

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2008-2502

Plaintiff-Appellee, : On Appeal from the

-vs- : Huron County

CHRISTIAN N. BODYKE, et al., : Court of Appeals,

Defendants- Appellants : Sixth Appellate District

: Court of Appeals Case Nos.:

: H-07-040, H-07-041, H-07-042

**MERIT BRIEF OF AMICI CURIAE CUYAHOGA COUNTY PROSECUTOR IN
SUPPORT OF APPELLEE STATE OF OHIO**

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INTEREST OF AMICUS CURIAE

The Cuyahoga County Prosecutor is the duly elected prosecutor for the largest county in Ohio and the residence of the largest number of sexual registrants in the State. The Cuyahoga County Prosecutor is currently engaged in litigation in more than two thousand cases involving challenges to the Adam Walsh Act in either the Court of Common Pleas or the Court of Appeals for Cuyahoga County. Moreover, the Cuyahoga County Prosecutor will be engaged in additional litigation in the future as a result of further criminal cases involving sexual offenses that implicate the Adam Walsh Act.

The Cuyahoga County Prosecutor has an interest in this case, as this Honorable Court's opinion will directly affect every pending case in Cuyahoga County by providing a comprehensive ruling on the constitutionality of Senate Bill 10, Ohio's Adam Walsh Act.

STATEMENT OF THE CASE AND FACTS

The Cuyahoga County Prosecutor takes no position regarding Appellants' rendition of the Statement of the Case and Facts.

INTRODUCTION

This Honorable Court has consistently held that Ohio's sex offender classification and registration statutes are remedial, not punitive, in nature and do not violate the Ohio Constitution's prohibition on retroactive laws, the Ex Post Facto Clause of the United States Constitution and the Double Jeopardy Clauses of the United States and Ohio Constitutions. See, e.g., *State v. Cook* (1998), 83 Ohio St.3d 404; *State v. Williams* (2000), 88 Ohio St.3d 513, 2000-Ohio-428; *State v. Ferguson* (2008), 120 Ohio St.3d 7, 896 N.E.2d 110, 2008-Ohio-4824. As such, this Court's rulings do not support Appellants' claim that successive versions of the law have become more restrictive and

punitive. To the contrary, as the General Assembly has continued to enact legislation to provide increased protection for the state's residents from convicted sex offenders, this Court has upheld each successive provision as constitutional.

The same should hold true for Ohio's most recent sex offender system. As a result of the federal Adam Walsh Act, Ohio passed Senate Bill 10, effective July 1, 2007, which reorganized Ohio's sex-offender classification and registration scheme. Every Ohio appellate district has held that R.C. Chapter 2950, as modified by S.B. 10, is constitutional and remains remedial in nature, not punitive. See, e.g., *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594; *In re Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198; *State v. Graves*, supra; 4th Dist. No. 07CA3004, 2008-Ohio-5763; *In re Kristopher W.*, 5th Dist. No.2008 AP030022, 2008-Ohio-6075; *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397; *State v. Byers*, 7th Dist. No. 07CO39, 2008-Ohio-5051; *State v. Ellis*, 8th Dist. No 90844, 2008-Ohio-6283; *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076; *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104; *State v. Swank*, 11th Dist. No.2008-L-019, 2008-Ohio-6059; and *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195.

Additionally, federal courts that have addressed the issue have also reached the same result. See *United States v. Markel* (W.D.Ark.2007), 2007 U.S. Dist. LEXIS 27102; see, also, *United States v. Templeton* (W.D.Okla.2007), 2007 U.S. Dist. LEXIS 8930. Since this Court reviewed Ohio's former Megan's Law, Alaska's system of lifetime, quarterly registration and its internet registry were upheld as valid non-punitive measures to protect the public. See *Smith v. Doe* (2003), 538 U.S. 84. Additionally, classification based upon an offender's criminal conviction has been upheld. See

Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003), in which Connecticut’s statutory scheme, like S.B. 10, provided for sex offender registration and community notification based on the fact of previous conviction; and *Fullmer v. Michigan Dept. of State Police*, 360 F.3d 579 (6th Cir. 2004), in which Michigan’s Sex Offender Registration Act where the duty to register was based solely upon the fact of an offender’s prior criminal conviction was upheld.

The Cuyahoga County Prosecutor respectfully requests that this Honorable Court affirm the decision of the Sixth District Court of Appeals and hold that Senate Bill 10, Ohio’s Adam Walsh Act, is remedial, not punitive, in nature and is constitutional under the Ohio and United States Constitutions.

LAW AND ARGUMENT

This Court is presented with a challenge to Ohio’s most recent sex offender classification and registration system. As S.B. 10, Ohio’s Adam Walsh Act (“AWA”), is remedial in nature and does not inflict punishment, this Court should uphold the AWA, as it has all prior versions of former R.C. Chapter 2950.

I. Supreme Court of Ohio’s Cases Upholding Former R.C. Chapter 2950

In *State v. Cook*, 83 Ohio St.3d 404, 700 N.E.2d 570, 1998-Ohio-291, this Court held that former R.C. Chapter 2950 was remedial, not punitive, and its application to conduct prior to its effective date did not violate the Ohio Constitution’s prohibition on retroactive laws and the Ex Post Facto Clause of the United States Constitution.

