

IN THE SUPREME COURT OF OHIO
2009

ORIGINAL

STATE OF OHIO,

Case No. 08-2502

Appellee,

-vs-

On Appeal from
the Huron County
Court of Appeals, Sixth
Appellate District

CHRISTIAN N. BODYKE et al.,

Court of Appeals
Nos. H-07-040, -041, & -042

Appellants.

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON
O'BRIEN IN SUPPORT OF APPELLEE STATE OF OHIO**

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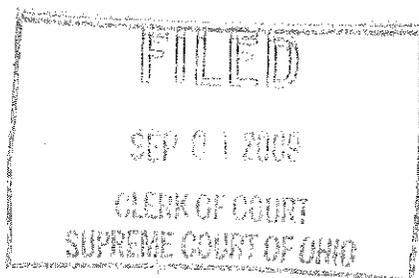


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STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecutor prosecutes thousands of cases every year. Representation over the past twenty months has included representing the State in proceedings under Senate Bill 10 involving the reclassification of sex offenders and child-victim offenders. Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues related to the classification and registration of sex offenders and child-victim offenders. In the interest of aiding this Court's review of the present appeals, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the constitutionality of Senate Bill 10.

STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the procedural history of the cases as set forth in paragraphs two through eight of the Sixth District's decision.

ARGUMENT

RESPONSE TO PROPOSITIONS OF LAW

SENATE BILL 10 CONSTITUTIONALLY INCREASES THE FREQUENCY AND DURATION OF REGISTRATION REQUIREMENTS FOR SEX OFFENDERS AND CHILD-VICTIM OFFENDERS WHOSE OFFENSES OCCURRED PRIOR TO THE EFFECTIVE DATE.

These three offenders raise various constitutional challenges to the changes effected by Senate Bill 10. But, in a series of cases, including *State v. Cook* (1998), 83 Ohio St.3d 404, *State v. Williams* (2000), 88 Ohio St.3d 513, *Smith v. Doe* (2003), 538 U.S. 84, and, most recently, *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, this

Court and the United States Supreme Court have repeatedly upheld sex-offender registration schemes. Although these cases were not ruling on a registration scheme that is identical in all respects to Ohio's new scheme under Senate Bill 10, these cases repeatedly, in statement after statement, have provided statements of law and analysis that support the constitutionality of Ohio's new scheme. These cases all support the view that the new registration system, just as much as the old, permissibly considers prior convictions in regulating current conditions and circumstances, and it does so without taking away any vested right and without imposing an additional "punishment."

These offenders appear to be making facial and as-applied constitutional challenges. But facial challenges rarely succeed, since the challenger must establish that no set of circumstances exists under which the provision would be valid. *East Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, ¶ 30; citing *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 37; citing *United States v. Salerno* (1987), 481 U.S. 739, 745.

In light of these offenders' burden to prove unconstitutionality beyond a reasonable doubt, *Cook*, 83 Ohio St.3d at 409, their constitutional claims all lack merit and should be rejected.

Λ. Law before and after Senate Bill 10

Effective in 1997, House Bill 180 enacted "Megan's Law" for Ohio as part of a completely revamped R.C. Chapter 2950. The law set up a list of "sexually oriented offenses," see former R.C. 2950.01(D) (eff. 1-1-97), and provided that persons convicted of such offenses would at least be required to register their address and annually verify their address for 10 years. Former R.C. 2950.04, .05, .06, & .07 (all eff. 7-1-97). The

law also provided for a hearing at the time of sentencing, or upon recommendation of the ODRC for current prisoners, to determine whether the offender was a habitual sex offender for having a prior sex offense conviction or whether the offender was a “sexual predator” because he was likely to commit one or more sex offenses in the future. Former R.C. 2950.09 (eff. 1-1-97). If the offender was a habitual sex offender, the registration period was 20 years with annual verification (later increased for almost all such offenders to lifetime registration in 2003). If the offender was a sexual predator, the registration period was for life with quarterly verification. Predators were all subject to community notification, while habituals were subject to such notification if the court ordered it. Former R.C. 2950.11 (eff. 1-1-97).¹

Under the Megan’s Law scheme, Bodyke was a sexually oriented offender. (See Judgment Entry filed 12-20-99) Phillips was a sexually oriented offender as well, there apparently having been no court determination as to whether he should be designated a sexual predator. (See Prosecutor’s Motion filed 11-5-97, stating that State would not seek a predator finding, but no court action thereafter making a determination) As sexually oriented offenders, Bodyke and Phillips were subject to a 10-year registration requirement with annual verification.

¹ Another category was added for “aggravated sexually oriented offense,” which included rape of a child under thirteen (committed after June 13, 2002) and forcible rape (committed after July 31, 2003). See former R.C. 2950.01(O) (as eff. 6-13-2002 & 7-31-03). Persons convicted of such offenses were subject to lifetime quarterly registration and community notification regardless of whether the offender was further found to be a “sexual predator.” See former R.C. 2950.06(B)(1) (eff. 6-13-02); former R.C. 2950.07(B)(1) (eff. 6-13-02); former R.C. 2950.11(F)(1)(c) (eff. 6-13-02).

Schwab was a habitual sex offender without community notification. (See Judgment Entry filed 6-2-99) He faced a 20-year registration requirement with annual verification, a duration which was later increased by the legislature to a lifetime duration in 2003. Former R.C. 2950.07(B)(2) (eff. 7-31-03).

Ohio passed Senate Bill 10, partly effective July 1, 2007, and the remainder effective January 1, 2008. Instead of having three levels for “sexually oriented offenders,” “habitual sex offenders,” and “sexual predators,” the new law employs three “Tiers,” and it assigns offenders to such tiers largely based on the offense of conviction and/or the number of convictions. See R.C. 2950.01(E), (F), & (G).

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. R.C. 2950.11.

The General Assembly provided that the new registration system would apply to offenders who had an existing duty to register as of July 1, 2007. 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 AG 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). Similar transition provisions were put in place for the AG to reclassify sex offenders in prison.

See R.C. 2950.032. Provision was also made for the AG to classify offenders who register for the first time after December 1, 2007, for convictions occurring before that date. See R.C. 2950.031(B).

Under Senate Bill 10, offenders Bodyke, Phillips, and Schwab were all reclassified as Tier III offenders, as the sexual battery and attempted rape offenses they were convicted of are Tier III offenses under the new scheme. R.C. 2950.01(G)(1)(a) & (h). As discussed above, Tier III status carries with it lifetime registration, quarterly verification, and community notification. Community notification no longer applies in these cases, the trial court having removed community notification in each case. Lifetime registration is new for Bodyke and Phillips, and quarterly verification is new for all three, but lifetime registration is not new for Schwab, who already faced lifetime registration as a habitual sex offender. As lifetime registration is not new for Schwab, he cannot complain about that issue here, as petitions filed under R.C. 2950.031(E) are limited to challenging “new registration requirements” that were effective on January 1, 2008. See Part L, *infra*.

