

IN THE SUPREME COURT OF OHIO

IN RE: D.S., : No. 2008-1624
A Minor Child, :
: On Appeal from the Allen
: County Court of Appeals,
: Third Appellate District,
: No. CA2007-058

BRIEF OF AMICI CURIAE, THE JUSTICE FOR CHILDREN PROJECT AND
FRANKLIN COUNTY PUBLIC DEFENDER, ET AL.,
IN SUPPORT OF MINOR CHILD-APPELLANT D.S.

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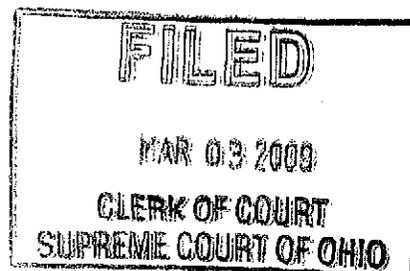
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I. STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae, the **Justice for Children Project**, is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. The Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum, a one-semester course open to eligible third-year law students certified as Legal Interns by the Ohio Supreme Court, and through its amicus representation, the Justice for Children Project strives to advance the cause of children's rights.

Amicus curiae, the **Franklin County Public Defender** Office is a countywide program that provides comprehensive legal representation services in criminal, juvenile and custody proceedings to indigent persons in Franklin County so as to fulfill the constitutional mandate of "equal justice under the law."

Amicus curiae, the **Juvenile Justice Coalition (JJC)**, an Ohio non-profit membership organization, has as its mission to promote effective programs, equitable treatment of youth, and public policy that will reduce juvenile delinquency in Ohio. JJC has focused on two policy areas: encouraging community-based alternatives to institutionalization, and reducing minority overrepresentation in the juvenile justice system. JJC understands that the brain development of adolescents makes teenagers less able to understand the consequences of their behavior and less likely to think through the potential outcomes of their actions.

Amicus curiae, the **National Juvenile Justice Network (NJJN)** is an organization devoted to enhancing the capacity of statewide juvenile justice coalitions to advocate for the fair, equitable and developmentally appropriate adjudication and treatment for all children, youth and families involved in the juvenile justice system. NJJN currently comprises 37 members in 31 states. NJJN believes that youth who commit sex offenses should be kept within the jurisdiction of the juvenile court and should be afforded all of the confidentiality protections and rehabilitative programming inherent in juvenile court processing.

Amicus curiae, the **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

Amicus curiae, the **Children's Defense Fund Leave No Child Behind[®] (CDF)** mission is to ensure every child a *Healthy Start*, a *Head Start*, a *Fair Start*, a *Safe Start* and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. CDF provides a strong, effective and independent voice for *all* the children of America who cannot

vote, lobby or speak for themselves. We pay particular attention to the needs of poor and minority children and those with disabilities. CDF educates the nation about the needs of children and encourages preventive investments before they get sick, drop out of school, get into trouble or suffer family breakdown. CDF began in 1973 and is a private, nonprofit organization supported by foundation and corporate grants and individual donations.

Amicus curiae, **Voices for Ohio's Children** is a non-partisan group of public, not-for-profit, and private sector organizations who share a mutual concern about the present and future of children. Through a collaborative effort and a collective voice, Voices for Children promotes improvements in the well being of the community's children.

Amicus curiae, the **Ohio Association of Child Caring Agencies (OACCA)** was founded in 1973 as a statewide association of private and public agencies that provide a wide array of services to children, youth, and families across the state. OACCA works with its member agencies, policymakers, county and state agencies, and sister advocacy groups to develop and implement effective public policy that supports healthy, safe, stable, and productive Ohio families. OACCA advocates on the county, state, and federal levels to equip policymakers to make informed decisions. OACCA champions a hopeful future for Ohio's children, youth, and families by advocating for cooperation and efficiency across all systems.

Because of the important interests raised in this case, the Amici Curiae hereby offers this Brief pursuant to S. Ct. Prac. R. III, Section 5. Amici have no relationship to any of the individuals involved in this litigation.

II. STATEMENT OF THE CASE AND FACTS

Amici curiae hereby adopts the Statement of Case and Facts set forth in the Brief of Appellant, Minor Child.

III. ARGUMENT

AMICI'S FIRST PROPOSITION OF LAW

The classification, notification, and registration provisions of Senate Bill 10 as applied to juvenile adjudications violate constitutional prohibitions against cruel and unusual punishments. Eighth and Fourteenth Amendments to the United States Constitution; Section 9, Article I of the Ohio Constitution.

The Ohio Supreme Court has repeatedly recognized the “unique role” filled by the juvenile courts of this state. *State v. D.H.*, 2009-Ohio-9. Unlike the criminal courts, the juvenile courts remain centrally concerned with the care, protection, development, treatment, and rehabilitation of those youthful offenders who remain in the juvenile system. *State v. D.H.*; *In re Kirby* (2004), 101 Ohio St.3d 312, 2004-Ohio-970; *In re Caldwell* (1996), 76 Ohio St.3d 156, 1996-Ohio-410; *In re Anderson* (2001), 92 Ohio St.3d 63, 2001-Ohio-131; *Plain Dealer v. Geauga Cty. Court of Common Pleas* (2000), 90 Ohio St.3d 79, 2000-Ohio-35. On the other hand, this Court also has acknowledged that juvenile delinquency laws have an inherently criminal aspect that warrant the extension of certain constitutional safeguards. *In re L.A.B.*, 2009-Ohio-354; *In re A.J.S.* (2008), 120 Ohio St.3d 185, 2008-Ohio-5307; *In re C.S.* (2007), 115 Ohio St.3d 267, 2007-Ohio-4919; *In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851; *State v. Walls* (2002), 96 Ohio St.3d 437, 2002-Ohio-5059; *In re Cross* (2002), 96 Ohio St.3d 328, 2002-Ohio-4183. “Because of the state’s stake in the rehabilitation of the juvenile offender and its theoretically paternal role that the state continues to play in juvenile justice, a balanced approach is necessary to preserve the special nature of the juvenile process while protecting procedural

fairness.” *State v. D.H.*, at ¶¶49-50 (citing *Santosky v. Kramer* (1982), 455 U.S. 745, 766, 102 S.Ct. 1388, 1401, 71 L.Ed.2d 599; *In re Winship* (1970), 397 U.S. 358, 366, 90 S.Ct. 1068, 25 L.Ed.2d 368; *Breed v. Jones*, 421 U.S. 519, 531, 95 S.Ct. 1779, 44 L.Ed.2d 346; *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647).

This Court has attempted to strike that balance by recognizing that juveniles who remain in the juvenile system have “certain fundamental rights just like criminal defendants,” while preserving the juvenile court’s therapeutic approach. *In re L.A.B.*, at ¶54. Thus this Court has recognized the child’s need for independent counsel as well as the juvenile court judge’s responsibility to ensure that any waiver of this critical right comports with the requisites of due process. *In re C.S.*; *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647; *In re L.A.B.* Similarly, this Court has held that while the juvenile court’s authority to fashion an appropriate disposition is extremely broad, that authority is not without limits. Thus in *In re Cross*, the “completion of probation signals the end of the juvenile court’s jurisdiction over a juvenile delinquent.” *Cross*, at ¶28. In *In re D.S.*, this Court rejected the indiscriminate use of a polygraph as a condition of probation in the absence of any showing that the “polygraph is needed for therapeutic reasons in a particular case, that is, for the treatment and monitoring of the juvenile’s behavior.” Moreover, the use of a polygraph violates the minor’s Fifth Amendment right against self-incrimination. *D.S.*, at ¶18.

When this Court has refused to extend constitutional rights to minors in juvenile court, it has done so in order to further the protection and rehabilitation of those youth. In *In re Kirby*, this Court found that a juvenile had no right to enter an *Alford* plea because the objective of such a plea is “incongruent with the stated purposes of juvenile court—to provide for the care, protection, and mental and physical development of children, to protect the public from wrongful

acts committed by juvenile delinquents, and to rehabilitate errant children and bring them back to productive citizenship, or, as states, to supervise, care for and rehabilitate those children.”

