

ORIGINAL

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

REPLY BRIEF OF AMICI CURIAE, THE JUSTICE FOR CHILDREN PROJECT,  
 THE FRANKLIN COUNTY PUBLIC DEFENDER, THE NATIONAL JUVENILE  
 DEFENDER CENTER, AND THE JUVENILE JUSTICE COALITION  
 IN SUPPORT OF MINOR CHILD-APPELLANT D.S.

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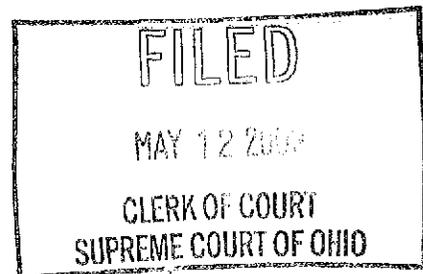
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## I. REPLY ARGUMENT

### JUDICIAL DISCRETION DOES NOT RESOLVE THE CONSTITUTIONAL QUESTIONS PRESENTED TO THIS COURT.

#### A. Giving juvenile judges the discretion to impose additional burdens and disabilities for misconduct that predates the effective date of an act does not satisfy the protections set forth in the federal Ex Post Facto Clause and Ohio's Retroactivity Clause.

Contrary to the assertions of the parties, concluding that juvenile court judges have discretion in determining tier classifications does not resolve the constitutional issues. Significantly, the United States Supreme Court has rejected the presence of discretion as a determining factor in retroactivity analysis. In *Garner v. Jones* (2000), 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236, the United States Supreme Court held that “[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause.” *Id.* at 253. “The controlling inquiry...[is] whether retroactive application of the change in... law create[s] “a sufficient risk of increasing the measure of punishment attached to the covered crimes. *Id.* at 250 (citations omitted). The United States Court of Appeals for the Sixth Circuit also noted that a law designed to be applied retroactively may violate the Ex Post Facto Clause if that amendment increases the risk for greater punishment. *Id.* at 253 n.7 (“*Garner* decision merely illuminated that a modification of state law, designed to apply retroactively, which increases the period between parole reviews, may violate the ex post facto clause, if that alteration in the law creates a significant risk of prolonging a defendant's incarceration”). Similarly, the Connecticut Supreme Court held that “the primary focus of an ex post facto claim is the probability of increased punishment.” *Johnson v. Comm’r of Correction* (Conn. 2002), 786 A.2d 1091, 1100. Judicial discretion may be relevant when considering a due process claim, but does not preclude consideration of the claim that the law applies retrospectively. *Id.*

As indicated in the merit brief of Amici, the ex post facto test applied by state and federal courts is based on the factors contained in *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644. Of the five relevant factors discussed by the Court,<sup>1</sup> the absence of discretion in imposing a sentence arguably promotes the traditional aims of punishment – retribution and deterrence, which would make a law more punitive. It is, however, but one consideration in one of the *Mendoza-Martinez* factors. Nor does *Mendoza-Martinez* state that resolution of one factor precludes consideration of the others; on the contrary, it is the overall *punitive effect*, rather than satisfaction of any given factor, that determines whether a law has retroactive application. See, *Garner*. Thus the Ex Post Facto Clause cannot be satisfied by giving trial courts discretion to choose the cases in which to apply punitive measures retroactively (or in deciding the duration of the penalty imposed on a past transgression). If a new law seeks to impose additional penalties for the commission of prior acts, it is not rendered constitutional merely because a court may choose which offender warrants the additional penalty or disability.

On balance, S.B. 10 still overwhelmingly promotes the traditional aims of punishment. The Act imposes 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

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<sup>1</sup> The factors include whether the regulatory scheme can be regarded in history and tradition as a form of punishment, whether the law subjects respondents to an affirmative disability or restraint, whether the law promotes the traditional aims of punishment, whether the law has a rational connection to a legitimate non-punitive purpose – public safety, and whether the regulatory scheme is excessive with respect to the Act's purpose. See, *State v. Cook*, 83 Ohio St.3d 404, 418, 1998-Ohio-291, (citing *Mendoza-Martinez*, 372 U.S. at 168-69).

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 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. In either circumstance, the Act promotes traditional aims of punishment. Combined with the remaining *Mendoza-Martinez* factors, there is a clear punitive effect.

Challenges made under Ohio's Retroactivity Clause are similarly unaffected by a claim that juvenile judges have discretion in its selecting tier level. The Retroactivity Clause under Section 28, Article II of the Ohio Constitution is Ohio's protection against *ex post facto* laws that seek to punish. "[T]he 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." *State ex rel. Corrigan v. Barnes* (1982), 3 Ohio App.3d 40, 44, 443 N.E.2d 1034. Moreover, "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. The burdens and disabilities imposed by S.B. 10 on past offenses impact substantive rights. Giving trial courts the discretion to select the tier

classification, which affects the duration of the burdens and disabilities, does not change the fact that the disabilities are substantive as opposed to remedial.

The parties suggest to this Court that if juvenile judges have discretion in choosing tier classifications under S.B. 10, then the restrictions and disabilities contained in the Act are constitutional and may be applied retrospectively. This position is incorrect. Discretion in selecting tier classification for juveniles, which affects the duration of the disabilities as opposed to the severity of the disabilities, has a marginal effect on retroactivity analysis. The federal Ex Post Facto Clause prohibits the imposition of a new penalty, while Ohio's Retroactivity Cause bars imposition of a new burden or disability. Neither provision is excused merely because juvenile judges have the discretion to choose the duration of new burdens or disabilities for prior misconduct.

**B. Imposing sex offender classification, notification, and registration requirements on juvenile offenders violates constitutional prohibitions against cruel and unusual punishments regardless of the fact that judges have discretion to select the duration of the penalties.**

The Eighth Amendment requires that the “punishment for crime . . . be graduated and proportioned to the offense.” *Atkins v. Virginia* (2002), 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 334 (quoting *Weems v. United States* (1910), 217 U. S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793). 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* (1958), 356 U. S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630. 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*. Thus, it is the nature of the punishment that determines whether there is a constitutional violation, not whether a court has discretion to impose it.

The imposition of registration and reporting requirements on juveniles adjudicated for sexual offenses violates the prohibition against cruel and unusual punishment because juvenile offenders are morally less culpable. In *Roper v. Simmons* (2005), 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, the Supreme Court emphasized that there are 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.

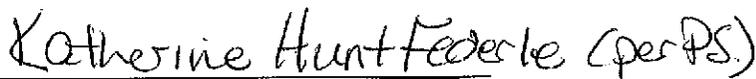
As Amici have noted, the imposition of registration and notification requirements on juveniles adjudicated for sexual offenses have little, if any, therapeutic or rehabilitative value. Registration and notification requirements themselves, for example, do not reduce rates of recidivism. Thus the absence 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. Consequently, the impact of S.B. 10 restrictions on juvenile offenders violates the precepts of the Eighth Amendment because they are disproportionate to the moral culpability of the offender. The fact that a judge is not required

to impose an unconstitutional punishment does not make the intermittent imposition constitutional.

## II. CONCLUSION

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

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document has been served upon the following persons, by Regular U.S. Mail, on this 12<sup>th</sup> day of May, 2009:

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