B. Ex Post Facto Analysis

“To fall within the *ex post facto* prohibition, a law must be retrospective -- that is ‘it must apply to events occurring before its enactment’ -- and it ‘must disadvantage the offender affected by it’ * * * by altering the definition of criminal conduct or increasing the punishment for the crime * * *.” *Lynce v. Mathis* (1997), 519 U.S. 433, 442 (citations omitted). In the present cases, the increases in frequency and duration of the registration requirements are neither “retroactive” nor “punishment.”

1. Non-Retroactivity

In *Cook*, this Court determined that the old system effective in 1997 was “retroactive” because it looked to the prior conviction as a starting point for regulation. *Cook*, 83 Ohio St.3d at 410. Even so, the Court upheld the old system because it had a valid remedial and non-punitive purpose. Undersigned counsel respectfully disagrees with *Cook*’s “retroactive” conclusion because it overlooked the prospective *operation* of the old system and the prospective purposes thereof, which were to regulate current conditions and circumstances. When a statute involves only prospective operation, there is no “retroactivity.” *East Liverpool*, ¶ 31. Indeed, in much of the remainder of the *Cook* opinion, the logic of the Court indicates that sex-offender registration laws constitute the proper regulation of current conditions and ongoing events so that the public may be protected. *Cook*, 83 Ohio St.3d at 412 (indicating that weapon-under-disability statute is comparable as a “statute[] using past events to establish *current* status.”; emphasis added).

A statute is not retroactive “merely because it is applied in a case arising from conduct antedating the statute’s enactment, * * * or upsets expectations based on prior law.” *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 269. Nor is a statute retroactive “merely because it draws on antecedent facts for a criterion in its operation.” *United Engineering & Foundry Co. v. Bowers* (1960), 171 Ohio St. 279, 282. “Statutes that reference past events to establish current status have been held not to be retroactive.” *State ex rel. Playcan v. School Emp. Retirement Sys. of Ohio* (1994), 71 Ohio St.3d 240, 243. A law is “retroactive” only if “the new provision attaches new legal consequences to events completed before its enactment.” *Landgraf*, 511 U.S. at 270.

A lengthened registration duty does not attach new consequences to old, completed

events but rather regulates current conditions and ongoing events. The purpose is to authorize longer and more frequent registration on a prospective basis so that persons may act on an informed basis about the offender.

To be sure, the new system ties an offender's Tier status to the offender's prior conviction. But the old system did that as well, and it was constitutional. *Cook*, supra. Even for Tier III offenders who are now subject to community notification, the system remains constitutional. The ultimate concern remains the danger of recidivism, which is an on-going matter of concern. The General Assembly could adopt a categorical system, as it has now done, largely dependent on prior conviction(s).

Such categories "are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith*, 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 that "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 Court upheld against ex post facto challenge 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 offences 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 practise 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.

The Court revisited this issue in *DeVeau v. Braisted* (1960), 363 U.S. 144, a decision which upheld a New York statute which effectively prevented the employment of convicted felons as officers in longshoreman unions. *DeVeau* stated, as follows:

The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. See *Hawker v. New York*, 170 U.S. 189. No doubt is justified regarding the legislative purpose of § 8. The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much needed scheme of regulation of the waterfront, and for the

effectuation of that scheme it became important whether individuals had previously been convicted of a felony.

Id. at 160 (plurality). The lesson of *Hawker* and *DeVeau* is that a statutory reference to a prior criminal conviction or charge will not make the statute “retroactive,” so long as the statute can be said to regulate current events and ongoing situations, such as the ongoing problems of bad character presented in those cases. See, also, *Flemming v. Nestor* (1960), 363 U.S. 603, 614 (disqualification provision related to status “is not punishment even though it may bear harshly upon one affected.”).

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. The 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 in bold 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.

This principle also can be seen at work in cases upholding laws prohibiting convicted felons from possessing firearms. Even when the prior conviction predates the effective date of the law, the convicted felon is still subject to the prohibition. Such laws are not “retroactive.” *State v. Reagle* (1991), 9th Dist. No. 14601; *State v. Vanhorn* (1983),

8th Dist. No. 44655. Such laws do not punish for the prior conviction, but rather regulate a present situation (i.e., the bad character of those persons who would presently carry firearms).

Habitual-criminal statutes have also been upheld for the same reasons, even when they allow the use of a conviction predating the statute to enhance the penalty for a subsequent offense. “A law cannot properly be considered retroactive when it apprises one who has established, by previous unlawful acts, a criminal character, that if he perpetrates further crimes, the penalty denounced by the law will be heavier than upon one less hardened in crime.” *Blackburn v. State* (1893), 50 Ohio St. 428, 438.

2. Increased Registration Duties do not inflict “Punishment.”

The issue of “punishment” turns on a two-prong analysis.

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.*

Under this standard, registration does not constitute criminal “punishment.” The

General Assembly expressly stated its intent that registration would be non-punitive and would be meant to serve the non-criminal purposes of aiding law enforcement, providing helpful information to the public, and protecting the public. R.C. 2950.02(A) & (B). Moreover, offenders cannot show by the “clearest proof” that the purpose or effect of registration is so punitive as to negate the General Assembly’s intent that it be treated as remedial.

This Court has repeatedly upheld registration in the old system as a valid non-punitive measure. “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.” *Id.* at 420.

The deletion of the likelihood-of-reoffense criterion does not change the foregoing analysis. As stated before, the General Assembly can regulate in a categorical way tied to the nature of the conviction. *Smith*, *supra*.

Some contend that the inability to prove lack of dangerousness means that the new system is not “narrowly tailored” to the danger of recidivism. But “[a] statute is not deemed

punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance.” *Smith*, 538 U.S. at 103. The legislature is allowed to make categorical judgments. *Id.* 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 * * *.” *Smith*, 538 U.S. at 104. “Under the rational basis standard, we are to grant substantial deference to the predictive judgment of the General Assembly.” *Williams*, 88 Ohio St.3d at 531.

These offenders argue that the law is punitive because R.C 2929.19(B)(4) provides that the trial court “shall include in the offender’s sentence a statement that the offender is a tier III sex offender/child-victim offender * * *.” But this provision is consistent with the law’s remedial purpose. To ensure compliance, the law requires that the ODRC provide notifications to a prisoner before his release regarding his registration duties upon release. R.C. 2950.03(A)(1). The provision in R.C. 2929.19(B)(4) requiring that the trial court include the Tier III statement in the judgment will help ensure that the ODRC fully understands that the offender is a Tier III offender. It will help ensure that the offender understands his Tier III status as well. Such information-sharing furthers the remedial goal of having the defendant register. As recognized in *Smith*, requiring the trial court to notify the offender of registration duties does not show a punitive legislative intent. *Smith*, 538 U.S. at 95-96 (regulatory scheme helps ensure compliance in providing notice; “Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.”). Neither should a requirement that the trial court notify the prison system and

defendant via the judgment.