Kirby, at ¶21. In *State v. D.H.*, this Court declined to extend constitutional jury trials rights afforded by *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856; to a juvenile offender adjudicated a serious youthful offender but whose adult sentence had not yet been invoked; rather, this Court addressed the ramifications of the *potential* imposition of the adult sentence. Acknowledging that juveniles clearly have due process rights in juvenile proceedings, this Court nevertheless held that the imposition of a jury trial as a matter of due process was not required. Emphasizing the need for informality and flexibility in order to preserve the unique rehabilitative mission of the juvenile court, this Court stated that:

removing the jury from the dispositional process does not violate due process. The court’s dispositional role is at the heart of the remaining differences between juvenile and adult courts....To leave that determination to an expert, given the juvenile system’s goal of rehabilitation, does not offend fundamental fairness, especially since the adult portion of the blended sentence that the judge imposes upon a jury verdict is not immediately, and may never be, enforced.

D.H., at ¶59.

This emphasis on the treatment and rehabilitation of juvenile offenders is squarely grounded in the knowledge that children are not simply small adults. This Court has recognized the significant distinctions between the two. In *In re C.S.*, this Court noted that children lack maturity and the judgment to make good decisions consistently as well as the ability to understand the consequences of their actions. *In re C.S.*, at ¶82 (citing *Roper v. Simmons* (2005), 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1). Similarly, in *In re D.S.*, the Court opined that children are more susceptible to peer pressure, have less ability to control their own environments, and may be impetuous. Moreover, because children are still developing, it is

unsurprising that their characters and personality are less fixed. *In re D.S.*, at ¶11 (citing *Roper v. Simmons*).

Recent findings about the development of the human brain support legislative and judicial judgments that juvenile offenders are in need of care, protection, rehabilitation, and treatment. What is indisputable is the essential fact that the mind of a child is different. Because the brain reaches 95% of its adult size by the time a child is six, it was thought to be fully developed. “FRONTLINE: Inside the Teenage Brain, Adolescent Brains are Works in Progress” available at www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html (2002). Technological advances in brain scanning and mapping, however, show that brain development is marked by waves of proliferation and pruning of brain cells moving from the back to the front of the brain. Elizabeth Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationship During Postadolescent Brain Maturation*, 21 J. Neuroscience 8819 (2001). Thus, the brain regions that mature earliest are those responsible for controlling sensory functions like vision, hearing, and spatial processing, while the last part of the brain to fully develop—the prefrontal cortex—is the region responsible for planning, organizing, suppressing impulses, and weighing the consequences of one’s actions. Elizabeth Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 Nature Neuroscience 309 (2003). These findings suggest that the human brain does not reach its full adult capacity until the individual is in his early twenties. The International Justice Project, “Brain Development, Culpability and the Death Penalty” available at <http://www.internationaljusticeproject.org/pdfs/juvBrainDev.pdf>.

This new brain development research, especially when considered in conjunction with the increasing criminalization of the juvenile justice system and the concomitant imposition of adult

sanctions on increasingly younger offenders, raises questions about the culpability and accountability of juveniles. When a child is between the ages of six and twelve, the brain's gray matter, the "thinking" part of the brain, thickens as brain cells make connections to neurons and create new pathways for nerve signals. "FRONTLINE: Interview Jay Giedd" available at www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interview/giedd.html (2002). The thickening of all this gray matter – the neurons and their branchlike dendrites – peaks when girls are about eleven and boys 12-1/2, at which point the brain then alters the number of connections, or synapses, between them. *Id.* As the gray matter is pruned, the brain's white matter, which makes nerve-signal transmissions faster and more efficient, thickens. This thickening process continues well into adulthood, possibly up to the age of forty. Bruce Bower, *Teen brains on trial: the science of neural development tangles with the juvenile death penalty*, 165 *Sci. News* 299 (May 8, 2004).

The thickening of this gray matter peaks roughly around the time of puberty and its subsequent pruning occurs during adolescence. This pruning process results in a significant and "massive" loss of brain tissue. So, while the brain of a teenager between the ages of thirteen and eighteen is maturing, it nevertheless loses 1-2% percent of its gray matter per year. American Bar Association Criminal Justice Section Juvenile Justice Center, "Adolescence, Brain Development and Legal Culpability" available at <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>. This pruning process, however, is critical to the brain's development. Brain scanning and mapping studies thus reveal that there is relatively subtle growth in the brain's frontal lobes after adolescence. *Id.*

Because the brain is developing from back to front, the part of the brain that is most affected by this wave of proliferation and pruning is the prefrontal cortex, the part involved in

organization, planning, judgment, and strategizing. Recent developments in brain research have established a link between the frontal lobe and the maturation of judgment and impulse control. By comparing adult brain scans with scans of adolescent brains, scientists have been able to contrast the relative differences in decisionmaking abilities, thereby, highlighting distinct dissimilarities between adults and adolescents. Thus certain abilities associated with the frontal lobes, like response inhibition, emotional regulation, planning and organization, continue to develop between adolescence and young adulthood, while cognitive functioning like learning, which also is linked to the frontal system, improves throughout adolescence. *Id.* This means that even as they become fully capable in other areas, adolescents cannot reason as well as adults; “maturation, particularly in the frontal lobes, has been shown to correlate with measures of cognitive functioning.” *Id.*

These studies indicate that during the teenage years, the frontal lobe of the brain that is supposed to help organize and strategize, is not done being built. *Id.* The brain consolidates learning by pruning away synapses and wrapping white matter, myelin, around other connections and strengthening them. The accumulation of this fatty tissue, which fosters transmission of electrical signals, develops especially slowly in the frontal lobe. Those parts of the brain that “govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable” are not developed until the early twenties. *Id.* Thus, with respect to controlling aggression and other impulses, “[i]f the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.” *Id.* It would be “unfair to expect [teens] to have adult levels of organizational skills or decision making before their brain is finished being built.” *Id.*

This evidence provides a neural basis for assuming that teens are less blameworthy than adults for the commission of criminal acts. Bruce Bower, *Teen brains on trial: the science of neural development tangles with the juvenile death penalty*, 165 *Sci. News* 299 (May 8, 2004). To compensate for the relative immaturity of the frontal lobe, the teenage brain places heavy reliance on an almond-shaped inner-brain structure called the amygdala, a more primitive part of the brain that is responsible for gut reactions. “FRONTLINE: Interview with Deborah Yurgelun-Todd,” available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html>. Studies conducted at Harvard Medical School used functional MRI scans to show that adolescents rely on the amygdala in interpreting emotional information, while adults rely on the prefrontal cortex, the brain’s rational decision-making region. *Id.* In order for adolescents to appreciate the consequences of a behavior, they have to understand the potential outcome. Since adolescents cannot always rely on the frontal lobe, they may not be able to appreciate these outcomes and consequences the way an adult may. As a result, the information received by the brain, how it is organized, and the ultimate response may all be different in adolescents.

Adolescents also lag behind in the development of other critical areas of the brain. For example, the corpus callosum, the cable of nerves that connects and relays information between the two hemispheres of the brain, develops in waves. “FRONTLINE: Inside the Teenage Brain, Adolescent Brains are Works in Progress” available at www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html (2002). This is significant because the corpus callosum, which is involved in problem solving and creativity, continues to grow and change through adolescence. The International Justice Project, “Brain Development, Culpability and the Death Penalty” available at

<http://www.internationaljusticeproject.org/pdfs/juvBrainDev.pdf>. Moreover, the lack of a properly formed corpus callosum as well as a prefrontal cortex suggests that an adolescent brain relies heavily on the amygdala. The International Justice Project, “Brain Development, Culpability and the Death Penalty” available at <http://www.internationaljusticeproject.org/pdfs/juvBrainDev.pdf>. Similarly, the cerebellum, involved in the coordination of our thinking processes, also continues to change well into adolescence. The cerebellum is “not essential for any activity...but it makes any activity better. Anything we can think of as higher thought, mathematics, music, philosophy, decision-making, social skill, draws upon the cerebellum...To navigate the complicated social life of the teen and to get through these things...seems to be a function of the cerebellum.” “FRONTLINE: Interview Jay Giedd” available at www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interview/giedd.html (2002).