Two years later, in *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342, 2000-Ohio-428, this Court, relying on its reasoning in *Cook*, reaffirmed that former Chapter R.C. 2950 is “neither ‘criminal,’ nor a statute that inflicts punishment” and held R.C.

Chapter 2950 does not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. *Williams*, 88 Ohio St.3d at 528.

In *State v. Wilson*, 113 Ohio St.3d 382, 865 N.E.2d 1264, 2007-Ohio-2202, this Court, relying on *Cook* and *Williams*, held that “the sex-offender-classification proceedings under R.C. Chapter 2950 are civil in nature and that a court of appeals must apply the civil manifest-weight-of-the-evidence standard in its review of the trial court's findings.” *Wilson*, 113 Ohio St.3d at 389.

Recently, in *State v. Ferguson*, 120 Ohio St.3d 7, 896 N.E.2d 110, 2008-Ohio-4824, this Court reaffirmed the civil, remedial nature of former R.C. Chapter 2950, as amended by S.B. 5 in 2003. S.B. 5 amendments included the designation of an offender as a “sexual predator” and the duty to register remain for life, registration in the offender's counties of residence, employment and school, expanded community notification, and that registration information be included on an internet data base. This Court held that S.B. 5 amendments, as applied to conduct prior to the statute's effective date, did not violate the Retroactivity Clause of the Ohio Constitution nor the Ex Post Facto Clause of the United States Constitution. *Ferguson*, 120 Ohio St.3d at 16-17.

II. Ohio's Adam Walsh Act

The AWA reorganized Ohio's sex-offender registration scheme. Instead of having three levels for “sexually oriented offenders,” “habitual sex offenders,” and “sexual predators,” the AWA employs three “Tiers” and assigns offenders to tiers based on the offense of conviction and/or the number of convictions. See R.C. 2950.01(E), (F), & (G). The AWA removes discretion from the trial court in classifying an offender, which oftentimes produced illogical and inconsistent results.

Effective January 1, 2008, Tier I offenders must register for fifteen years and must periodically verify their residence address with the sheriff on an annual basis. R.C. 2950.05(B)(3); R.C. 2950.06(B)(1). Tier II offenders must register for twenty-five years and periodically verify every 180 days. R.C. 2950.05(B)(2); R.C. 2950.06(B)(2). Tier III offenders must register for the rest of their life and periodically verify every 90 days. R.C. 2950.05(B)(1); R.C. 2950.06(B)(3). Tier III offenders are also subject to community notification, under which the sheriff is required to notify the offender's neighbors and certain other persons in the community of the offender's residence, offense, and Tier III status. R.C. 2950.11.

The General Assembly also expressly provided that the new registration system would apply to offenders who were currently registering. For registrant-offenders not currently in prison, the Attorney General would determine which tier the registrant-offender would belong to. R.C. 2950.031(A)(1). The Attorney General was required to send registered letters to the offenders by December 1, 2007, informing the registrant-offenders of their new Tier classification and their new duties thereunder. R.C. 2950.031(A)(2). The AWA also provided a mechanism to challenge the new registration requirements by filing a petition in the common pleas court in their county of residence. R.C. 2950.031(E). Similar transition provisions were put in place for the Attorney General to reclassify sex offenders in prison. See R.C. 2950.032.

Another provision added by S.B. 10 allows a Tier III offender to avoid community notification under R.C. 2950.11 "if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment." R.C. 2950.11(F)(2). The

statute sets forth the factors that the court “shall consider,” which are the same factors that courts were required to consider under prior law in determining whether the offender is a sexual predator, see R.C. 2950.11(F)(2)(a) – (i) & (k), except that the new law adds a factor (j) to consider whether the offender would have been considered a habitual sex offender.

III. Ex Post Facto Clause of the United States Constitution

Appellants argue that the AWA has punitive intent and effect, citing that: S.B. 10 is part of Ohio’s Criminal Code; an offender may be subject to criminal penalties for failure to comply with its requirements; the sole consideration is an offender’s offense of conviction; and that S.B. 10 imposes punishment in the form of strict registration and internet notification. As such, Appellants argue that the AWA violates the Ex Post Facto Clause of the United States Constitution.

The Ex Post Facto Clause states that “[n]o State shall * * * pass any * * * ex post facto Law.” An ex post facto law literally means “[a]fter the fact; by an act or fact occurring after some previous act or fact, and relating thereto.” *State v. Cook* (1998), 83 Ohio St.3d 404, 414. “To violate the ex post facto clause, the law must be retrospective, such that it applies to events occurring before its enactment. It must also disadvantage the person affected by altering the definition of criminal conduct or increasing the punishment for the crime.” *State v. Glaude* (Sept. 2, 1999), Eighth App. No. 73757, citing *Lynce v. Mathis* (1997), 519 U.S. 433. In effect, the Ex Post Facto Clause bars a law “that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed * * *.” *Calder v. Bull* (1798), 3 U.S. 386, 390.