Language about the sex-offender classification being specified “in” the “sentence” is nothing new, as Megan’s Law had a similar requirement that the sexual predator and habitual-sex-offender classifications be set forth “in the offender’s sentence and the judgment of conviction,” and this Court upheld the statutory scheme as non-punitive in *Cook*. See former R.C. 2950.09(B)(3) & (E) (eff. 1-1-97). Offenders Bodyke et al. concede at page seven of their brief that Megan’s Law was “clearly remedial.” R.C. 2929.19(B)(4) is therefore not some “smoking gun” of punitive legislative intent, but, rather, a recognition that judgments and sentences are forwarded to the ODRC, and the General Assembly wishes to ensure that the ODRC understands the offender is Tier III.

If anything, a requirement that the Tier III “statement” be included in the “sentence” is a recognition that the Tier III “statement” is not itself a “sentence.” A “statement” is different than a “sentence.”

In any event, the General Assembly’s intent must be viewed as a whole. R.C. 2950.02 demonstrates the non-punitive purposes behind the law. R.C. 2929.19(B)(4) does not constitute the “clearest proof” that the registration scheme as a whole is punitive.

Neither do the statements of a single legislator, who is quoted on page 9 of the offenders’ brief as being part of the “legislative history” and as showing that the legislative intent was to “stiffen penalties.” There is no official legislative history in Ohio, and the statements of a single legislator hardly control and do not matter. “The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.” *Chrysler Corp. v. Brown* (1979), 441 U.S. 281, 311. “[A] single legislator does not speak for the entire Ohio General Assembly. * * * Thus, we must determine the intent of the

Ohio General Assembly not from the expressions of a single legislator, but from the expression of the legislative body as a whole.” *Nichols v. Villareal* (1996), 113 Ohio App.3d 343, 349.

C. Section 28 Retroactivity Analysis

Increased frequency and duration of registration is also valid under Article II, Section 28, of the Ohio Constitution, which prohibits the passage of “retroactive laws.” Senate Bill 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.*

Registration and community notification are also remedial, so that they may be applied to prior offenders. *Cook*, 83 Ohio St.3d at 413-14. “[R]egistration and verification provisions are remedial in nature and do not violate the ban on retroactive laws * * *.” *Id.* at 413. “We cannot conclude that the Retroactivity Clause bans the compilation and dissemination of truthful information that will aid in public safety.” *Id.* “[D]issemination provisions do not impinge on any reasonable expectation of finality defendant may have had with regard to his conviction * * *.” *Id.* at 414.

Nor can these offenders claim a reasonable expectation of finality because they were processed under the old system. “[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*, at ¶ 30.

D. Ferguson

Ferguson represents a further step in this Court’s line of case law recognizing that registration requirements for sex offenders are constitutional, even as applied to persons convicted before those requirements went into effect. While *Ferguson* does not address the constitutionality of the Senate Bill 10 amendments that were effective January 1, 2008, *Ferguson* continues the *Cook-Williams* line of authority and gives a clear indication of this Court’s view that sex-offender registration schemes are remedial and non-punitive because they are reasonably related to regulating the risks of sex-offender recidivism and serving the non-punitive purpose of protecting the public from those risks.

As *Ferguson* recognizes, the General Assembly reasonably concluded that sex-offender recidivism is a serious problem. “Many courts, including this one and the U.S. Supreme Court, have cited studies finding high recidivism rates in rapists and pedophiles.” *Ferguson*, at ¶ 7 n. 2. As *Ferguson* further recognizes, the General Assembly can view the risk of recidivism as serious, even though there might be some data that points in another direction. “Other research indicates that there is no increased risk of recidivism among sex offenders when compared to other criminals. * * * [But] [o]ur role is not to determine which view is the better-reasoned or more empirically accurate one, or to judge the wisdom of the General Assembly’s conclusions about the debate as those conclusions are reflected in Am.Sub.S.B. 5.” *Ferguson*, at ¶ 7 n. 2.

Ferguson recognizes the General Assembly was pursuing remedial purposes in adopting the registration scheme. “R.C. Chapter 2950 is replete with references to the legislature’s intent to ‘protect the safety and general welfare of the people of this state’

and to ‘assur[e] public protection,’ * * *.” *Ferguson*, at ¶ 28. “In light of that legislative intent, we have held consistently that R.C. Chapter 2950 is a remedial statute.” *Id.* at ¶ 29 (citing *Cook, Williams*).

Ferguson holds that deference must be given to the General Assembly’s stated intent of pursuing remedial, non-punitive goals of protecting the public. “Although the General Assembly’s stated intent is not dispositive, it is an important consideration in determining whether a statute is punitive.” *Ferguson*, at ¶ 36 n. 5. “We thus weigh it heavily.” *Id.*

Ferguson indicates that a law will not be considered “punitive” merely because it seems “harsh” to the offender. “R.C. Chapter 2950 may pose significant and often harsh consequences for offenders, including harassment and ostracism from the community. * * * We disagree, however, with *Ferguson*’s conclusion that the General Assembly has transmogrified the remedial statute into a punitive one by the provisions enacted through S.B. 5.” *Ferguson*, at ¶ 32.

“*Ferguson* may be negatively impacted by the amended provisions, just as he was burdened by the former provisions. But ‘the sting of public censure does not convert a remedial statute into a punitive one.’” *Ferguson*, at ¶ 37, quoting *Cook*, 83 Ohio St.3d at 423. “And although the scorn of the public may be the result of a sex offender’s conviction and his ensuing registration and inclusion in the public database, we do not believe that scorn is akin to colonials’ clearly punitive responses to similar offenses, which ranged from public shaming to branding and exile.” *Ferguson*, at ¶ 37 (citing *Smith*).

The *Ferguson* Court emphasized that the “Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment.” *Ferguson*, at ¶ 39. Whether a provision is “punitive” is not determined from the defendant’s perspective, as even remedial measures can have a “sting of punishment.” *Id.* A statutory scheme serving a regulatory purpose “is not punishment even though it may bear harshly upon one affected.” *Ferguson*, at ¶ 39, quoting *Flemming*, 363 U.S. at 614. “[C]onsequences as drastic as deportation, deprivation of one’s livelihood, and termination of financial support have not been considered sufficient to transform an avowedly regulatory measure into a punitive one.” *Ferguson*, at ¶ 39, quoting *Doe v. Pataki* (C.A.2, 1997), 120 F.3d 1263, 1279.

“If a legislative restriction is an incident of the state’s power to protect the health and safety of its citizens, it should be considered as evidencing an intent to exercise that regulatory power rather than as an intent to punish.” *Ferguson*, at ¶ 37 (citing *Smith*).

Thus, even permanent, lifetime registration requirements can be upheld. “[T]he United States Supreme Court and state appellate courts have upheld provisions similar to the permanent, lifetime classification imposed by S.B. 5’s amendments.” *Ferguson*, at ¶ 35 (citing *Smith*). “Central to these holdings is the understanding that the legislatures enacting such statutes found recidivism rates of sex offenders to be alarming and that an offender’s recidivism may occur years after his release from confinement rather than soon after his initial reentry to society.” *Ferguson*, at ¶ 35 (citing *Smith*).