Recognizing the process in which teenage brains develop also might give us a better understanding of teen behavior. Studies indicate that it may be harder for juveniles than adults to foresee the consequences of their actions. Helen Philips, *Teenagers fail to see the consequence*, *New Scientist*, Dec. 4, 2004 available at www.newscientist.com/article.ns?id=dn6738. In these experiments, adults and teens were shown scenarios on a computer screen, like swimming with sharks, and were asked whether each scenario was a good idea or a bad idea. It took juveniles 0.15 second longer than adults to reach a decision. Brain scans conducted during the study showed more activity in the prefrontal cortex of juveniles’ brains indicating that they may be making a greater effort to judge the results of each scenario. *Id.* Adults, however, had more basal ganglia activity, which indicates a more automatic response. *Id.* Adults also had more activity in the parts of the brain that create mental imagery and often signal internal distress.

Abigail Baird, *Why do teens do "stupid" things?*, www.theteenbrain.com/latest. The results suggest that juveniles try to use the frontal lobe to reason but it is not automatic and may actually be a difficult process. A NewsHour with Jim Lehrer, Transcript, "The Teen Brain" (Oct. 13, 2004) available at www.pbs.org/newshour/bb/science/july-dec04/brain_10-13.html.

Physiological differences in the teenage brain raise serious questions about juvenile culpability and punishment. Juveniles are less likely to be deterred from committing crimes because of the threat of harsh punishment. The inability of adolescents to understand the longer term consequences of their actions means they look only to the immediate future, perhaps a period of one to three days, when assessing choices. The International Justice Project, "Brain Development, Culpability and the Death Penalty" available at <http://www.internationaljusticeproject.org/pdfs/juvBrainDev.pdf.s> Although such limitations do not negate knowledge and a basic understanding of right and wrong, they nevertheless suggest that teenagers are not yet adults and should not be treated in the same way. *Id.* The developmental evidence also overwhelmingly demonstrates just how different the brains of pre-pubescent children are and how baseless it is to treat offenders under the age of 12 or 13 in the same way as older teens, since in most instances, the brains of these children are still growing.

Because medical evidence suggests that juveniles are less culpable for their actions, this evidence is relevant to considerations of treatment and punishment. Certainly, the research comes at a crucial time, in light of the United States Supreme Court decision in *Roper v. Simmons*, holding that it is cruel and unusual punishment to execute a person for crimes committed under the age of eighteen. Minors convicted of certain sexual offenses, for example, may be subject to sex offender registration requirements for terms lasting well beyond the maximum age of the juvenile court's jurisdiction. These measures are based, in large part, on a

philosophy that sex offenders cannot be cured and that they will pose a risk to society throughout their lives. For political, more than scientific reasons, states have increasingly extended these adult restrictions to juveniles who have committed sexual offenses.

Advances in neuroscience, however, tell us two critically important yet related facts about juveniles identified as sexual offenders. First, because adolescence is a time of dramatic change, it comes as no surprise that sexual interest and arousal also are subject to change. David Prescott & Jill Levenson, "Youth who have sexually abused: Registration, recidivism, and risk," available at <http://www.atsa.com/pdfs/ppYouth.pdf>. Thus juveniles who commit sexual offenses do not manifest sexual disorders in the same ways as adults, and even those juveniles who do engage in sexual deviance may not manifest persistent and entrenched deviance. *Id.* As a practical matter, the fluidity of the juvenile brain makes the prediction of future criminality and assessment of risk like trying to hit a "moving target." *Id.* Consequently, "there remains no empirically validated method for determining the likelihood of a young person to abuse again." *Id.*

Second, juveniles are more amenable to treatment because their brains are still developing. Association for the Treatment of Sexual Abusers, "The Effective Legal Management of Juvenile Sexual Offenders" (Adopted by the ATSA Executive Board of Directors, March 11, 2000) available at <http://www.atsa.com/ppjuvenile.html>. The fluidity of the adolescent brain indicates not only that cognitive development is not stable but that aspects of personality may change over time as part of the developmental process. David Prescott, *Twelve Reasons to Avoid Risk Assessment*, in *Risk Assessment of Youth Who Have Sexually Abused: Theory, Controversy, and Emerging Strategies* (David Prescott ed., 2006). Consequently, the pathological expression of personality also may change over the course of development. What this means is that a juvenile may never develop into an adult sexual abuser. On the other hand, a juvenile who may appear to be trending toward sexual pathology may respond well to

treatment because the brain is still maturing. Thus, the research clearly shows that adolescents who engage in sexual offending behavior are more responsive to treatment than adult sex offenders and typically do not appear to continue re-offending into adulthood, especially when provided with appropriate treatment. Association for the Treatment of Sexual Abusers, *The Effective Legal Management of Juvenile Sexual Offenders*” (Adopted by the ATSA Executive Board of Directors, March 11, 2000) available at <http://www.atsa.com/ppjuvenile.html>.

Similarly, within the behavioral sciences, there are no concrete definitions for what constitutes sexual misconduct in juveniles. Lisa Trivits and N. Dickon Reppucci, *Application of Megan’s Law to Juveniles*, 57 *American Psychologist* 690,695 (September, 2002). Rather, the law’s understanding of sexual offending by juveniles is informed largely by misconceptions. First, the scientific studies suggest that even though the behavior of juveniles who commit sexual offenses may appear similar to the conduct of adult sex offenders, the underlying mechanisms triggering the behavior may be different. When juveniles commit these offenses, they are rarely violent or deviant in nature, typically occur over shorter periods of time, and generally are not aggressive in nature. National Center on Sexual Behavior of Youth, “What Research Shows About Adolescent Sex Offenders,” Fact Sheet, available at <http://www.ncsby.org/pages/publications/What%20Research%20Shows%20About%20Adolescent%20Sex%20Offenders%20060404.pdf>. Juveniles with offending behaviors also have fewer incidents of extreme forms of sexual aggression, fantasy, and compulsivity. Association for the Treatment of Sexual Abusers, *The Effective Legal Management of Juvenile Sexual Offenders*” (Adopted by the ATSA Executive Board of Directors, March 11, 2000) available at <http://www.atsa.com/ppjuvenile.html>.

Importantly, the sexual offending of youth is not typically evidence of psychological deviance. The behavior seldom could be characterized as predatory by mental health professionals nor would these

youth meet the criteria for pedophilia under the *Diagnostic and Statistical Manual of Mental Disorders* since only an adult may be diagnosed as a pedophile. National Center on Sexual Behavior of Youth, "What Research Shows About Adolescent Sex Offenders," Fact Sheet, available at <http://www.ncsby.org/pages/publications/What%20Research%20Shows%20About%20Adolescent%20Sex%20Offenders%20060404.pdf>. Moreover, there is no agreement as to what constitutes normal sexual behavior for children and adolescents. Lisa Trivits and N. Dickon Reppucci, *Application of Megan's Law to Juveniles*, 57 *American Psychologist* 690,693 (September, 2002). However, according to the National Longitudinal Survey of Youth, 75% of minors reported having had sex; while 80% of those youths reported having engaged in sex by the age of 15. Michael Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 *Child Maltreatment* 291 (2002). Thus juveniles may be charged with sex offenses for behaviors that may be quite common across different age groups.