Statutes enjoy a strong presumption of constitutionality. *Cook*, 83 Ohio St.3d 404, 409. “An enactment of the General Assembly is presumed to be constitutional, and

before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.’ “ *Id.*, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus.

A. Intent

In determining whether a statute violates the Ex Post Facto Clause, a two-prong analysis must be utilized, commonly referred to as the intent-effects test.

The categorization of a particular proceeding as civil or criminal “is first of all a question of statutory construction.” We must initially ascertain whether the legislature meant the statute to establish “civil” proceedings. If so, we ordinarily defer to the legislature’s stated intent. * * *

Although we recognize that a “civil label is not always dispositive,” we will reject the legislature’s manifest intent only where a party challenging the statute provides “the clearest proof” that “the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention” to deem it “civil.” In those limited circumstances, we will consider the statute to have established criminal proceedings for constitutional purposes.

Kansas v. Hendricks (1997), 521 U.S. 346, 361 (citations omitted). A party faces a “heavy burden” when, despite a non-punitive legislative intent, he is claiming the statute imposes “punishment.” *Id.*

Here, the General Assembly expressly stated its intent that these measures would be non-punitive and would be meant to serve the non-criminal purposes of aiding law enforcement, providing helpful information to the public, and protecting the public. R.C. §2950.02(A) & (B). In further examining the legislative intent, the initial placement of the statutes in R.C. Title 29, the title containing the criminal code, is not dispositive of the question of legislative intent. The location and labels of the statute do not by themselves designate the nature of the statute. *Smith v. Doe*, 538 U.S. 84, 94, 123

S.Ct. 1140. See, also, *Lee v. Alabama* (Ala. 2004), 895. As noted by the Eighth Appellate District in *Gildersleeve v. State*, Cuyahoga App. Nos. 91515, 91519, 91521 and 91532, 2009-Ohio-2031, “Indeed, the language in former R.C. Chapter 2950, which the Supreme Court in *Cook* relied on to find that the legislature’s intent was remedial, is almost identical to the language used in S.B. 10.” *Gildersleeve*, 2009-Ohio-2031, at ¶ 27.

While the new system ties the offender’s tier status to the offender’s prior conviction, the old system, in some instances, also classified an offender based on his conviction. For example, those individuals convicted of specified sexual offenses were classified, as a matter of law, as sexually oriented offenders who were then required to comply with registration and reporting requirements. Although the old system required an express finding of a likelihood to sexually reoffend by clear and convincing evidence in order for the offender to be found to be a sexual predator subject to lifetime quarterly registration and community notification, such a finding was not constitutionally required. Instead, the General Assembly could adopt a categorical system, as it has now done, dependent on prior conviction(s) alone.

Broad categories “are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.” *Smith v. Doe*, 538 U.S. at 102. “Sex offenders are a serious threat in this Nation.” *Conn. Dept. of Public Safety v. Doe* (2003), 538 U.S. 1, 4 (quoting another case). “The risk of recidivism posed by sex offenders is frightening and high,” see *Smith*, 538 U.S. at 103 (internal quotation marks omitted), and the General Assembly could conclude, “a conviction for a sex offense provides evidence of substantial risk of recidivism.” *Id.* at 103. “The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specific crimes should entail particular regulatory consequences.” *Id.* at 103. The State can “legislate with respect to

convicted sex offenders as a class, rather than require individual determination of their dangerousness,” and “can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants’ convictions * * *.” *Id.* at 104.

The United States Supreme Court and this Court have explained why the use of prior convictions in this manner is not “ex post facto” or “retroactive.” In *Hawker v. New York* (1898), 170 U.S. 189, the Supreme Court rejected an ex post facto challenge to a New York statute that prohibited persons with felony convictions from practicing medicine. The Court determined that New York had good grounds for being concerned about the character of its physicians.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance and not the form; and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that and nothing more. The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character.

Id. at 196. Similar language is found in *DeVeau v. Braisted* (1960), 363 U.S. 144, which recognized that prior convictions could be used “as a relevant incident to a regulation of a present situation * * *.” *Id.* at 160 (plurality).

This Court reached similar conclusions in *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, which addressed the constitutionality of a statute that precluded persons convicted of a felony within the past ten years from receiving compensation under the Victims of Crime Act. This Court rejected the relator’s “retroactivity” contention, concluding that, “Except with regard to constitutional protections against *ex post facto*

laws, no claim of which is made here, *felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.*” *Matz*, 37 Ohio St.3d at 281-82 (emphasis added). The Court recognized that there were “important public policy reasons for so holding. For example, if relator’s theory were to prevail no person convicted of abusing children could be prevented from school employment by a later law excluding such persons from that employment.” *Id.* at 282.

Additionally, this Court has repeatedly upheld registration and community notification under the prior system as valid non-punitive measures. “Registration with the sheriff’s office allows law enforcement officials to remain vigilant against possible recidivism by offenders. Thus, registration objectively serves the remedial purpose of protecting the local community.” *Cook*, 83 Ohio St.3d at 417. “Registration allows local law enforcement to collect and maintain a bank of information on offenders. This enables law enforcement to monitor offenders, thereby lowering recidivism.” *Id.* at 421. “Registration has long been a valid regulatory technique with a remedial purpose.” *Id.* at 418. “R.C. Chapter 2950 has the remedial purpose of providing law enforcement officials access to a sex offender’s registered information in order to better protect the public.” *Id.* at 419.