The risks of recidivism justify the collection and/or dissemination of information. “[W]e believe that the General Assembly’s findings also support the conclusion that the more burdensome registration requirements and the collection and dissemination of

additional information about the offender as part of the statute's community notification provisions were not borne of a desire to punish. Rather, we determine that the legislative history supports a finding that it is a remedial, regulatory scheme designed to protect the public rather [than] to punish the offender – a result reached by many other courts.”

Ferguson, at ¶ 36 (footnote omitted). “We conclude that the General Assembly’s purpose for requiring the dissemination of an offender’s information is the belief that education and notification will help inform the public so that it can protect itself.

‘Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.’” *Ferguson*, at ¶ 38, quoting *Smith*, 538 U.S. at 99.

Measures far more inconvenient than registration can qualify as non-punitive.

“[C]onsequences as drastic as deportation, deprivation of one's livelihood, and termination of financial support have not been considered sufficient to transform an avowedly regulatory measure into a punitive one.” *Ferguson*, at ¶ 39 (quoting another case); see, also, *Smith*, 538 U.S. at 100.

E. No De Minimis Standard

Some have contended that sex-offender registration requirements are “punitive” unless they are de minimis. Some rely on a statement in *Cook* in which the Court referred to the act of registration as the equivalent of de minimis requirements for renewing a driver’s license. *Cook*, 83 Ohio St.3d at 418. But this argument amounts to a misreading of *Cook*.

Although *Cook* referenced the inconvenience of registering as the equivalent of the de minimis act of renewing a driver’s license, see *Cook*, 83 Ohio St.3d at 418, it is

clear from *Cook* that the “renewing driver’s license” reference was never meant to be a benchmark in the matter. Sexual predators even then were required to verify four times a year, and there is no known quarterly “renewal of license” requirement, and yet *Cook* upheld the quarterly verification requirement. Thus, *Cook* itself shows the insignificance of the “renewing driver’s license” example.

A full reading of *Cook* also reveals that the Court found that the real benchmark was *Kansas v. Hendricks*, in which the United States Supreme Court had rejected an ex post facto challenge to the involuntary civil commitment of sexually violent predators. The *Cook* Court found that “the registration/notification provisions of R.C. Chapter 2950 are far less restrictive and burdensome than the commitment statute” in *Hendricks*. *Cook*, 83 Ohio St.3d at 422. The *Cook* Court reasoned that, if the involuntary commitment of a predator was proper as a non-punitive measure, then the registration and notification provisions of R.C. Chapter 2950 were proper as well. *Id.* at 422-23.

In the final analysis, the test is not governed by the relative convenience of making a trip to the BMV. Far more inconvenient measures can qualify as non-punitive, as this Court recently recognized in *Ferguson*., including deportation, deprivation of employment, and, in *Hendricks*, involuntary commitment. *Ferguson*, at ¶ 39; see, also, *Smith*, 538 U.S. at 100.

F. Vast Majority of Appellate Courts Have Upheld Senate Bill 10

The vast majority of Ohio appellate courts have now addressed constitutional challenges to the new statutory scheme and have rejected one or more of those challenges, even by Tier III offenders. In *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104, ¶¶ 109-117, appeal allowed, 122 Ohio St.3d 1477, 2009-Ohio-3625, the Tenth District concluded that Senate Bill 10 is not punitive even as to a Tier III offender

and is, instead, a civil regulatory scheme regarding sex offenders that serves the remedial purpose of protecting the public. *Gilfillan* also rejected a separation-of-powers challenge.

Other Ohio appellate districts have rejected one or more of the constitutional challenges as to the new statutory scheme.

- **First District:** *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872 (Tier III).
- **Second District:** *State v. Desbiens*, 2nd Dist. No. 22489, 2008-Ohio-3375 (Tier II); see, also, *State v. King*, 2nd Dist. No. 08-CA-02, 2008-Ohio-2594 (Tier II -- no right to counsel because not punitive), appeal allowed, 119 Ohio St.3d 1471, 2008-Ohio-4911, dismissed, 120 Ohio St.3d 1441, 2008-Ohio-6417.
- **Third District:** *In re Gant*, 3rd Dist. No. 1-08-11, 2008-Ohio-5198 (Tier III), appeal allowed, 121 Ohio St.3d 1424, 2009-Ohio-1296; *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234 (Tier III), appeal allowed, 120 Ohio St.3d 1416, 2008-Ohio-6166.
- **Fourth District:** *State v. Countryman*, 4th Dist. No. 08CA12, 2008-Ohio-6700 (Tier III), appeal allowed, 121 Ohio St.3d 1449, 2009-Ohio-1820; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832 (Tier II).
- **Fifth District:** *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581 (Tier III), appeal allowed, 121 Ohio St.3d 1472, 2009-Ohio-2045; *State v. Gooding*, 5th Dist. No. 08 CA 5, 2008-Ohio-5954 (Tier III).
- **Sixth District:** *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397 (Tier II); *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387 (Tier III), appeal allowed, 121 Ohio St.3d 1438, 2009-Ohio-1638.
- **Seventh District:** *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051 (Tier I).
- **Eighth District:** *State v. Ellis*, 8th Dist. No. 90844, 2008-Ohio-6283 (Tier II); *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008-Ohio-2189 (Tier III).
- **Ninth District:** *State v. Ralston*, 9th Dist. No. 08CA009384, 2008-Ohio-6347 (Tier III); *State v. Honey*, 9th Dist. No. 08CA0018-M, 2008-Ohio-4943 (Tier II); *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076 (Tier III), appeal allowed, 120 Ohio St.3d 1504, 2009-Ohio-361.
- **Twelfth District:** *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195 (Tier II), appeal allowed, 121 Ohio St.3d 1449, 2009-Ohio-1820.

Conflicting decisions have been forthcoming from the Eleventh District. That Court rejected various constitutional challenges in *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059 (Tier III), appeal allowed in part, 121 Ohio St.3d 1439, 2009-Ohio-1638. But more recent decisions have gone back and forth on the issue of constitutionality, with different panels rendering different decisions. Compare *McCostlin v. State*, 11th Dist. No. 2008-L-117, 2009-Ohio-4097 (decided 8-14-09) with *State v. Lasko*, 11th Dist. No. 2008-L-075, 2009-Ohio-4100 (decided same day).

Representative of the vast majority of appellate authorities upholding the law is the Second District's decision in *King*, which found that *Cook*, *Williams*, and *Smith* governed: "[W]e cannot ignore the precedent set by the Ohio Supreme Court in *Cook* and later reaffirmed in *Williams* and [*State v.*] *Wilson*, [113 Ohio St.3d 382, 2007-Ohio-2202]. Although S.B. 10 alters the landscape, we still do not find, in light of the foregoing cases and the United States Supreme Court's opinion in *Smith*, that the reclassification and registration requirements at issue have a punitive effect negating the General Assembly's intent to establish a civil regulatory scheme." *King*, at ¶ 13.