The American Psychological Association has noted that because "adolescent sexual offending is different from adult sexual offending in its motivation, nature, extent, and response to intervention," "[r]esearch has consistently shown that the majority of children and teenagers adjudicated for sex crimes do not become adult offenders." American Psychological Association Public Policy Office, "Ensure that Youth are Not Treated as Adult Sex Offenders," available at <http://www.apa.org/ppo/ppan/sexoffenderaa06.html>. While recidivism rates are difficult to compare, it is clear that recidivism rates for juveniles convicted of sex offenses is quite low. In fact, juveniles are far more likely to commit a subsequent nonsexual offense than they are to commit a sexual offense. Michael Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 20 *Int'l J. Offender Therapy & Comp. Criminology* 1 (2009). The research also suggests that the arrest of a minor for a sexual offense is more than likely to be a one-time event. Moreover, these youth appear to be no different than other youths charged with nonsexual offenses, suggesting that

both sexual and nonsexual offenders would benefit from similar interventions. Franklin E. Zimring, Alex R. Piquero, & Wesley G. Jennings, *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 *Criminology & Pub. Pol'y* 507 (2007).

Therefore, treating juveniles adjudicated for sexual offenses in the same manner as adult sex offenders is inconsistent with the neuroscientific and social science research. If registration and notification requirements, however, had some valid and measurable therapeutic purpose, perhaps then such measures could be justified in light of the juvenile court's long-standing commitment to the care, protection, and rehabilitation of juvenile offenders. But research has shown that registries and public notification cut offenders off from social, school, and community networks, create social stigma and isolation. Franklin E. Zimring, Alex R. Piquero, & Wesley G. Jennings, *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 *Criminology & Pub. Pol'y* 507 (2007). Moreover, registries and community notification are likely to stigmatize the adolescent and have detrimental effects on the juvenile's family. Association for the Treatment of Sexual Abusers, "The Effective Legal Management of Juvenile Sexual Offenders" (Adopted by the ATSA Executive Board of Directors, March 11, 2000) available at <http://www.atsa.com/ppjuvenile.html>. Ironically, social isolation and alienation of youth from schools and communities enhance the risk for delinquent reoffending and may result in additional barriers to successful reintegration into society. Franklin E. Zimring, Alex R. Piquero, & Wesley G. Jennings, *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 *Criminology & Pub. Pol'y* 507 (2007).

Although only a few studies have looked at the effect of registration and notification on recidivism, most have found no reduction in rates of recidivism as a result of these laws. David Prescott & Jill Levenson, "Youth who have sexually abused: Registration, recidivism, and risk," available at

<http://www.atsa.com/pdfs/ppYouth.pdf>. Registration and notification laws also create significant consequences for juveniles that are likely to interfere with their successful transition to adulthood. For example, offenders who are subjected to ongoing registration or community notification as adults because of their juvenile adjudications are more likely to have difficulty obtaining affordable housing, securing employment or completing their educations. *Id.* Again, difficulties in obtaining education, housing or employment are factors associated with an increased risk for reoffending. *Id.* Additionally, the decision to commit considerable resources to notification and registration have the anomalous effect of diverting attention away from services that may actually prevent future sexual offending. *Id.*

The registration and notification requirements are contrary to the traditional goal of non-punitive intervention and rehabilitation. Moreover, it is especially problematic that sex offender laws tend to treat juveniles in the same manner as adults with respect to reporting, notification, and, in the case of Tier III offenders, length of classification, even though juveniles have fewer legal rights and protections than adults. Given the significant differences between juveniles and adults, it makes little sense as a public policy matter to treat them the same. Yet this is precisely what S.B. 10 does, and it does so gratuitously, since the Adam Walsh Act does not require these sweeping changes to Ohio law. See, e.g., 18 U.S.C. §16911(8)(2009)(requiring a child over 14 be placed on a registry only if the child has been adjudicated of a crime comparable to the federal crime of aggravated sexual assault, which is punishable by life in prison).

These statutory enactments violate the rights of Ohio juveniles to be free from cruel and unusual punishment. Both the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution prohibit the infliction of cruel and unusual punishment by the state. As the Court explained in *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 334, the Eighth Amendment guarantees individuals the right not to be subjected to

excessive sanctions. The right flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” 536 U. S., at 311 (quoting *Weems v. United States* (1910), 217 U. S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against cruel and unusual punishments, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. *Roper v. Simmons*, 543 U.S. at 560 (citing *Trop v. Dulles* (1958), 356 U. S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (plurality opinion)). To implement this framework, federal courts have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U. S. at 100-101 (plurality opinion). The Eighth Amendment requires that the “punishment for crime . . . be graduated and proportioned to the offense.” *Atkins*, 536 U.S. at 311 (quoting *Weems*, 217 U.S. at 367). Moreover, the Eighth Amendment’s prohibition on cruel and unusual punishment “is not static;” rather, it “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. at 101. Consequently, punishment is cruel and unusual within the meaning of the Eighth Amendment if there is *either* a general societal consensus against its imposition, *or* if it affronts the “basic concept of human dignity at the core of the Amendment” because it is disproportionate to the moral culpability of the offender. *Gregg v. Georgia* (1976), 428 U.S. 153, 182, 96 S.Ct. 2909, 49 L.Ed.2d 859 (opinion of Stewart, J.); *see also, e.g., Atkins*.

The imposition of registration or reporting requirements on juveniles adjudicated for sexual offenses violates the prohibition against cruel and unusual punishment because juvenile offenders are morally less culpable. In considering the culpability of the offender, this Court must be guided by numerous factors, including age and moral responsibility. “Our cases recognize that youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage.” *Johnson v. Texas* (1993), 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (citing *Eddings v. Oklahoma* (1982), 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1.) Similarly, a plurality of the Court in *Thompson v. Oklahoma* (1987), 487 U.S. 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702, held that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” Justice O'Connor's controlling opinion in *Thompson* recognized that “[t]he special qualitative characteristics of juveniles that justify legislatures in treating them differently from adults . . . are also relevant to Eighth Amendment proportionality analysis.” *Thompson*, 487 U.S. at 854 (O'Connor, J.).

This Court has repeatedly cited with approval the United States Supreme Court's acknowledgment that there are critical differences between juvenile and adult offenders that make juvenile offenders morally less culpable. See, e.g., *In re C.S.*, at ¶82 and *In re D.S.*, at ¶11. In *Roper v. Simmons*, the Supreme Court noted three critical differences between juvenile and adult offenders. First, juveniles lack maturity, are impetuous and less responsible than adults. *Roper*, at 569. Second, juveniles are more susceptible to outside influence, including peer pressure, and so are less able to “extricate themselves from a criminogenic setting.” *Roper*, at 569. Lastly, the juvenile's personality and character is less fixed thus making it “less supportable to conclude that even a heinous crime committed by a juvenile is evidence of

irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, at 570.

As the United States Supreme Court recognized in *Roper*, the traditional goals of sentencing are less appropriate for juvenile offenders. Harsher sentences cannot deter juveniles because they do not fully understand the consequences of their actions and are less affected by the threat of sanctions. Moreover, taking retribution against an individual who is less culpable because of developmental immaturity would, for any civilized society, be immoral. The old formula of dealing with crime through stiffer sentences and restrictions, while politically popular, is an over-simplistic approach that lacks social and scientific validation as a way of dealing with juveniles. The scientific research is sufficiently compelling as to require us to reconsider our views on juvenile punishment as it is morally wrong and scientifically unsound to hold juveniles to the same degree of responsibility as adults who commit similar offenses.

While the imposition of registration and notification requirements on juveniles adjudicated for sexual offenses is disproportionate to their moral culpability, these laws also have no therapeutic or rehabilitative value. As the research makes clear, registration and notification requirements themselves do not reduce rates of recidivism. In fact, the research indicates the anomalous finding that registration and notification may actually increase the risk for reoffending because offenders find themselves isolated from important social, educational, and family networks. This Court, however, has reaffirmed the unique role played by the juvenile courts in furthering the rehabilitation and treatment of juvenile offenders as justification for limiting the constitutional rights of minors in juvenile proceedings. This quid pro quo, however, is directly undermined by the statutory prescriptions of S.B.10, which mandate the imposition of

conditions unrelated to the minor offender's rehabilitation and care extending well beyond the juvenile court's jurisdiction.

