Assembly to add additional requirements without limitation. But there comes a time when this Court must say, "enough is enough." That time has arrived.

A. This Court should exercise jurisdiction in order to create a coherent and consistent legal rule with respect to the enforcement of S.B. 10.

Presently, the law with respect to S.B. 10 is in a state of chaos and many lower courts have simply refused to proceed without additional guidance from this Court. For example, nine counties have issued county-wide stays on all S.B. 10 challenges pending final resolution by this

Court.¹ In eighteen other counties, at least some judges have issued stays, injunctions, or restraining orders with respect to the enforcement of S.B. 10's registration and notification provisions until further appellate guidance is provided.² For all practical purposes, twenty-eight counties, or approximately one-quarter of the State, will not take any action to resolve pending S.B. 10 challenges until this Court provides additional guidance regarding the constitutionality of the statute.

In those counties that moved forward with S.B. 10 litigation, the decisions regarding the constitutionality of the statute have varied widely. At this time, four common pleas courts have found S.B. 10 to be unconstitutional for various reasons. See *State v. Toles*, No. 00CR-02-875 (Franklin Cty. Sept. 9, 2008); *Sigler v. Ohio*, No. 07-CV-1863 (Richland Cty. Aug. 11, 2008); *Evans v. Ohio*, No. CV-08-646797 (Cuyahoga Cty. May 9, 2008); *Brooks v. Ohio*, No. 07-CV-154328 (Lorain Cty. July 24, 2008). But eleven appellate districts, including the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth, have upheld S.B. 10 against various constitutional challenges. See *State v. Desbiens*, 2d Dist. No. 26489, 2008-Ohio-3375; *State v. Worthington*, 3d Dist. No. 7-07-62, 2008-Ohio-3222; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3234; *State v. Gooding*, 5th Dist. No. 07-CA-3004, 2008-Ohio-5954; *State v. Bodyke*, 6th Dist. No. H-07-040, 2008-Ohio-6387; *State v. Byers*, 7th Dist. No. 07-CO-39, 2008-Ohio-5051; *State v. Ellis*, 8th Dist. No. 90844, 2008-Ohio-6283; *State v. Honey*, 9th Dist. No. 08CA0018-M, 2008-Ohio-6347; *State v. Christian*, 10th Dist. No. 08AP-170, 2008-

¹ County-wide stays have been issued in Astabula, Darke, Geauga, Hardin, Highland, Mahoning, Medina, Summit, and Union counties.

² Stays have been issued by certain judges in Butler, Fairfield, Franklin, Hamilton, Hancock, Henry, Hocking, Licking, Richland, Tuscarawas, and Wood counties. Temporary Restraining Orders have been issued in Cuyahoga, Franklin, Lorain, Pickaway, and Warren counties. Injunctions have been issued in Cuyahoga, Franklin, Lake, Miami, Ottawa, Portage, Richland, Scioto, Tuscarawas, and Warren counties.

Ohio-6304; *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195.

Taken together, these cases address all the issues presented in Mr. Bodyke's case. But, unlike Mr. Bodyke's case, none of these other appellate decisions include all of the potential constitutional challenges to S.B. 10. Thus, only by exercising jurisdiction over Mr. Bodyke's case can this Court resolve all S.B. 10 challenges in a single decision.

~~Without a decision from this Court regarding the constitutionality of S.B. 10, the lower courts are being flooded with cases that present questions of first impression. And these courts must individually decide how far the Constitution permits the State to go in order to protect potential victims from potential reoffenders. This leaves open the possibility that the application and enforcement of S.B. 10 will be governed more by geography than by law. By exercising jurisdiction in Mr. Bodyke's case, and considering his claims on the merits, this Court can ensure a uniform application of the law across this State. Amici urge this Court to do so.~~

B. This Court should exercise jurisdiction in order to provide much needed judicial oversight to the actions of the General Assembly with respect to sex-offender registration.

In many areas of the law, courts can rely upon the democratic process to produce statutes that comply with the Constitution. But public outrage against sex offenders, and popular pressure upon legislators to respond to social fear, threaten to chill the normal political protections militating against unconstitutional legislation. This fact alone justifies careful judicial oversight. Moreover, given the breakdown in the normative political process, it falls to this Court to establish the constitutional limits upon the state's authority to retroactively punish convicted sex offenders.

It is precisely the type of crippling political climate surrounding the issue of sex-offender registration that prompted James Madison to observe that “[t]here are particular moments in public affairs when the people, stimulated by some irregular passion . . . may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to . . . suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?” The Federalist No. 63, at 382-83 (James Madison) (Clinton Rossiter ed., 2003). Reason, justice, and truth no longer govern the dialogue regarding the increasingly burdensome and harsh “civil penalties” imposed upon convicted sex-offenders. It is, therefore, incumbent upon this Court to ensure that valuable constitutional safeguards operate to protect a desperately unpopular minority from the irrational fears of the majority.

Reasonable and constitutionally permissible sex-offender registration laws certainly exist. In fact, this Court recognized as much in *State v. Cook* (1998), 83 Ohio St.3d 404, and *State v. Ferguson* (2008), 120 Ohio St.3d 7. But S.B. 10 goes far beyond what was previously sanctioned in *Cook* and *Ferguson*. Amici again urge this Court to accept jurisdiction in order to prevent the further erosion of constitutional safeguards prohibiting the type of vindictive and retroactive punishment inflicted upon sex offenders by S.B. 10.

C. This case presents the perfect vehicle for considering the constitutionality of S.B. 10.

Mr. Bodyke’s case presents this Court with the perfect vehicle for considering the myriad constitutional challenges to S.B. 10. First, all of the potential constitutional challenges are presented in a single case. Second, this case is free of procedural defects because all of Mr. Bodyke’s claims were properly presented and preserved in the courts below.

This Court has previously stated its desire to avoid piecemeal litigation. See *Denham v. City of New Carlisle* (1999), 86 Ohio St.3d 594, 597 (citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378, 380-81). By accepting Mr. Bodyke's case, this Court can avoid piecemeal litigation, which will preserve scarce judicial resources and ensure a swift remedy to the thousands of convicted sex-offenders currently being subjected to this unconstitutional statute.

LAW AND ARGUMENT

In his memorandum in support of jurisdiction, Mr. Bodyke presents six propositions of law challenging the constitutionality of S.B. 10. Specifically, Mr. Bodyke raises challenges based upon separation of powers, retroactivity, ex post facto, double jeopardy, due process, cruel and unusual punishment, and breach of contract. The substantial constitutional questions presented by this case are well-articulated by Mr. Bodyke in his MISJ, and Amici urge this Court to accept each proposition of law presented in Mr. Bodyke's MISJ. Because Mr. Bodyke has presented this Court with an adequate recitation of the facts and law supporting his claims, Amici have limited their arguments to important practical and public policy considerations that demonstrate the need for action from this Court.

CONCLUSION

For the reasons stated above, Amici urge this Court to exercise jurisdiction over Mr. Bodyke's six propositions of law.

Respectfully Submitted,

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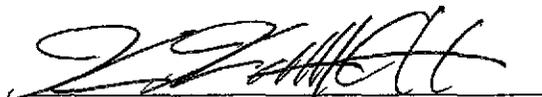
I hereby certify that a true copy of the foregoing **Memorandum in Support of Jurisdiction of Amici Curiae Office of the Ohio Public Defender and the Ohio Association of Criminal Defense Lawyers in Support of Appellant Christian Bodyke** was served by regular U.S. mail, this 20th day of January, 2009, upon the following:

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