"We are not persuaded that the Ohio Supreme Court would view the issues of criminality and punishment as applied to R.C. 2950 et. seq. in the *Cook* and *Williams* decisions any differently with regard to the provisions of Senate Bill 10." *In re Gant*, 3rd Dist. No. 1-08-11, ¶21. "[W]e conclude that the S.B. 10 amendments at issue here are remedial and civil in nature." *Montgomery*, 6th Dist. No. H-08-011, at ¶ 22.

{¶ 36} As the Clermont County Common Pleas Court noted in *Slagle v. State*, 145 Ohio Misc.2d 98, 2008 Ohio 593, 884 N.E.2d 109, "as it currently stands, *Cook* is good law and must be followed by this court." *Id.* at ¶ 40. The

Ohio Supreme Court has continued to indicate the remedial nature of sex offender classification statutes. See *Williams*, 88 Ohio St.3d at 528; *Ferguson*, 2008 Ohio 4824, ¶ 29. As a result, we find that the classification and registrations provisions of Senate Bill 10 are remedial in nature and do not violate the ban on retroactive laws set forth in Section 28, Article II of the Ohio Constitution. *Slagle* at ¶ 40; *Byers*, 2008 Ohio 5051, ¶ 69.

* * *

{¶ 42} Appellant's first argument was rejected by two appellate courts. In *State v. King*, Miami App. No. 08-CA-02, 2008 Ohio 2594, the Second Appellate District stated: "[The offender's] attempt to divine punitive intent from the absence of any individualized risk assessment under S.B. 10 is unavailing. As noted above, the new legislation automatically places offenders into one of three tiers based solely on the offense of conviction and imposes corresponding registration requirements. In [*Doe*, 538 U.S. 84, * * *], the United States Supreme Court recognized that a legislature may take such a categorical approach without transforming a regulatory scheme into a punitive one." *King* at ¶ 12; see, also, *Desbiens*, 2008 Ohio 3375.

* * *

{¶ 44} We agree with the foregoing analyses. The legislature's intent in enacting Senate Bill 10 was not punitive simply because an offender's classification and registration obligations depend on the offense committed, rather than on the offender's risk to the community or likelihood of reoffending.

Williams, 12th Dist. No. CA2008-02-029.

{¶ 15} The crux of all of Countryman's constitutional arguments is that Senate Bill 10 ties sex-offender classification, registration, and notification requirements directly and solely to the crime of conviction. As such, Countryman claims that Senate Bill 10 has created a sex-offender registration scheme that is no longer remedial and civil in nature. He maintains that sex-offender registration, as it functions under Senate Bill 10, is purely punitive, and is, in fact, part of the original sentence. In short, Countryman asserts that Senate Bill 10 is punitive because, instead of the court looking at defendants individually to

determine how dangerous they are before it classifies them, classification is now tied solely to the type of crime committed.

{¶ 16} We do not find Countryman's argument persuasive. The Supreme Court of the United States has already stated, “[t]he State’s determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment[.]” *Smith v. Doe* (2003), 538 U.S. 84, 104 * * *.

Countryman, 4th Dist. No. 08CA12.

{¶ 82} After considering the legislation as a whole, we are persuaded that the General Assembly through S.B. 10 intended to enact a civil, regulatory scheme.

* * *

{¶ 86} Under the third factor, appellant argues that S.B. 10 is not rationally related to a non-punitive purpose and is therefore punitive in effect. He argues the new legislation is irrational because it does not take into account the likelihood of a particular defendant to reoffend, but rather classifies offenders based solely on the offense committed. However, we do not agree the new legislation is irrational. S.B. 10 serves the non-punitive purpose of protecting the public from released sex offenders. The new legislation is rationally related to this purpose because it alerts the public to the potential presence of sex offenders. *Smith*, supra, at 102-103. Further, the fact that the legislature chose to categorize offenders based on the crime committed does not make S.B. 10 irrational. *Id.*

* * *

{¶ 89} We note that the Second, Third, Fourth, Eighth, and Ninth Appellate Districts have held that S.B. 10 is civil in nature and not punitive in intent or effect and therefore not an ex post facto law. See *State v. Desbiens*, 2d Dist. No. 22489, 2008 Ohio 3375; *In re Smith*, 3d Dist. No. 1-07-58, 2008 Ohio 3234; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008 Ohio 3832; *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008 Ohio 2189; *In re G.E.S.*, 9th Dist. No. 24079, 2008 Ohio 4076. * * *

* * *

{¶ 95} We therefore hold that the registration and notification requirements of S.B. 10 are remedial and procedural in nature and not substantive, and that S.B. 10 is not a retroactive law prohibited by the Ohio Constitution.

Swank, 11th Dist. No. 2008-L-019.

The following passage from the Ninth District decision in *G.E.S.* is also representative of the thinking of a number of these courts:

{¶ 24} Lastly, *G.E.S.* argues that AWA demonstrates the legislature's punitive intent because, unlike pre-AWA law, AWA is not narrowly tailored. *G.E.S.* avers that the Supreme Court upheld the pre-AWA statutory scheme in *Cook* because pre-AWA's provisions were directly tied to an offender's ongoing threat in the community. He argues that AWA no longer embodies this narrow focus because it now applies classifications and registration requirements based solely on the underlying offense, rather than on a demonstrated risk of recidivism by a particular offender and/or the potential risk to a specific community -- each of which might be alleviated by public notice of the offender's presence. 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 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.

G.E.S., 9th Dist. No. 24079, ¶ 24; see, also, *Bodyke*, 6th Dist. Nos. II-07-040 et al., ¶¶14, 19 (rejecting “all of appellants’ arguments with regard to the allegation that S.B. 10 is punitive, rather than remedial, in nature.”; “this legislation is civil and remedial in nature.”).

G. Senate Bill 10 does not violate Separation of Powers

Sex-offender complaints about “separation of powers” are particularly marred by fuzzy logic. The sex-offender arguments misunderstand and overstate the exact role of courts under the former statutory scheme. While the former scheme assigned a fact-finding role to the court in determining whether the offender was a sexual predator or habitual sex offender, most offenders were automatically sexually oriented offenders by operation of law. And once the court had finished its fact-finding role, it was the *statutory* scheme that determined the scope, length, and frequency of the offender’s registration duties, with some allowance for a court to modify those duties. Although courts oftentimes mimicked the registration requirements by stating in the judgment entry that the offender would be required to register as a sexually oriented offender, such language was mere surplusage, i.e., a merely unnecessary “rubber stamping” of the then-extant registration scheme. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169.

Because the former scheme assigned a fact-finding role to the courts, the sex-offender arguments wrongly assume that such a role must always apply. In fact, the registration scheme presumptively falls within the General Assembly’s exercise of the police power. See *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560 (“valid exercise of the General Assembly’s police powers”). “[P]rotection of the public is a paramount

government function enforced through the police power.” *Cook*, 83 Ohio St.3d at 421. R.C. Chapter 2950 “is an exercise of the police power * * *.” *Williams*, 88 Ohio St.3d at 525. While the General Assembly can assign disputed factual issues to the courts for resolution, such as it did with the predator issue, there is no requirement that the General Assembly make a regulatory scheme turn on such a factual issue. The General Assembly can design the regulatory scheme as it sees fit, provided that constitutional rights are not infringed.