In the case at bar, D.S. was a fourteen-year-old offender who was adjudicated on one count of rape and classified as a Tier III sex offender. Critically, the classification of D.S. by the juvenile court resulted in the immediate imposition of registration requirements which will last until D.S. dies unless D.S. is able to prove to the court that he should be reclassified or declassified. Although it is possible that D.S. may be relieved of his ongoing registration obligation, that obligation nevertheless is neither conditional nor hypothetical but real and immediate, extending well beyond the juvenile court's jurisdiction. Moreover, because D.S. was tried as a juvenile, in juvenile court, he did not receive the same constitutional protections he would have been accorded had he been tried in criminal court. Specifically, D.S. was not entitled to be charged by indictment, to bail, to a statutory right to a speedy trial or, most significantly, to a jury trial.

The absence of a rehabilitative thrust to the classification, registration, and notification requirements suggests not only that the deprivation of additional rights is unconstitutional but also that the law is punitive. Under the new law, a Tier III offender will face substantially more onerous restrictions than those considered by this Court in *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, certiorari denied (1999), 525 U.S. 1182, 119 S.Ct. 1122, 143 L.Ed.2d 116, and *State v. Wilson* (2007), 113 Ohio St.3d 382, 388-89, 2007 Ohio 2202. These restrictions include lifetime registration requirements (increased from 10 years), quarterly reporting dates (increased from annual reporting), detailed and onerous restrictions on movement (with notice given to county sheriffs for relocations that are as short as three days and requiring twenty days prior notice), reporting requirements in counties of residency, (and for public registry-qualified

juvenile offender registrants, reporting requirements in counties where employed, and counties where attending school), extremely harsh penalties for even minor registration violations (and the potential for mandatory, minimum terms of incarceration), potential dissemination of detailed personal information, and regular community notification for Tier III offenders where determined to be applicable by the juvenile court. See R.C. 2950.04(C)

Under these circumstances, a Tier III classification that carries potential lifelong disabilities of reporting and registering, restrictions on travel and employment, on-going duties to report even minor changes in information, and the substantial likelihood that details of the past offense will forever be disseminated to the community is grossly disproportionate to the offense and constitutes cruel and unusual punishment. The factors to be balanced in a constitutionality challenge – the harm caused or threatened harm to the victim or society, the culpability of the offender, and the absolute magnitude of the crime – weigh heavily in favor of the juvenile offender. Although the offense is serious, there is little scientific or sociological support for finding a satisfactory basis for any rehabilitative value or even an on-going threat to the community. Moreover, recent advances in neuroscience and social science make it very clear that the moral culpability of a 14-year-old offender is exceedingly limited. Essentially, the juvenile offender may never be able to live a meaningful life. Without declassification, there is no way that he could expect to pursue higher education, maintain gainful employment, have a functional life, start a family, or become a productive member of his community.

AMICI'S SECOND PROPOSITION OF LAW

The retrospective application of Senate Bill 10 to juvenile adjudications violates Ohio's Retroactivity Clause as set forth in Section 28, Article II of the Ohio Constitution.

The Retroactivity Clause of the Ohio Constitution, which bars retrospective application of an Act that creates additional *duties, rights, and obligations*, is a broader rule that offers more protection than ex post facto analysis. Because it is a rule that focuses on *substantive* change as opposed to *punitive* change, the analysis is necessarily different and cannot be merged with ex post facto analysis. It is the impact of the measure that is determinative. Under a Retroactivity Clause analysis, a law cannot be applied retrospectively if it creates a new *burden or disability*, while under an ex post facto analysis, a law cannot be applied retrospectively if it creates a new *punishment*. In light of the extensive burdens and restrictions imposed by S.B. 10 upon juvenile offenders, it cannot reasonably be argued that the restrictions do not create a new burden or disability.

Section 28, Article II of the Ohio Constitution provides that the “general assembly shall have no power to pass retroactive laws.” A retroactive law is one that “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”. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, at 106, 522 N.E.2d 489, 496 (quoting *Cincinnati v. Seasongood* (1889), 46 Ohio St.296, 303, 21 N.E. 630, 633). The Supreme Court has held that “the proscription against retroactivity applies to laws affecting substantive rights but not to the procedural or remedial aspects of such laws.” *Kunkler v. Goodyear Tier & Rubber Co.* (1988) 36 Ohio St.3d 135, 137, 522 N.E.2d 477, 480 (citing *French v. Dwiggins* (1984), 9 Ohio St.3d 32, 458 N.E.2d 827; *Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70, 242 N.E.2d 658; *State, ex rel. Slaughter, v. Indus. Comm.* (1937), 132 Ohio St. 537, 9 N.E.2d 505). Further, in

this context, "substantive law is that which creates *duties, rights, and obligations*, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress." *Slaughter* (quoting *State, ex rel. Holdridge, v. Indus. Comm.* (1967), 11 Ohio St.2d 175, 178, 228 N.E.2d 621). It is in this regard that Ohio's Retroactivity Clause provides broader protection than the federal Ex Post Facto Clause. According to the Court of Appeals in *State ex rel. Corrigan v. Barnes* (1982), 3 Ohio App.3d 40, 44, 443 N.E.2d 1034:

For purposes of this lawsuit, the pertinent distinction between an ex post facto law and a retroactive one is that ex post facto laws include statutes which increase the *punishment* of a prior *criminal* act, whereas retroactive laws include statutes which ""* * * [attach] a new *disability* in respect to past *transactions* * * *"" (emphasis added), *State, ex rel. Michaels, v. Morse* (1956), 165 Ohio St. 599, 604 [60 O.O. 531]. **Retroactive laws are therefore a larger category than ex post facto laws, and comprise statutes imposing "disabilities" [***] as well as those imposing "punishments."** The Ohio Supreme Court, by way of obiter dictum, recently noted that R.C. 2961.01¹ is an example of ""* * * extra-territorial enforcement of the disabilities associated with criminal convictions * * *." *Barker v. State* (1980), 62 Ohio St. 2d 35, 39 [16 O.O.3d 22], at fn. 4.

Since 1998, the constitutionality of sex offender legislation in Ohio has rested on the standard set forth in *State v. Cook*. The State seeks to extend *Cook* to claim that even deeply intrusive and restrictive sex offender restrictions can constitutionally be applied retroactively. This argument is inconsistent with the philosophy of *Cook* and ignores the full impact of S.B. 10's restrictions. Amici rely on the *Cook* standard to demonstrate that the drastic changes incorporated into the new law have stretched the limits of the Retroactivity Clause much farther than the Supreme Court intended, and that the new law plainly violates this standard of review. Although the *Cook* Court's assessment of Megan's law is not determinative of this action, the process used by this Court is certainly applicable. According to *Cook*, at 410-411:

In order to determine whether R.C. Chapter 2950 is unconstitutionally retroactive under *Van Fossen*, we must determine whether R.C. Chapter 2950 is substantive or merely remedial. See *Van Fossen*, 36 Ohio St.3d 100, 522 N.E.2d 489,

¹ R.C. 2961.01 discusses disfranchised convicts – the loss of civil rights of convicted felons.

paragraph three of the syllabus. A statute is "substantive" if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities as to a past transaction, or creates a new right. *Id.* at 107, 522 N.E.2d at 496. Conversely, remedial laws are those *affecting only the remedy provided*, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. *Id.* at 107, 522 N.E.2d at 497. *A purely remedial statute does not violate* Section 28, Article II of the Ohio Constitution, even if applied retroactively. See *id.* at 107, 522 N.E.2d at 496. Further, while we have recognized the occasional substantive effect, we have found that it is generally true that laws that relate to procedures are ordinarily remedial in nature. *Id.* at 107-108, 522 N.E.2d at 497, citing *Wellston Iron Furnace Co. v. Rinehart* (1923), 108 Ohio St. 117, 140 N.E. 623, paragraph one of the syllabus.

