

ORIGINAL

In the
Supreme Court of Ohio

IN RE: DARIAN J. SMITH,

A Delinquent Child.

: Case No. 2008-1624
:
:
: On Appeal from the
:
: Allen County
:
: Court of Appeals,
:
: Third Appellate District
:
:
: Court of Appeals Case
:
: No. 1-07-58

**MOTION OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL RICHARD CORDRAY
FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT**

BROOKE M. BURNS* (0080256)
**Counsel of Record*
Assistant State Public Defender
250 E. Broad St., Suite 1400
Columbus, Ohio 43215
614-466-5394
614-752-5167 fax
brooke.burns@opd.ohio.gov

Counsel for Appellant Darian J. Smith

JUERGEN A. WALDICK (0030399)
Allen County Prosecutor
CHRISTINA L. STEFFAN* (0075206)
Assistant Prosecutor
**Counsel of Record*
204 N. Main St., Suite 302
Lima, Ohio 45801
419-228-3700
419-222-2462 fax
christina_steffan@yahoo.com

Counsel for Appellee State of Ohio

RICHARD CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*

ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General

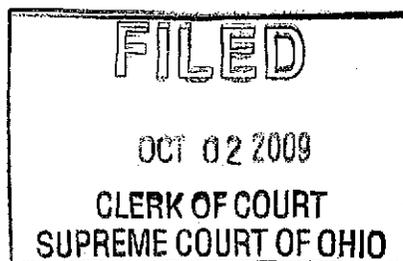
DAVID M. LIEBERMAN (*pro hac vice*)
Deputy Solicitor

CHRISTOPHER P. CONOMY (0072094)

JAMES A. HOGAN (0071064)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Richard Cordray



**MOTION OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL RICHARD CORDRAY
FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT**

Under S.Ct. Prac. R. IX, § 6(A), the Court will grant leave to an amicus curiae to participate in oral argument in “extraordinary circumstances.” This is such a circumstance. Appellant Smith attacks, and the State defends, the constitutionality of Ohio’s juvenile sex offender registration law. The Attorney General filed an amicus brief in support of neither party. He adopted a middle position, agreeing with Mr. Smith that the judgment below should be reversed, but on statutory grounds only. The Attorney General therefore requests leave of the Court to permit his participation in oral argument.

The Court accepted jurisdiction over Mr. Smith’s claims that the retroactive application of Ohio’s newly enacted sex offender law, Senate Bill 10 (“S.B.10”), to juvenile offenders violates the Ex Post Facto Clause of the United States Constitution, the Retroactivity Clause of the Ohio Constitution, and the Eighth Amendment’s prohibition against cruel and unusual conduct. See Jur. Mem. (Aug. 14, 2008), *In re Smith*, No. 2008-1624.

Mr. Smith then filed his merit brief. In his fact section, Mr. Smith documented how Ohio’s appellate districts have diverged in interpreting S.B.10’s juvenile offender classification provisions. (Br. 10-13). In this case, the Third District held that a tier classification is imposed *automatically* on a juvenile based on his offense of adjudication. By contrast, other districts have found that the juvenile court retains *discretion* in selecting the tier classification. Mr. Smith then noted correctly that his constitutional claims would be moot if this Court were to side with the latter camp and hold that juvenile courts have discretion under S.B.10 in choosing a delinquent child’s tier. (Br. 13-14). Later, in his argument section, Mr. Smith analyzed his constitutional claims. (Br. 14-35).

In its merit brief, the State focused on the constitutional issues. It defended the Third District's analysis and judgment below, including the court's conclusion that the tier determinations were automatic based on the offense of adjudication, and not within the juvenile court's discretion to determine. (Br. 27).

The Attorney General filed an amicus brief in support of neither party. He detailed the history of juvenile sex offender registration in Ohio and the new classification structure under S.B.10. The Attorney General then argued that a plain reading of S.B.10 confirms that the juvenile court retains *discretion* to determine a juvenile offender's tier classification, thus mooting the constitutional issues presented by Mr. Smith and accepted by the Court.¹ The Attorney General is therefore urging the Court to reverse the judgment below based on the Third District's misinterpretation of S.B.10 and to remand Mr. Smith's case for a proper tier classification hearing in the juvenile court.

The Attorney General recently contacted both parties about participating in oral argument. Neither party was willing to share time, and with good reason. The State of Ohio is defending the Third District's judgment below—a position that the Attorney General disagrees with. And although the Attorney General and Mr. Smith agree as to the ultimate result in this case (that the judgment below should be vacated and the case remanded for further proceedings), they espouse different positions. Mr. Smith has advanced constitutional arguments, whereas the Attorney General urges the Court to resolve this case on the statutory issues alone. More significantly, in his reply brief, Mr. Smith has asked the Court to reach beyond this case and invalidate every

¹ The Attorney General acknowledged that some of the confusion over the operation of the juvenile tier classifications could be attributed to a 2007 training manual released by the Attorney General's Office, which incorrectly defined the juvenile tier classifications as automatic based on the juvenile's offense of adjudication. The Attorney General immediately ordered revisions to the manual and instructed his staff to inform relevant parties of the error. Those directives have been completed.

single juvenile tier classification since S.B.10's enactment (Reply 6-9)—a remedy that the Attorney General opposes as overbroad and unwarranted. In short, the Attorney General is advancing a middle position that neither party endorses—a position grounded solidly in the statutory language of S.B.10, that preserves the long-standing discretion of juvenile courts over juvenile matters, and that avoids the need for unnecessary constitutional expeditions. See *Ashwander v. TVA* (1936), 297 U.S. 288, 346 (Brandeis, J., concurring) (“The Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it.’”) (citation omitted).

The Court would be best served if all three positions—Mr. Smith's, the State's and the Attorney General's—were addressed at oral argument. As such, the Attorney General respectfully requests leave of the Court under S.Ct. Prac. R. IX, § 6(A) to participate in oral argument. If leave is granted, the Attorney General defers to the Court as to the appropriate length of time allotted for his presentation, but would respectfully request a minimum of five minutes.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Attorney General of Ohio


BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General

DAVID M. LIEBERMAN (*pro hac vice*)
Deputy Solicitor

CHRISTOPHER P. CONOMY (0072094)

JAMES A. HOGAN (0071064)
Assistant Attorneys General

30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Richard Cordray

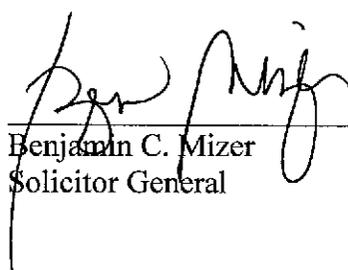
CERTIFICATE OF SERVICE

I certify that a copy of the above *Amicus Curiae* Ohio Attorney General Richard Cordray's Motion for Leave to Participate in Oral Argument was served by U.S. mail on this 2nd day of October, 2009 upon the following counsel:

Brooke M. Burns
Assistant State Public Defender
250 E. Broad St., Suite 1400
Columbus, Ohio 43215
Counsel for Appellant Darian J. Smith

Juergen A. Waldick
Allen County Prosecutor
Christina L. Steffan
Assistant Prosecutor
204 N. Main St., Suite 302
Lima, Ohio 45801

Counsel for Appellee State of Ohio



Benjamin C. Mizer
Solicitor General