Although the sex-offender arguments invoke separation-of-powers doctrine so as to nominally prevent encroachments by the General Assembly into core areas of concern to the judiciary, the sex-offender arguments in fact amount to a plea for judicial supremacy over the coordinate branches of government, thereby seeking to insinuate the judiciary into every sex-offender registration scheme that the General Assembly might devise. No such supremacy is called for by the Ohio Constitution.

In fact, the General Assembly honors the judicial branch by assigning regulatory weight to judicial acts, such as the acceptance of a plea or the entering of a conviction. The regulatory scheme validates the entering of the conviction and thereafter uses that conviction as a jumping-off point for the regulatory scheme. Such a scheme simply does not encroach on judicial prerogatives.

Rather than invading any judicial prerogative, the General Assembly has merely changed its earlier laws; it has not purported to “overrule” or “vacate” a judgment. “[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*, at ¶ 30.

Indeed, a trial court's "sexually oriented offender" determination is *entirely consistent* with the new system, as the General Assembly has properly dispensed with the need to prove a likelihood to reoffend.

Various Ohio appellate courts have rejected the separation-of-powers argument.

As stated in *Williams*, 12th Dist. No. CA2008-02-029:

{¶ 97} Senate Bill 10 * * * does not violate the doctrine of separation of powers.

{¶ 98} As the Third Appellate District stated in *In re Smith*, 2008 Ohio 3234:

{¶ 99} "However, we note that the classification of sex offenders has always been a legislative mandate, not an inherent power of the courts. 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." *Id.* at ¶ 39 (internal citation omitted).

{¶ 100} Or, as the Clermont County Common Pleas Court stated in *Slagle*, 2008 Ohio 593, 884 N.E.2d 109:

{¶ 101} "[The legislature] has not abrogated final judicial decisions without amending the underlying applicable law. Instead, the [legislature] has enacted a new law, which changes the different sexual offender classifications and time spans for registration requirements, among other things, and is requiring that the new procedures be applied to offenders currently registering under the old law or offenders currently incarcerated for committing a sexually oriented offense. Application of this new law does not order the courts to reopen a final judgment, but instead simply changes the classification scheme. This is not an encroachment on the power of the judicial branch of Ohio's government." *Id.* at ¶ 21. See, also, *Byers*, 2008 Ohio 5051, ¶ 73-74 (adopting the reasoning of *Slagle* as its own).

“The enactment of laws establishing registration requirements for, e.g., motorists, corporations, or sex offenders, is traditionally the province of the legislature and such laws do not require judicial involvement.” *Swank*, 11th Dist. No. 2008-L-019, at ¶ 99; *Bodyke*, 6th Dist. Nos. H-07-040 et al., ¶¶21-22; *Adrian R.*, 5th Dist. No. 08-CA-17, ¶ 34.

H. Senate Bill 10 does not violate Res Judicata

Res judicata likewise does not bar the General Assembly from increasing the frequency and duration of registration duties.

Even if a court’s “sexually oriented offender” determination had purported to grant a defendant a lifetime exemption from a longer or more frequent registration duty, such an injunctive order would not be controlling now. No one has a “vested right” in prospective injunctive relief, as such relief necessarily operates in futuro. *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 273-74. Prospective injunctive relief is subject to modification or vacation when a significant change in statutory law has occurred, even when the original injunction was the result of a consent decree. *Agostini v. Felton* (1997), 521 U.S. 203, 215; Civ.R. 60(B)(4). An offender would have no “vested right” in prospective injunctive relief, and such an “injunction” would be required to yield to the change in law, not vice versa. Res judicata would not pose any bar to the revisiting of such a prospective matter.

I. Senate Bill 10 does not breach any Plea Bargain

Arguments that Senate Bill 10 violated earlier plea agreements are also problematic. These offenders make no claim that their plea agreements specifically barred any change in their registration status by the General Assembly, nor could they do so. “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, unfestooned 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. Courts should not “imply” terms into a plea agreement. *United States v. Benchimol* (1985), 471 U.S. 453, 456.

These offenders have pointed to no part of their plea agreements that purported to tie the hands of the General Assembly as to amending the sex-offender registration laws.

The offenders have conceded that they stand in different positions in regard to their plea agreement. In a memorandum filed in the Court of Appeals on January 4, 2008, discussing a motion to consolidate the three cases (see the Bodyke file), counsel for the offenders conceded that Phillips had no plea-bargain-based argument, as he was convicted in 1994, before Megan’s Law took effect in 1997.

Counsel further conceded in the 1-4-08 memorandum that, although the parties reached a joint recommendation that Bodyke was only a sexually oriented offender, “there

was no negotiation” and “the record does not indicate negotiations took place.” A review of the plea document filed on October 18, 1999, confirms the absence of any sex-offender-registration promise, as the plea document indicated that there were no promises other than stated in the plea document, and the plea was silent on the issue of sex-offender registration.

As to Schwab, counsel contended in the 1-4-08 appellate memorandum that Schwab’s classification as a habitual sex offender without community notification was part of the plea agreement. Counsel had contended in a 12-14-07, memorandum filed in the trial court that the habitual-offender classification had been “negotiated.” But the earlier plea document filed on May 28, 1999, had indicated that there were no promises other than what was stated in the document, and the document was silent on sex-offender registration. If the habitual status was “negotiated,” it was apparently not a part of the plea agreement itself.

In any event, even a firm plea agreement that the offender shall have a certain classification under prior law would not represent any agreement that the General Assembly would not change the law and would not amend the classifications. There is no indication of any such promise actually having been made.

Offenders have more generally contended that, as a matter of law, the “law in existence” entered into the plea agreement. But such an 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 change and increase SORN 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. Sex offenders *lose* under a “law in existence” theory, as the law in existence contained no “unalterable SORN law” principle.

Some offenders 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.

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, an “impairment of contract” argument would lack 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 view that no promise of legislative inaction was ever “impliedly” made.

J. Senate Bill 10 does not constitute Double Jeopardy or Cruel and Unusual Punishment.

Double-jeopardy and cruel-and-unusual punishment claims also lack merit. As discussed elsewhere, increasing the frequency and duration of registration requirements is not a second “punishment.” *Williams*, 88 Ohio St.3d at 527-28.

K. Senate Bill 10 does not violate Due Process

Based on the briefing of amici Iowa Coalition against Sexual Assault et al., the offenders Bodyke, Phillips, and Schwab contend in a conclusory fashion that the statutory scheme violates substantive due process. The theory seems to be that registration schemes not tethered to a court finding of likelihood to reoffend are counterproductive and that sex offenders would be best off if they could live and work in anonymity. The theory is also grounded in the view that the registration scheme is borne of fear, not actual danger, and that a more enlightened policy would involve an enforced ignorance on the part of the public.