This Court noted that many of the requirements contained in Megan's law were directed at officials rather than offenders and that "[o]nly the registration and verification requirements of R.C. Chapter 2950 require action by the defendant...." *Cook*, at 411. Under S.B. 10, the "substantive" requirements for offenders have dramatically increased. For Tier III juvenile offenders who were not juvenile sexual predators, the frequency of reporting has changed from annually to quarterly, and the duration has changed from ten years to death. The information required of offenders is much broader and substantially more detailed, there is an affirmative duty to update, and punishment for registration and reporting violations is substantially increased. If an offender wishes to leave his county of residence for any reason, and stay in another county for three days or more, he must, at a minimum, provide the county sheriff with twenty (20) days notice of his intent to change his residence, register the fact of his leaving when he departs, register with the sheriff of his destination county upon arrival, immediately provide notice to that sheriff of his intent to change his residence at the end of his stay, register the fact of his leaving with that Sheriff upon departure, and re-register with the county sheriff upon his return. At each of these junctures, he may spend hours waiting to complete the process, and, if still a juvenile, would be dependent on others to complete the registration process. The sheriff

will most likely be compelled to verify his address, a process which may sound benign, but which will often involve telephone calls or letters to landlords, co-residents and neighbors, or repeated visits by deputies to his home until his presence there can be verified. The fact that community notification may not necessarily be ordered for Tier III juvenile offenders is irrelevant because the practical result of the verification process is that notice of the presence of a juvenile who has been adjudicated as a sex offender will be disseminated throughout the community. In addition, provisions address an offender's duty to inform the sheriff of all names and aliases used, telephone numbers, e-mail addresses, vehicle registrations and other listed personal details, and of changes to any of these. R.C. 2950.04(C) Moreover, these requirements can be expanded at any time by the Ohio Bureau of Criminal Investigation without legislative authorization. *Above all, failure to complete any one of these detailed requirements will, for a juvenile adjudicated a delinquent on a charge of rape, constitute a first-degree felony, punishable for a minimum period of a year to maximum of age 21. Once the juvenile becomes an adult, a registration offense is punishable by up to ten years in prison and a \$20,000 fine.* A characterization of the changes as onerous is certainly appropriate.

Moreover, it is not just the nature of the disability that changes the outcome of an analysis under *Cook*; it is also the nature of the offender. As noted earlier, recent medical, social, and scientific studies have led scientists to conclude that there are no concrete definitions for what constitutes sexual misconduct in juveniles. In fact, there is no consensus on what is considered normative sexual conduct at different points in a child's life. Lisa Trivits and N. Dickon Reppucci, *Application of Megan's Law to Juveniles*, 57 AMERICAN PSYCHOLOGIST 690,695 (September, 2002). This reality reflects a series of problems unique to juvenile offenders. First, juvenile offenders differ from adult sex offenders because their brains are at a

lower stage of development. Motivations to engage in sexual activity are different and are part of behaviors that often do not persist as the juvenile develops. Traditional concepts of offending and deterrence also do not apply to juveniles because the pre-frontal cortex, which controls judgment and understanding of consequences, is not fully connected. As a result, the constant maturation of the brain not only permits a juvenile to grow out of behavior, it also results in greater responsiveness to and a higher degree of success in treatment. These socio-scientific findings are reflected in the consistently low rates of recidivism for juvenile offenders. Finally, as the Supreme Court indicated in *Roper v. Simmons*, because the brains of children are not yet fully formed, they are not as legally culpable and morally responsible for their behavior as adult offenders.

Second, there is no therapeutic value in applying registration and notification laws to juvenile offenders. Without question, the detailed reporting requirements, limitations on movement, and the potential for disseminating private information make it impossible for a juvenile offender to be rehabilitated and reintegrated into society. S.B. 10 imposes disabilities that are inconsistent with the foundational goals of the juvenile court, as set forth in history, by statute, and by court rule.

Third, the Supreme Court has refused to extend certain constitutional rights to juvenile offenders in order to protect the rehabilitative mission of the juvenile court. In giving great deference to the therapeutic role of the juvenile court, the Supreme Court has struck a balance in favor of that protection by refusing to extend the full panoply of criminal rights. S.B. 10 is inconsistent with that balance because it imposes disabilities that prevent rehabilitation and extend well beyond the age of majority.

The combination of these factors drastically and irrevocably shifts the balance that *Cook* states should be drawn between privacy expectations of the offender and the government's interest in protecting the public, *Cook*, at 413, by abandoning any possibility of permitting a juvenile offender to live in peace, in favor of an attenuated and unproven attempt to protect the public from sexual predators. In contrast, juvenile offenders themselves are virtually guaranteed a dramatic reduction in the quality of life.

Since *Cook*, this Court has reviewed several modifications to Megan's Law. In its review of a 2004 sexual predator hearing, the Court held that a civil standard of appellate review should be applied in evidentiary appeals, and in the course of expressing its reasoning, made a passing reference to *Cook* as dispositive of the law as remedial, not punitive. See, *State v. Wilson*, at ¶ 29-32 (relying on *Cook*, and *State v. Williams* (2000), 88 Ohio St.3d 513, 2000-Ohio-428). In fact, beyond incorporation of *Cook*, little was said about the nature of Chapter 2950 in the context of substantive and remedial laws. However, the dissent in *Wilson* provided a more comprehensive, and perhaps implicitly prophetic, view of the direction these laws have taken:

While protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that severe obligations are imposed upon those classified as sex offenders. All sexual predators and most habitual sex offenders are expected, for the remainder of their lives, to register their residences and their employment with local sheriffs. Moreover, this information will be accessible to all. The stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment, as the *Cook* court recognized. []. Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions.

Wilson, at 391-392, at 1273-74, at ¶ 45-46 (Lanzinger, J., dissenting in part).

The Supreme Court recently revisited the constitutionality of S.B. 5 in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, with Justice O'Connor, who had previously called for a finding that sex offender laws be viewed as punitive, now finding that retroactive application of

S.B. 5 was permissible. Interestingly, Justice O'Connor suggested in footnote 4 to her opinion that her position was an attempt to remain consistent with the precedent established in *Wilson* as to S.B. 5's changes. More noteworthy is that Justice Stratton, who was part of the majority opinion in *Wilson*, joined with Justice Lanzinger's dissent in *Ferguson*, which called for a finding that S.B. 5 was punitive.

The three-Justice dissents in *Wilson* and *Ferguson* correctly depict the trend that culminated in the passage of S.B. 10. Senate Bill 10 violates Ohio's Retroactivity Clause because it "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past," *Van Fossen*, 36 Ohio St.3d at 106. *Cook* provides a framework by which we can determine when a retroactive law ceases to be remedial and becomes a disability. While Megan's Law (H.B. 180) and S.B. 5 may have withstood scrutiny under this standard, the burdens and restrictions created by S.B. 10 have increased exponentially.

To suggest that the constitutionality of S.B. 10 has been pre-ordained by *Cook* is incorrect. *Cook* did not hold that all sex offender laws are remedial; it held that the simple, short-term registration and reporting process contained in Megan's Law was remedial. It is the standard of *Cook* that is important and not its interpretation of Megan's Law. Under the *Cook* standard, a new, independent review must be conducted of S.B. 10. Because of the clear burdens and disabilities that it applies, S.B. 10 cannot satisfy the *Cook* standard.

AMICI'S THIRD PROPOSITION OF LAW

The retrospective application of Senate Bill 10 to juvenile adjudications violates the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution.