Registration and notification provisions “have the remedial purpose of collecting and disseminating information to relevant persons to protect the public from registrants who may reoffend.” *Cook* at 420. “Notification provisions allow dissemination of relevant information to the public for its protection.” *Id.* at 421. “[N]otification requirements may be a detriment to registrants, but the sting of public censure does not convert a remedial statute into a punitive one.” *Id.* at 423.

In *In re G.E.S.*, 9th District No. 24079, 2008-Ohio-4076, the Ninth Appellate District addressed G.E.S.'s argument that, the AWA demonstrates the Legislature's punitive intent because it is not based on an offender's likelihood to reoffend, but rather, is based solely on an offender's underlying conviction. In rejecting this argument, the court noted the difficulty in predicting recidivism, finding:

Such an argument assumes, incorrectly, that the potential for recidivism and/or the effectiveness of public notice are the only legitimate non-punitive rationales for classification and registration requirements.

We reject that analysis, first because of the inherent difficulty in predicting recidivism in a particular offender FN1 and second because notice depends upon knowledge of the offender's presence in a given community. History teaches us that predictions of recidivism are not sufficiently reliable and that discovery of an offender's presence in a community often comes tragically too late. AWA's provisions are directly related to the second problem and seek to enhance law enforcements' awareness of the presence of potential offenders. The utility of such knowledge is obvious and its use during a particular criminal investigation is no more suspect than use of the many data base resources presently available to law enforcement. While the enhancements in AWA cannot guarantee that sexual offenders will be identified before committing another offense, or caught thereafter, such enhancements have a rational and sufficient nexus to community safety and the public good.

FN1. See Ohio Office of Criminal Justice Services, *Report to the Ohio Criminal Sentencing Commission: Sex Offenders* (January 2006), available at: <http://www.ocj.s.state.oh.us/Research/SexOffenderReport.pdf> (explaining that while up to eight-five percent of sex offenders are first time offenders, offenders generally admitted "to having committed multiple offenses prior to being arrested" for which they were never caught and generally underreported the sex offenses that they committed). See, also, Scott I. Vrieze & William M. Grove, *Predicting Sex Offender Recidivism. I. Correcting for Item Overselection and Accuracy Overestimation in Scale Development. II. Sampling Error-Induced Attenuation of Predictive Validity Over Base Rate Information*, 32 *Law & Hum. Behav.* 266 (June 2008) (discussing various problems in methods used to calculate sex offender recidivism rates and the corresponding problems with the reliability of those results).

In re G.E.S., 2008-Ohio-4076, at ¶ 24.

B. Intent

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

1. Historical Assessment

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

Further, the increased registration obligations and residency restrictions do not mirror colonial punishments, as Appellants argue. While a sex offender is required to provide additional information to a sheriff – the name and address of an employer or an institution of higher education – this information is not automatically disseminated to co-workers, fellow students, or the general public in its vicinity. Rather these individuals must actively seek this information. A sex offender is not standing in public announcing these facts, unlike colonial times. “Humiliated offenders were required ‘to

stand in public with signs, cataloguing their offenses.” *Smith v. Doe*, 538 U.S. at 97 (citation omitted). Publicity and any dishonor that may come from dissemination of this information was not the ultimate goal of the General Assembly. And the information which a sex offender must supply does, by no means, equate to a public shaming. *Id.* at 98. It results in the accurate dissemination of relevant information to further assist the public and protect it. *Cook* at 422.

Additionally, the residency restrictions imposed by the AWA are not designed to banish sex offenders from the community. Rather, the restrictions place certain, minimal restrictions on the places where a sex offender may reside within a community without completely banishing or restricting him from the community. See *Smith v. Doe*, 538 U.S. at 98. (“The aim [of banishment] was to make these offenders suffer permanent stigmas, which in effect cast the person out of the community.”) Consequently, this stigma adversely impacts every other aspect of an offender’s life. *Iowa v. Seering* (Iowa, 2005) 701 N.W.2d 655, 667 (citation omitted). But limiting a sex offender’s residency from within 1,000 feet of a school does not act as an automatic expulsion from the community, since it does not restrict sex offenders’ freedom to travel outside of this barrier.

2. Affirmative Disability Or Restraint

Contrary to Appellants’ argument, the AWA not act as a disability or restraint; it is not comparable to parole, probation, and supervised release. The Court is required, under this prong, to determine “how the effects of the [amendments] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.” *Smith v. Doe*, 538 U.S. at 99-100.