The General Assembly was not bound by these views of what constitutes enlightened policy. The General Assembly was required to deal with the cold and hard fact that sex offenders reoffend in substantial numbers. Even the amici Iowa Coalition et al. briefing concedes varying recidivism rates of as high as 5% to 20 %, and they concede that such rates underestimate the actual reoffense rates. These rates are themselves a rational basis for legislative action. *Williams*, 88 Ohio St.3d at 529-31 (applying rational-

basis standard) This Court's "role is not to determine which view is the better-reasoned or more empirically accurate one, or to judge the wisdom of the General Assembly's conclusions" about recidivism risks. *Ferguson*, at ¶ 7 n. 2.

To the extent this argument depends on there being no individualized assessment of a likelihood to reoffend, no such individualized assessment was required. Again, as *Smith* indicates, 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 * * *." *Smith*, 538 U.S. at 104. While the prior scheme required clear-and-convincing proof of a likelihood to reoffend in order for the defendant to be treated as a "sexual predator," the General Assembly could rationally conclude that legislative action was warranted at lower degrees of risk. For those offenders who posed a likelihood to reoffend by a preponderance, or even for those offenders who were believed to pose a risk of reoffense in rates greater than zero but less than a likelihood, the risk of reoffense rationally supports legislative action. Any implication that the risk of reoffense is non-existent for these offenders would be questionable anyway.²

² Bodyke "attacked a neighbor," (12-21-07 Tr. 4), and was drunk at the time, (*id.*), which was apparently an outgrowth of an alcohol/drug abuse pattern related to the offense. (Judgment Entry filed 12-20-99) The offense involved entering the neighbor's home without permission and accosting her while she slept. (Municipal Court complaint filed 6-24-99 – "while she was asleep in her bed")

Phillips victimized two family members, (12-21-07 Tr. 3), who were ages 12 and 8 at the time. (Memorandum of Law filed by counsel for Phillips on 12-14-07) The case apparently involved multiple instances. (*Id.*)

Ohio appellate courts have recognized that classification based on the fact of conviction does not violate due process:

No due process violation occurs where “the law required an offender to be registered based on the fact of the conviction alone.” *Doe I v. Dann et al.*, (June 9, 2008), N.D. Ohio No. 1:08-CV-00220-PAG, Document 146, 2008 U.S. Dist. LEXIS 45228, 2008 WL 2390778. Moreover, “public disclosure of a state sex offender registry without a hearing as to whether an offender is ‘currently dangerous’ does not offend due process where the law required an offender to be registered based on the fact of his conviction alone.” *Doe I v. Dann et al.*, citing *Connecticut Dept. of Public Safety v. Doe* (2003), 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98. Therefore, we conclude that due process is not implicated by Senate Bill 10.

Adrian R., 5th Dist. No. 08-CA-17, at ¶ 33; see, also, *King*, 2nd Dist. No. 08-CA-02, 2008-Ohio-2594, ¶ 34 (“the Ohio Supreme Court held [in *Hayden*] that imposing a sex-offender registration requirement on a defendant without holding a hearing did not deprive the defendant of any protected liberty interest.”).

To the extent the substantive due process argument depends on the view that sex offenders should or must be allowed to live and work in anonymity, this Court has already rejected the contention that a sex offender has any “right to privacy” in the information related to his conviction(s). *Williams*, 88 Ohio St.3d at 525-27. The General Assembly could rationally conclude that the public should have ready access to such information so that the public may be forewarned and take precautionary measures when

Schwab molested a young male member of his family under the age of 13 over an extended period of time. (12-21-07 Tr. 3) The case apparently involved multiple instances. (Memorandum of Law filed by counsel for Schwab on 12-14-07)

appropriate.

To the extent the substantive due process argument is based on the risk that some members of the public might engage in vigilantism, “[i]t cannot be presumed that the receipt of public information will compel private citizens to lawlessness.” *Id.* at 527. It is generally presumed that private individuals -- the vast majority of whom are law-abiding -- will obey the law. *Jacobson v. United States* (1992), 503 U.S. 540, 551 (“there is a common understanding that most people obey the law even when they disapprove of it.”). In any event, there are laws in place to deal with harassment, and those laws should be sufficient to save the facial constitutionality of the law. A law should not be found facially unconstitutional on the chance that isolated incidents of harassment by private individuals might occur, particularly in light of the fact that “due process” only protects from “state action,” and the law in no way countenances lawlessness. As recognized by this Court, “even if some private citizens impermissibly interfere with a convicted sex offender’s rights, the offender may seek redress through this state’s tort and criminal laws. R.C. Chapter 2950 does not remove an offender’s access to the courts to seek redress for harms committed by other citizens.” *Williams*, 88 Ohio St.3d at 527.

Under “substantive due process,” the threshold question is whether the defendant has invoked a liberty interest that is deemed “fundamental.” *Washington v. Glucksberg* (1997), 521 U.S. 702, 720-22. As *Williams* held, no fundamental interest is at stake here, so a rational-basis standard applies. *Williams*, 88 Ohio St.3d at 530-31.

It is doubtful that even a rational-basis standard applies, as there is no cognizable due process interest involved in the periodic act of registration/verification. The registration/verification requirement constitutes merely a de minimis burden for which due

process guarantees are inapplicable. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, at ¶ 14; *id.* at ¶ 21 (Cook, J., concurring).

Even if a cognizable due process interest were involved, sex offenders would be left to contend that the statutory scheme is not “rationally related to legitimate governmental interests.” *Glucksberg*, 521 U.S. at 722, 728; *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560, 561; *Adkins v. McFaul* (1996), 76 Ohio St.3d 350, 351. A substantially equivalent test for substantive due process is found in Ohio case law: “[A]n exercise of the police power * * * will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.” *Benjamin v. Columbus* (1957), 167 Ohio St. 103, paragraph five of the syllabus. “[T]he Ohio Constitution’s guarantees of due process are substantially equivalent to those of the United States Constitution’s.” *State v. Benson* (1992), 81 Ohio App.3d 697, 700 n. 2; *Thompkins*, 75 Ohio St.3d at 560 (“similar”).

The “rational basis” standard of review is the paradigm of judicial restraint. See *FCC v. Beach Communications* (1993), 508 U.S. 307, 314.

Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

Benjamin, at paragraph six of the syllabus; *DeMoise v. Dowell* (1984), 10 Ohio St.3d 92, 96-97.

Offenders Bodyke et al. fall far short of demonstrating a violation of substantive

due process beyond a reasonable doubt. Under rational-basis review, courts are poorly situated to second-guess the lines drawn by the legislature. Rational-basis review “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices” or “authorize ‘the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.’” *Heller v. Doe* (1993), 509 U.S. 312, 319. “The state does not bear the burden of proving that some rational basis justifies the challenged legislation; rather, the challenger must negative every conceivable basis” for the law. *Williams*, 88 Ohio St.3d at 531. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Am. Assoc. of Univ. Professors v. Central State University* (1999), 87 Ohio St.3d 55, 58, quoting *Beach Communications*, 508 U.S. at 315. “[A] state has no obligation whatsoever ‘to produce evidence to sustain the rationality of a statutory classification.’” *Id.* at 58, quoting *Heller*, 509 U.S. at 320. Perfection and mathematical nicety are not required in drawing classifications. *Dandridge v. Williams* (1970), 397 U.S. 471, 485. “[C]ourts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” *Univ. Professors*, 87 Ohio St.3d at 58, quoting *Heller*, 509 U.S. at 321.