Article I, Section 10 of the United States Constitution states that “No state shall . . . pass any . . . ex post facto law”. The United State Supreme Court has interpreted the Ex Post Facto Clause as prohibitive of “any statute which . . . makes more burdensome the punishment for a crime, after its commission”. *Beazell v. Ohio* (1925), 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216. This foundational principle of American jurisprudence demands that individuals receive fair warning of the effect of legislative acts, so that they may reasonably rely on the meaning of such. *Cook*, 83 Ohio St.3d at 414 (relying upon *Weaver v. Graham* (1981), 450 U.S. 24, 28-29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17). It also “prevents the legislature from abusing its authority by enacting arbitrary or vindictive legislation aimed at disfavored groups.” *Cook*, at 415-16, (citing *Miller v. Florida* (1987), 482 U.S. 423, 429, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351).

In *Cook*, the Supreme Court applied the “intents-effect” test to determine whether Ohio’s Megan’s Law, effective in 1997, would violate ex post facto protections. The first step under this analysis was to determine whether the legislature indicated either expressly or impliedly a preference for retroactive or prospective application. Within the body of S.B. 10, the legislature expressed a clear intent to apply it retrospectively. Next, and independent of this intent, the Act must be reviewed to determine whether “the statutory scheme [is] punitive either in purpose or effect as to negate that intention.” *Cook*, at 415.

The “effects” argument is analytically distinct from the explication in the statute of a criminalizing purpose. Whereas intent can manifest in aspects of a statute that exhibit the punitive objective, the effect of a statute can be measured in terms of a series of “guideposts,”

which tend to indicate whether that statute will be punitive in its application. *Kennedy v.*

Mendoza-Martinez (1963), 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644. These factors include:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Cook, 83 Ohio St.3d at 418, (quoting *Mendoza-Martinez*, 372 U.S. at 168-69.

1. The General Assembly intended S.B. 10 to be punitive.

Contrary to legislative claims, the overwhelmingly punitive effect of S.B. 10 evinces an intention to punish that is unrelated to risk of recidivism and dangerousness to the community. Although the General Assembly's stated intent is not dispositive, it is an important consideration in determining whether a statute is punitive. *Cook*, 83 Ohio St.3d at 417-418; *Smith v. Doe* (2003), 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164. Nevertheless, even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive *either in purpose or effect*," *United States v. Ward* (1980), 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742, as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Rex Trailer Co. v. United States* (1956), 350 U.S. 148, 154, 76 S.Ct. 219, 100 L.Ed. 149. The United States Supreme Court has not hesitated in the past to reject what it characterized as a "civil label of convenience" to find a punitive or criminal legislative intent. In *In re Gault*, (1966), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, the Court rejected the historical treatment of juvenile delinquency proceedings as civil by applying a realistic standard that recognized delinquency hearings for what they were --

prosecutions that carried serious penalties and disabilities. Stated legislative intent and tradition have never been deemed to be conclusive.

Similarly, a legislative statement that the intent of S.B. 10 is to protect the public does not conclusively establish the law as remedial. There are numerous other factors that demonstrate that the intent of the measure was primarily punitive. A remedial measure would not have been included in the criminal code and closely tied to sentencing provisions (see, *Kansas v. Hendricks* (1997), 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501² – where legislature chooses to codify a statute suggests its intent). A remedial measure would not be enforced through harsh, potentially mandatory prison terms. A remedial measure would not have created oversight similar to parole and probation. The non-punitive purpose of protecting children that is proffered for much of the oversight contained in S.B. 10 is not furthered by an Act that accomplishes little while restricting much. Moreover, the punitive effect of the Act is so severe that the legislature could not have failed to notice it. Protestations of a non-punitive intent are insufficient to establish a legitimate, remedial purpose.

2. The statutory scheme of S.B. 10 is punitive in its effect.

In arguing that the effect of S.B. 10 is not punitive, the State relies heavily on the holding of *Smith v. Doe*. Although *Smith*, is instructive in the manner in which ex post facto issues are

² In *Hendricks*, the Supreme Court upheld the Kansas Sexually Violent Predator Act against constitutional challenge. That statute provided for civil commitment of persons "who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder." Kan. Stat. Ann. § 59-29a01 et seq. (1994). The Supreme Court observed that the due process clause places constraints on the use of civil commitment statutes but that they have been upheld "when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Hendricks*, 521 U.S. at 358, 117 S.Ct. 2072. The Supreme Court determined that proof of another factor in addition to future dangerousness serves to limit civil commitments to "those who suffer from a volitional impairment rendering them dangerous beyond their control." *Hendricks*, at 358, 117 S.Ct. 2072. In contrast to Ohio's statutory scheme, the Kansas civil commitment process, reviewed by the Supreme Court, required hearings before a civil commitment could be ordered. *Hendricks* concluded that in order for civil commitment to meet constitutional requirements *it is necessary for the State to show* "proof of serious difficulty in controlling behavior". *Linehan v. Milczark* (8th Cir. 2003), 315 F.3d 920, 926.

addressed, there are two important limitations in applying *Smith v. Doe*. First, the Court, in a much divided opinion, reviewed the Alaska Sex Offender Registration Act (ASORA), which is not as intrusive or extensive in its effect as Ohio's law. To the same extent that *Cook's* review of Megan's law is not dispositive of Retroactivity Clause questions concerning S.B. 10, *Smith v. Doe's* review of the Alaska's law is not dispositive of federal ex post facto questions concerning Ohio's law. Second, following the decision of the Supreme Court in *Smith v. Doe*, the Alaska Supreme Court struck down its sex offender law as violating Alaska's state ex post facto clause, which is identical to the United States Ex Post Facto Clause and not as broad as Ohio's Retroactivity Clause. See, *Doe v. State* (Ak. 2008), 189 P.3d 999. The holding of the Alaska Supreme Court is more instructive on the issue before this Court as it relies on a more narrowly tailored Alaska ex post facto clause to reject a law that is not as intrusive or extensive as S.B. 10.

In striking down its sex offender law in *Doe v. State*, the Alaska Supreme Court emphasized that its application of the federal ex post facto standard did not endorse federal ex post facto analysis as superseding or limiting independent consideration of Alaska's prohibition. The Alaska Supreme Court was entitled to reach a different, more protective, result under the Alaska Constitution. Moreover, even though Alaska could choose to apply a different test in determining violations under its ex post facto clause, it chose to apply the same multi-factored test articulated by the United States Supreme Court in *Kennedy v. Mendoza-Martinez* and used by the Supreme Court in *Smith v. Doe*. The five factors applied by the *Smith* Court, if applied to S.B. 10, yield a much different result than the United States Supreme Court's review of Alaska's sex offender law in *Smith v. Doe*. These factors are as follows:

- a. Whether the regulatory scheme can be regarded in history and tradition as a form of punishment.**

The governmental oversight of an individual subject to registration is not just comparable to probation and parole, because the strict monitoring, reporting, and enforcement provisions far exceed those imposed on probationers and parolees. In a general sense, the nature of the control is similar. Criminal and delinquent offenders are forced to report periodically, are subject to detailed restrictions on movement, and face harsh punishment for any violation. *Morrissey v. Brewer* (1972), 408 U.S. 471, 477, 92 S.Ct. 2593, 33 L.Ed.2d 484 [“parole is an established variation on imprisonment”]). Reviews of probation and parole, however, indicate that the sex offender registration process is more intrusive and, thereby, more punitive. Because actual supervision of parolees and probationers is minimal due to high supervisory officer caseloads, only about half of probationers comply with probation requirements. This suggests that sex offender restrictions “may actually exceed those of probationers and parolees.” Andrea E. Yang, Comment, *Historical Criminal Punishments, Punitive Aims and Un-“Civil” Post Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights*, 75 U.Cin.L.Rev. 1299, 1328 n.199 (2007) (citing Joan Petersilia, COMMUNITY CORRECTIONS: PROBATION, PAROLE AND INTERMEDIATE SANCTIONS 1, 19-24 (Oxford 1998)).