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

Furthermore, the prolonged and more-frequent act of updating residential and employment information does not equate with the onerous obligations of probation and other forms of conditional release. Therein, defendants must maintain employment, submit to random drug testing, and permit warrantless searches of their residences, in addition to reporting on a regular basis to a probation or parole officer. Under the AWA, a sex offender is required to provide the same information during his regular reporting cycle as was required under Ohio’s former Megan’s Law. Similarly, the U.S. Supreme Court, in *Smith v. Doe*, juxtaposed registration requirements against supervised release holding: “[p]robation and supervised release entails a series of mandatory conditions and allow the supervising officer to such the revocation of probation or release in case of infraction.” *Id.* at 101. But Alaska’s Megan’s Law, which the Court reviewed, went even further than Ohio’s, forcing sex offenders to inform authorities about changes in facial features, the failure to comport with this requirement resulted in criminal prosecution. *Id.* at 101-102.

3. Promotes Punishment Via Deterrence And Retribution

The primary objectives of criminal punishment are deterrence and retribution. *Kansas v. Hendricks*, 521 U.S. at 361-362. “Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior.” *Cook*,

at 420 (citation omitted). On the other hand, “[r]etribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing justice.” *Id.* While all laws, to some extent, may result in a deterrent effect, deterrence is not the primary purpose of the AWA. “Any number of government programs might deter crime without imposing punishment.” *Smith v. Doe*, 538 U.S. at 102. And “[t]o hold that the mere presence of a deterrent purpose renders * * * sanctions ‘criminal’ * * * would severely undermine the government’s ability to engage in effective regulation * * *.” *Hudson*, 522 U.S. at 105.

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

Additionally, the increased reporting requirements are in place to aid the community in protecting against potential recidivism. As the *Cook* Court held, “[t]he registration and notification provisions * * * have the remedial purpose of collecting and disseminating information to relevant persons to protect the public from registrants who may reoffend.” *Cook*, at 420. And much like Ohio’s former Megan’s Law, criminal penalties still exist for failure to abide by them. But the criminal penalties are not meant as a deterrent. *Id.*

4. Rational Connection To Non-Punitive Purpose

In analyzing an ex post facto claim, the statute must have some rationale connection to a non-punitive purpose. However, the statute does not require such “a close or perfect fit with the non-punitive aim it seeks to advance.” *Smith v. Doe*, 538 U.S. at 103. The amendments in question were passed for the “preservation of the public peace, health, and safety.” S.B. 5, Section 9. It thereby furthers the stated intent of Megan’s Law, which seeks to protect the health and well-being of the general public, with a specific focus on children.

The AWA is specifically targeted to protecting children. By requiring sex offenders to continue notifying authorities of their residence, place of employment or institution of higher learning, it better enables law enforcement to disseminate information and thereby, the public can develop plans to protect their children. R.C. §2950.02(A)(1). There are “grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is ‘frightening and high.’” *Smith v. Doe*, 538 U.S. at 103, quoting *McKune v. Lile* (2002), 536 U.S. 24, 34.

Protecting against the high risk of recidivism, continually noted by the Supreme Court, as well as this Court, also coincides with the 1000-foot residency restrictions. The increased buffer-zone reduces access to children, thereby minimizing the opportunity and temptation for sex offenders to re-offend. Additionally, this restriction only places a prohibition on a sex offender’s abode; it does not interfere with a sex offender’s right to traverse within this buffer zone. See *Illinois v. Leroy* (2005), 357 Ill. App.3d 530, 541 (“[I]t is reasonable to conclude that restricting child sex offenders from residing within 500 feet of a playground or a facility providing programs or services

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

Finally, this Court has repeatedly upheld registration, community notification and residency restrictions in the old system as valid, non-punitive measures. “Registration with the sheriff’s office allows law enforcement officials to remain vigilant against possible recidivism by offenders. Thus, registration objectively serves the remedial purpose of protecting the local community.” *Cook* at 417. “Registration allows local law enforcement to monitor offenders, thereby lowering recidivism.” *Id.* at 421. “Notification provisions allow dissemination of relevant information to the public for its protection.” *Id.* at 421. “R.C. Chapter 2950 has the remedial purpose of providing law enforcement officials access to a sex offender’s registered information in order to better protect the public.” *Id.* at 419.

5. Excessive In Light Of Its Purpose

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

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

Under the intents-effect test, the Legislature unequivocally provided that the AWA is civil in nature. In viewing the effect of the Act’s amendments, it is clear that they are non-punitive. Therefore, the State submits that the AWA should be upheld as not violative of the Ex Post Facto Clause of the United States Constitution.

IV. Retroactivity Clause Of The Ohio Constitution

The imposition of heightened registration and community notification on Appellants is valid under Article II, Section 28, of the Ohio Constitution, which prohibits the passage of “retroactive laws.”¹ A retroactive statute is unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in nature. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 9. In *Consilio*, this Court applied a two-part test. *Id.* at ¶ 10. Under this test, the court must first determine

¹ Ohio’s Retroactivity Clause provides a broader prohibition than that afforded under the Ex Post Facto Clause of the United States Constitution.

whether the General Assembly expressly made the statute retroactive. *Id.* If it did, then it must determine whether the statutory restriction is substantive or remedial in nature. *Id.*

A statute must “clearly proclaim” its retroactive application. *Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, paragraph one of the syllabus. Much like this Court’s finding in *Cook*, the legislature herein specifically made the statute retroactive. “In *State v. Cook* * * * our finding that the General Assembly specifically made R.C. 2950.09 retroactive was based in part on an express provision making the statute applicable to anyone who ‘was convicted of or pleaded guilty to a sexually oriented offense prior to the effective date of this section, if the person was not sentenced for the offense on or after’ that date. *Hyle v. Porter* (2008), 117 Ohio St.3d 165, 2008-Ohio-542, ¶ 16.