Under these standards, the General Assembly is not required to prove through statistical studies that its registration scheme is perfect. The General Assembly’s generalizations can be imperfect and still be upheld under rational-basis review. The General Assembly could reasonably make the judgment that offenders convicted of the most serious sex offenses should be assigned to the highest Tier. “Under the rational

basis standard, we are to grant substantial deference to the predictive judgment of the General Assembly.” *Williams*, 88 Ohio St.3d at 531. “[T]he legislature has the power in cases of this kind to make a rule of universal application” and “to legislate with respect to convicted sex offenders as a class * * *.” *Smith*, 538 U.S. at 104, quoting in part *Hawker*, 170 U.S. at 197.

L. Residency Restriction and Limits of Petition Review under R.C. 2950.031(E)

Offenders Bodyke et al. do not appear to be complaining about the residency restriction in R.C. 2950.034, which prohibits offenders convicted of sexually oriented offenses or child-victim oriented offenses from establishing a residence within 1,000 feet of a school, day care, or preschool. Even if they were raising such a challenge, the challenge would not be properly raised in this petition-contest proceeding under R.C. 2950.031(E). They do not claim any property interest making such a claim ripe for review. *State v. Pierce*, 8th Dist. No. 88470, 2007-Ohio-3665, ¶ 33, affirmed, 120 Ohio St.3d 321, 2008-Ohio-6248. More importantly, a petition under R.C. 2950.031(E) is only allowed to contest the applicability of “the new registration requirements under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008.”

R.C. 2950.034(A) does not create a “registration” requirement. R.C. 2950.034 provides for the bringing of an injunctive-relief action against a convicted offender who is living within 1,000-feet of a school, preschool, or day care. Its provisions reach sexually oriented offenders regardless of whether the offender is registering or is done with registration. In addition, the phrase “registration requirements” connotes acts to be done by the offender, i.e., registration and periodic verification. The phrase “registration

requirements” does not reach other matters performed by the sheriff, such as community notification, or matters such as R.C. 2950.034, which creates a cause of action to be brought *by others* against the offender and which applies regardless of whether the offender registers. See *Cook*, 83 Ohio St.3d at 411 (“we observe that many of the requirements contained in R.C. Chapter 2950 are directed at officials rather than offenders,” including the sheriff providing community notification).

In addition, the petition procedure in R.C. 2950.031(E) is designed to allow the offender to challenge “the new registration requirements * * * *that will be implemented on January 1, 2008.*” (Emphasis added) The amendments vis-à-vis the R.C. 2950.034 residency restriction were effective on July 1, 2007, not January 1, 2008. Even if the residency restriction could be deemed a “registration” requirement, it was not a “new registration requirement” effective January 1, 2008, that could be challenged in a petition under R.C. 2950.031(F).

M. Additional Information Requirements are Proper

Some have contended that Senate Bill 10 is “punitive” because it requires that sex offenders provide more information than was required under prior law. But, under the rational-basis review recognized in *Smith*, the additional informational requirements of the new law easily pass constitutional muster. As held in *Cook*, “[r]egistration 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.

Valid registration schemes can collect information about the offender. As *Cook* recognized, “[r]egistration 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.

The additional informational requirements provide law-enforcement officials with a complete picture of the offender’s identity. These requirements help avoid subterfuges and end-runs around the registration scheme by requiring thorough disclosure. While it might be easy for an offender to obtain a single false identification or to use an alias if no checking is done, it is far more difficult for the offender to dupe the sheriff’s office when the offender must provide full identification, including copies of travel and immigration documents and social security number, which will provide a truer picture of the offender’s identity. And even if they, too, rely on aliases or false social security numbers, law enforcement will thereby have fuller knowledge of the aliases that the offender might use, thereby reinforcing the informational purposes behind the scheme.

Knowledge of phone numbers, e-mail addresses, internet identifiers, and vehicles also are rationally related to having a full picture of the offender’s true identity, so that end-runs and subterfuges are not used. These are all tools potentially used by sex offenders to commit further crimes, whether it be chatting online with a young girl, calling that girl on a phone to arrange a tryst, or using a vehicle to cruise by schools, parks, or playgrounds. Identifying persons engaged in such behavior is important. But if the offender were only required to give his own phone number or his own vehicle license plate, the protections

would be easily avoided by, for example, the offender using an employer's car or a relative's phone or internet address to make the questionable contacts.

Some complain that the offender might be unable to provide all of the required information ahead of time. But only a rational relationship to a non-punitive purpose is required to uphold these information requirements. The law need not be a "perfect" law taking into account all possible scenarios in which compliance might be difficult or impossible. "If a legislative restriction is an incident of the state's power to protect the health and safety of its citizens, it should be considered as evidencing an intent to exercise that regulatory power rather than as an intent to punish." *Ferguson*, at ¶ 37 (citing *Smith*).

And the facial constitutionality of a law is not governed by speculative "worst case scenarios." *Ohio v. Akron Center for Reproductive Health* (1990), 497 U.S. 502, 514. Concerns about the offender possibly being prosecuted in "impossible compliance" scenarios should await actual situations in which it was impossible for the offender to comply, rather than severing the additional information requirements entirely, even as to the vast majority of situations in which compliance is easy.

In addition, for much of the information, including vehicle information and phone numbers, the offender has the ability to notify the sheriff within three days of a change in the information. R.C. 2950.05(D). And so the statutory scheme does not appear to require perfect foreknowledge on the part of the offender as to this information.

Some also complain about R.C. 2950.04(C)(11) because it gives BCI the ability to require additional information from sex offenders. But R.C. Chapter 2950 already gave BCI the ability to require additional information from the registrant-offender. See former

R.C. 2950.04(C) (eff. 7-1-97; “any other information required by the bureau”). This would not be a “new registration requirement” that could be challenged under R.C. 2950.031(E).

In any event, concerns about this delegation of authority to BCI are misplaced. This delegation of authority to BCI is perfectly consistent with a non-punitive regulatory intent, as many regulatory schemes would give an agency the ability to tweak informational requirements as necessary, such as to counter any new subterfuge or end-run that sex offenders may develop to skirt the regulatory scheme. There is nothing inherently “punitive” about giving BCI that authority. As *Cook* holds, collecting information is a non-punitive regulatory purpose. And even if BCI might someday adopt some informational requirement that somehow is “punitive,” the remedy would be to strike that particular informational requirement, not to engage in a preemptive strike barring BCI from ever adopting any informational requirement.

All constitutional challenges to Senate Bill 10 should be rejected.

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien supports the constitutionality of Senate Bill 10 and urges that this Court affirm the judgment of the Sixth District Court of Appeals in all respects.

Respectfully submitted,

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