The S.B. 10 restrictions are sufficiently close to the traditional and historical punishments of parole and probation as to be deemed punitive. This factor weighs heavily in favor of finding a punitive effect.

b. Whether the law subjects respondents to an affirmative disability or restraint.

As noted above, juvenile offenders and their families are restricted in their movements as they cannot leave their county of residence for a period that exceeds three days without giving prior notice and they must notify the sheriff in the county they are visiting. If designated a

public registry-qualified juvenile offender registrant (PRQJOR), they also must notify the sheriff in the counties in which they are working or attending school. R.C. 2950.04(A). A sheriff is now permitted to request that the juvenile offender's landlord or the manager of the juvenile offender's residence verify that the juvenile offender currently resides at the registered address. R.C. 2950.111(A)(1). Moreover, the result of address verification necessarily disseminates information into the offender's community. This can result in community recrimination and the denial of employment opportunities

The effect of these restrictions is that they impose affirmative post-discharge conduct in the form of mandatory registration, re-registration, and required updating of that information under threat of felony prosecution. The nature of the information is often very private. The time periods associated with reporting requirements are intrusive, appearing more in scope to probation and parole conditions. Moreover, juveniles, who are less mobile and less capable, are held to the same level of responsibility for reporting information and updating details as adults. They must timely appear at the county sheriff office with their information or face serious felony filings. The disabilities and burdens also extend well beyond the juvenile offender. Parents of children who have duties to register as juvenile sex offenders are subject to prosecution if their children fail to "register, register a new residence address, and periodically verify a residence address, and, if applicable, to send a notice of intent to reside, and if the child is not emancipated, as defined in R.C. 2919.121 of the Revised Code, fail to ensure that the child complies with those duties under Chapters 2152 and 2950 of the Revised Code." R.C. 2919.24(A)(3) Parents are foreclosed from decisions that would benefit the entire family, and siblings will, in many ways, suffer the same burdens as an offending brother or sister.

In finding that Alaska's Sex Offender Act was non-punitive in its effect, the Supreme Court held in *Smith v. Doe* that ASORA "restrains [no] activities sex offenders may pursue but leaves them free to change jobs or residences." *Smith*, 538 U.S. at 100.³ S.B. 10, however, sets clear restrictions on the ability to gain access to jobs, residential placements, treatment programs, and job training. The collateral consequences of S.B. 10, either through direct or indirect dissemination of detailed information, create real disabilities through the loss of employment and housing opportunities for the juvenile and family members, the denial of residential placement options, and rejection from treatment programs – all of which are necessary for rehabilitation.

c. Whether the law promotes the traditional aims of punishment.

The traditional aims of punishment are deterrence and retribution. *Mendoza-Martinez*, 372 U.S. at 168; *Smith*, 538 U.S. at 102. The *Cook* court recognized that requiring sex-offender registration and reporting did not likely have a deterrent effect on crime, *Cook*, 83 Ohio St.3d at 420, but concluded that the purpose of the law was more remedial than punitive. Under S.B. 10, however, there is detailed monitoring of offenders and labeling, an on-going duty to update information, severe and unreasonable restrictions on even short-term travel, and a complex system of reporting changes in address, vehicle and parking information, telephone service, email contact information, employment, and place of education. The primary purpose of these comprehensive provisions is not to make it easier to identify and prosecute crimes after they have been committed; it is to prevent crime by tracking offenders, placing persons on notice that offenders live in the neighborhood, and even removing offenders from places of residence and types of employment where they will be in contact with children. Unlike Megan's Law, S.B. 10

³ With respect to this finding, the Alaska Supreme Court noted that the reality of its law's effect seemed much different. "The argument that registered sex offenders are free to change jobs and residences calls to mind Anatole France's view of the 'majestic equality of the laws which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.' ANATOLE FRANCE, *THE RED LILY* 75 (The Modern Library 1917) (1894). We cannot allow the mere appearance of equal freedom to obscure the reality of its denial."

is intended to deter crime by reducing contacts with likely victims and by placing those potential victims on notice of the presence of an offender. If S.B. 10 were not intended to have a deterrent effect, the only justification for the expensive and intrusive registration and oversight process would be retribution.

d. Whether the law has a rational connection to a legitimate non-punitive purpose – public safety.

While S.B. 10 is directed at the non-punitive purpose of protecting public safety, there is a disconnect between the stated justification and the draconian measures that are employed to serve that purpose. Although the proffered purpose for the law is non-punitive, the evidence demonstrates that there is no legitimate connection between the restrictions imposed and public safety. Moreover, with respect to juveniles, who are not viewed, socially or scientifically, as sex offenders and who posed a much lower risk to the community, there can be no rational connection to a legitimate non-punitive purpose. As a result, this factor carries little weight in support of the law's legitimacy.

e. Whether the regulatory scheme is excessive with respect to the Act's purpose.

The detailed information that is required of registered juvenile offenders is excessive to the point of becoming unmanageable. As noted above, juvenile offenders are required to identify all telephone numbers, internet addresses, and vehicles to which they have access, in addition to indicating where vehicles may be parked. The overwhelming detail that must be updated by persons who are constantly forced to relocate and find new employment, is unreasonable. Moreover, Tier III offenders, like Appellant, who faced ten years of annual reporting under the old law are now required to report quarterly until death. There is limited opportunity to be treated and rehabilitated, and there is no likelihood for juvenile offenders to ever be reintegrated into society. The excessive nature of S.B. 10 indicates a punitive effect.

While numerous Ohio appellate courts have upheld the constitutionality of S.B. 10, the common thread in the decisions has been deference to *State v. Cook*. As expressed in detail in the Second Proposition of Law, *Cook* reviewed a much different law than S.B. 10, and the analysis to be conducted is substantially different. In *State v. Wilson*, a review of the restrictions imposed by S.B. 5 (enacted in 2003), Justice Lanzinger noted in dissent that “R.C. Chapter 2950 has been amended since *Cook* and *Williams*, however, and the simple registration process and notification procedures considered in those two cases are now different.” *Wilson*, at ¶45.

Moreover,

[w]hile protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that severe obligations are imposed upon those classified as sex offenders. All sexual predators and most habitual sex offenders are expected, for the remainder of their lives, to register their residences and their employment with local sheriffs. Moreover, this information will be accessible to all. The stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment, as the *Cook* court recognized. *Id.*, 83 Ohio St.3d at 418, 700 N.E.2d 570. Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions.

Wilson, at ¶46. Moreover, Justice Lanzinger further noted in dissent in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶ 58, also a review of the constitutionality of S.B. 5, that sex offender laws have evolved from remedial to punitive measures.

The registration and reporting provisions are comparable to conditions of supervised release or parole; the public notification, which places the registrant's face on a web page under the label "Registered Sex Offender," calls to mind shaming punishments once used to mark an offender as someone to be shunned. It is a past conviction alone that triggers all obligations. See *Mendoza-Martinez*, 372 U.S. at 169-170, 83 S.Ct. 554, 9 L.Ed.2d 644. Admittedly, S.B. 5 has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community. But its scope notably exceeds this purpose.

The appellate authority supporting the state's position, while numerous, understandably gives great deference to *Cook* and reflects the reluctance of the lower appellate courts to distinguish this Court's position. It is, to that extent, neither persuasive nor controlling on the question before this Court. More persuasive, however, is the detailed analysis of the Alaska Supreme Court in *Doe v. State*, in which that court found a less intrusive law to violate its state ex post facto clause. In light of this authority, the socio-scientific evidence concerning juvenile offenders, and the intrusive and punitive nature of S.B. 10, retrospective application of the law to juveniles who committed offenses prior to the effective date of the Act violates the United States Constitution and must be stricken.

IV. CONCLUSION

For all these reasons, amici curiae respectfully request that this Court adopt the above propositions of law and reverse the judgment of the Allen County Court of Appeals, Third Appellate District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons,

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