Ohio’s AWA contains almost identical language: “At any time on or after July 1, 2007, and not later than December 1, 2007, the attorney general shall determine for each offender * * * who prior to December 1, 2007, has registered a residence, school, institution of higher education, or place of employment address pursuant to section 2950.04, 2950.041, or 2950.05 of the Revised Code the offender's * * * new classification as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008, the offender's * * * duties under Chapter 2950. of the Revised Code as so changed * * *.” R.C. §2950.031. The AWA is replete with similar language. Clearly, the legislature, in inserting such language, comported with the statutory and constitutional requirements declaring legislation, as a whole, to be retroactive.

Secondly, the AWA is not substantive in nature, but is remedial. A statute is

substantive in nature if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right.” *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 OhioSt.3d 100, 107. On the other hand, 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. *Cook* at 411. S.B. 10 does not “impos[e] new duties and obligations upon a person’s past conduct and transactions * * *.” *Personal Serv. Ins. Co. v. Mamone* (1986), 22 Ohio St.3d 107, 109, quoting *Lakengren v. Kosydar* (1975), 44 Ohio St.2d 199, 201. Conduct or transactions are “past” only if there is a “reasonable expectation of finality” as to those matters. *Matz*, 37 Ohio St.3d at 281-82. The commission of a felony does not create such a reasonable expectation of finality. *Id.*

The registration and community notification provisions of the AWA are remedial, so that they may be applied to prior offenders. As the *Cook* Court held: “[R]egistration and verification provisions are remedial in nature and do not violate the ban on retroactive laws * * *.” *Cook* at 413. In *Cook*, this Court reviewed the wholesale amendments to the prior version of Chapter 2950, originally enacted in 1963. While the Court noted that some of the amendments were directed at officials, rather than offenders, House Bill 180, in totality, amended the frequency and duration of the registration requirements, much like the AWA has done now. Additionally, it increased the number of classifications from one to three. The AWA essentially maintains the three classification levels; it merely renames them (which is a benefit to sex offenders). Clearly, the amendment of the registration provisions is a substitution better-suited to protect the public. “We cannot conclude that the Retroactivity Clause bans the compilation and dissemination of truthful information that will aid in public safety.” *Id.*

In addition, community notification has already been deemed a non-punitive regulatory matter that could be newly-imposed on prior offenders, even those that had not been subject to any sex-offender registration laws at all before. *Cook*, supra. “Had the Legislature chosen to exempt previously-convicted offenders, the notification provision of the law would have provided absolutely no protection whatsoever on the day it became law, for it would have applied to no one.” *Cook* at 412-413, citing *Doe v. Poritz* (1995), 142 N.J. 1, 662 A.2d 367.

Nor can Appellants claim a reasonable expectation of finality because they were initially processed under the old system. As this Court recently stated: “[N]o one has a vested right in having the law remain the same over time. If by relying on existing law in arranging his affairs, a citizen were made secure against any change in legal rules, the whole body of our law would be ossified forever.” *East Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, at ¶ 30. Finally “dissemination provisions do not impinge on any reasonable expectation of finality defendant may have had with regard to his conviction * * *.” *Cook* at 414. If entirely new provisions, such as community notification, could be imposed on old offenders, it stands to reason that the General Assembly could take the smaller step here of adding to the provisions that were already applicable to these Appellants.

The Ohio General Assembly expressly made this law retroactive. More importantly, the revisions contained therein are remedial, rather than substantive in nature. For these reasons, the Adam Walsh Act should be found not in violation of Ohio’s Retroactivity Clause.

V. *Separation Of Powers*

A fundamental principle of our constitutional system is that government powers are divided among the three branches of government: the legislative, executive, and judicial; and that each of these is separate from the others. This principle confines legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary. 16 American Jurisprudence 2d, Constitutional Law, Section 210. While not specifically provided for under the Ohio Constitution, this Court, in *State ex rel. Montgomery v. Rogers* (1905), 71 Ohio St. 203, at 216-217, found:

* * * [T]he fact that these governmental powers have been severally distributed by the constitution to the legislative, executive and judicial departments of our state government, clearly evidences a purpose that the powers and duties of each, shall be separate from and independent of the powers and duties of the other coordinate*309 branches, and the distribution so made to the several departments, by clear implication operates as a limitation upon and a prohibition of the right to confer or impose upon either powers that belong distinctively to one of the other coordinate branches. * * *

In sum, the separation of powers doctrine prohibits the General Assembly from conferring on one branch powers that belong to another branch.

Appellants claim that S.B. 10 violates the separation of powers doctrine in that the Attorney General vacates existing court judgments of sex offender classification and infringes on the powers of the judicial branch of government lack merit.

The Eighth Appellate District, in *Gildersleeve v. State*, Cuyahoga App. Nos. 91515, 91519, 91521 and 91532, 2009-Ohio-2031, thoroughly considered, and rejected this argument. The Eighth District noted that former R.C. Chapter 2950 and S.B. 10 are similar in that sex offenders are essentially classified by the offense they committed, finding:

Under former R.C. Chapter 2950, an offender who committed a sexually oriented offense that was not registration-exempt was classified by operation of law as a sexually oriented offender. No judicial action was required, and courts had no discretion to remove the label. Similarly, under S.B. 10, sex offenders are placed by operation of law into tiers based upon the crime they committed. Courts have no discretion to determine that a sex offender should not be placed into a tier. Under both systems, offenders are essentially classified by the offense they committed. See *Montgomery*, supra.

In fact, “the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *Slagle v. State*, 145 Ohio Misc.2d 98, 884 N.E.2d 109, 2008-Ohio-593. Without the legislature’s creation of sex offender classifications, no such classification would be warranted. Therefore, * * * we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature.” *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ---39 (holding that S.B. 10 does not violate the separation-of-powers doctrine). See, also, *Smith*, supra; *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112; and *Williams*, 2008-Ohio-6195.

Appellants further claim that S.B. 10 violates the separations-of-powers doctrine by requiring the executive branch, namely, the Ohio Attorney General, to interfere with a prior final adjudication. S.B. 10, however, does not require the Attorney General to reopen final court judgments. See *Slagle*, supra. It simply changes the classification and registration requirements for sex offenders and requires that the new procedures be applied to sex offenders currently registered under the old law or offenders currently incarcerated for committing sexually oriented offenses. In *Cook*, the Ohio Supreme Court made it clear that appellants should not have a reasonable expectation that their sex offenses would never be made the subject of future sex-offender legislation. *Id.* at 412, 700 N.E.2d 570. Thus, S.B. 10 cannot be said to abrogate a final judicial determination

Gildersleeve, 2009-Ohio-2031 at ¶¶ 35-37.

The General Assembly has merely changed its earlier laws; it has not purported to “overrule” or “vacate” the judgment previously rendered by the trial court, classifying the sex offender into one of three categories. Indeed, a “sexually oriented offender,” or some other determination, is *entirely consistent* with the new system, as the General

Assembly has properly dispensed with the need to prove likelihood to reoffend as a precondition to a sex offender's ultimate classification and attendant duties thereto.

The General Assembly, in enacting the AWA, has not abrogated the judgment previously rendered by the trial court. The new law merely changes the classification and the concomitant duties placed upon sex offenders. The application of the AWA by the Attorney General and the county sheriffs does not vitiate the final judgment. Rather, it works in conjunction with that final judgment, through such mechanisms as R.C. §2950.11(F)(2), which allows sex offenders to seek relief from community notification.

VI. Double Jeopardy Clauses Of The Ohio And United States Constitutions.

Appellants claim that the registration and notification provisions of the AWA operate as a second punishment upon convicted sex offenders, in violation of the Double Jeopardy Clause.

The Double Jeopardy Clause of the Fifth Amendment, and made applicable to the states through the Fourteenth Amendment, prohibits an accused from "being tried twice for the same offense." Ohio analogous guarantee provides that "[n]o person shall be twice put in jeopardy for the same offense." Ohio Const. Art. 1, Section 10.

As discussed above, the added weight of a longer registration period and community notification placed upon Appellants do not constitute "punishment." In *State v. Williams*, 88 Ohio St.3d at 527-28, this Court addressed this claim. Relying on its reasoning in *Cook*, this Court found that: "Because *Cook* held that R.C. Chapter 2950 is neither "criminal," nor a statute that inflicts punishment, R.C. Chapter 2950 does not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions."

This Court reaffirmed its finding in *State v. Wilson*, 113 Ohio St.3d 382, at 384, 865 N.E.2d 1264.

This Court has consistently held that the registration and notification requirements imposed on convicted sex offenders do not constitute punishment. As such, the AWA's provisions regarding registration and notification do not violate the Double Jeopardy Clauses.

VII. Cruel And Unusual Punishment

Appellants claim that application of the AWA to those convicted sex offenders who were subject to Megan's Law constitutes cruel and unusual punishment.

The Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution provide that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The prohibition against cruel and unusual punishment is applicable only if the government imposition is in the nature of punishment, and if the punishment is "grossly disproportionate to the severity of the crime." *Ingraham v. Wright* (1977), 430 U.S. 651, 667. As previously set forth, registration and residency restrictions are remedial and not punitive in nature. Since R.C. Chapter 2950 does not mete out punishment, there is no violation of Appellants' right against cruel and unusual punishment. See *Cook*; *State v. Ward* (1999), 130 Ohio App. 551.

This is true despite the fact that under the AWA, offenders will have to register for a longer period of time. This fact does not change the remedial nature of S.B. 10. "[A]s long as R.C. Chapter 2950 is viewed as civil, and not criminal-remedial and not punitive - then the period of registration cannot be viewed a punishment. Accordingly, it logically follows that it does not constitute cruel and unusual punishment since the

punishment element is lacking.” *Gildersleeve v. State*, 2009-Ohio-2031, at ¶ 43, quoting *State v. Byers*, 7th District No. 07CO39, 2008-Ohio-5051.

VIII. Application Of AWA To Plea Agreements

Appellants claim that the retroactive application of the AWA to convicted sex offenders who entered guilty pleas or no contest pleas impairs the obligation of contracts as protected by the Ohio and United States Constitutions.

“In order to declare the existence of a contract, both parties to the contract must consent to its terms; there must be a meeting of the minds of both parties; and the contract must be definite and certain.” *Episcopal Retirement Homes v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369 (citations omitted). “[A] plea agreement [need not] encompass all of the significant actions that either side might take. If the agreement does not establish a prosecutorial commitment * * *, we should recognize the parties’ limitation of their assent.” *United States v. Fentress* (C.A. 4, 1986), 792 F.2d 461, 464. Instead of inferring agreement from silence, “[u]nder traditional contract principles, we should take an opposite tack, treating a plea agreement as a fully integrated contract and enforcing it according to its tenor, unfastened with covenants the parties did not see fit to mention.” *United States v. Anderson* (C.A. 1, 1990), 921 F. 2d 335, 338. “The total absence of a provision from a written contract is evidence of an intention of the parties to exclude it rather than of an intention to include it.” *Buckeye Union Ins. Co. v. Consol. Stores Corp.* (1990), 68 Ohio App. 3d 19, 25. Simply put, courts should not “imply” terms into a plea agreement. *United States v. Benchimol* (1985), 471 U.S. 453, 456.

Appellants’ argument begs the question of what the “law in existence” actually provided. The real issue is whether the law provided that the General Assembly could

change things, and, as explained above, ex post facto and retroactivity principles *do* allow the General Assembly to impose requirements on prior offenders. “Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.” *El Paso v. Simmons* (1965), 379 U.S. 497, 508. Appellants *lose* under a “law in existence” theory, as the law in existence contained no “unalterable SORN law” principle.

Additionally, Appellants cite *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719, but that case is distinguishable in at least two respects. First, there was at least some legal basis there for saying that statutory law governing parole eligibility entered into the plea agreement. No “unalterable SORN law” principle existed here.

Secondly and more importantly, a “plea agreement” theory presumes that the “state actor” reaching the “agreement” was in a position to bind the subsequent “state actor.” In *Layne*, it was the prosecutor purportedly binding the Parole Board, both agents of the Executive Branch. But no similar authority can be found here. Obvious separation-of-powers problems would be created if the Executive Branch purported to bargain away the Legislative Branch’s ability to pass laws on a matter. Not even the legislative branch can bar future legislation. *State ex rel. Public Institutional Bldg. Auth. v. Griffith* (1939), 135 Ohio St. 604, 619-20 (“No general assembly can guarantee the continuity of its legislation or tie the hands of its successors.”). If the General Assembly itself cannot bar future legislative action, then certainly an Executive Branch official cannot do so by a mere contract, especially a contract that is silent on the matter.

Similarly, the “impairment of contract” argument lacks merit, as the prosecution made no contract to bar the General Assembly from modifying the SORN statutes. And

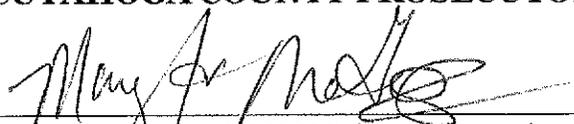
the SORN statutes themselves created no “contract.” “[A]bsent a clearly stated intent to do so, statutes do not create contractual rights that bind future legislatures.” *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 76. “Courts have coined the phrase ‘unmistakability doctrine’ for this legal principle,” and this doctrine “is useful not only in determining whether a contractual relationship exists, but also in ‘defining the contours’ of any contractual obligation that is found to exist.” *Id.* at 76. The “unmistakability doctrine” supports the State’s view that no promise of legislative inaction was “impliedly” made. For all of these reasons, Appellants’ breach of contract claim must fail.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellee State of Ohio’s Merit Brief, the Cuyahoga County Prosecutor respectfully requests that this Honorable Court affirm the decision of the Sixth District Court of Appeals and hold that Senate Bill 10, Ohio’s Adam Walsh Act, is remedial, not punitive, in nature and is constitutional under the Ohio and United States Constitutions.

Respectfully Submitted,

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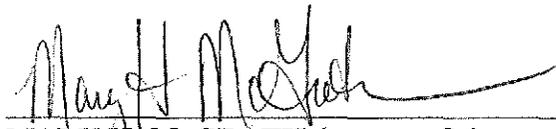


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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amici Curiae Cuyahoga County Prosecutor in Support of Appellee State of Ohio has been sent by regular U.S. Mail this 31st day of August, 2009, to Jeffrey M. Gamso, Counsel of Record for Appellant Christian Bodyke, ACLU of Ohio Foundation, Inc., 4506 Chester Avenue, Cleveland, Ohio, 44103, and Russell Leffler, Huron County Prosecuting Attorney, Counsel for Appellee State of Ohio, 12 East Main Street, 4th Floor, Norwalk, Ohio 44857.



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