ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	: Case No. 10-0822
	:
Plaintiff-Appellee,	: Appeal from the Hamilton County Court of Appeals, First Appellate District
	:
	: Court of Appeals Case No. C-0900396
vs.	:
	:
THOMAS DIVO	:
	:
Defendant-Appellant.	:

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT THOMAS DIVO

Michael J. Newman (0042684)
Christopher R. McDowell (0072218)
Kurt R. Hunt (0084362)
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
Phone: (513) 977-8200
Fax: (513) 977-8141
Email: christopher.mcdowell@dinslaw.com

COUNSEL FOR DEFENDANT-APPELLANT, THOMAS DIVO

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SUPREME COURT OF OHIO

Paula Adams (069036)
Hamilton County Prosecutor's Office
230 East Ninth Street, Suite 4000
Cincinnati, OH 45202
Phone: (513) 946-3228
Fax: (513) 946-3100
Email: paula.adams@hcpros.org

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST. 1

STATEMENT OF THE CASE AND FACTS. 1

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW 2

Proposition of Law No. 1: The Retroactive Application of Senate Bill 10 Violates the Prohibition of *Ex Post Facto* Laws in Article I, Section 10 of the United States Constitution. 2

Proposition of Law No. 2: The Retroactive Application of Senate Bill 10 Violates the Prohibition on Retroactive Laws in Article II, Section 28 of the Ohio Constitution. 4

Proposition of Law No. 3: Reclassification of Appellant Constitutes a Violation of the Separation of Powers' Doctrine. 6

Proposition of Law No. 4: Reclassification of Petitioner Constitutes Impermissible Multiple Punishment Under the Double Jeopardy Clauses of the Ohio and United States Constitutions. 7

Proposition of Law No. 5: The Residency Restrictions of Senate Bill 10 Violate Due Process. 8

Proposition of Law No. 6: Reclassification of Appellant Constitutes a Breach of Contract. 10

Proposition of Law No. 7: Senate Bill 10 Violates the Right to Contract Under the Ohio and United States Constitutions. 11

Proposition of Law No. 8: The Application of Senate Bill 10 Violates the Prohibition Against Cruel and Unusual Punishment in the United States Constitution. 13

CONCLUSION 13

CERTIFICATE OF SERVICE. 14

1767378_1

APPENDIX **Appx. Page**

Judgment Entry of the Hamilton County Court of Appeals (March 24, 2010) . . . . . A

Decision/Entry of the Hamilton County Court of Common Pleas (June 4, 2009) . . . . . B

1767378_1

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents the issues of all the critical constitutional questions raised by Senate Bill 10, Ohio's Adam Walsh Act, which pertains to the sex offender classification law. Challenges to the law including separation of powers, retroactivity, *ex post facto*, double jeopardy, due process, cruel and unusual punishment were presented and addressed below. Splits in opinions between the appellate districts, as well as the practice of many courts to stay challenges to Senate Bill 10 to await further guidance from this Court, strongly support the importance of the constitutional questions raised in this appeal. In addition, Appellant is only one of thousands of offenders affected by substantially the same issues.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

Defendant-Appellant Thomas Divo (hereinafter "Mr. Divo") submitted a petition to the trial court pursuant to R.C. 2950.031(E) and R.C. 2950.032(E), for a hearing to contest the application of Senate Bill 10 ("S.B. 10"), also known as the Adam Walsh Act, to him on January 28, 2008. Hearings were held on the petition on November 6, 2008 and June 4, 2009. On June 4, 2009, the court filed an Entry Denying Petition Contesting Reclassification and New Registration Requirements Pursuant to R.C. 2950.031(E), and Removing the Community Notification Requirement. On June 9, 2009, Mr. Divo filed a timely notice of appeal, and on March 24, 2010, the Hamilton County Court of Appeals upheld the trial court's decision.

B. Factual Background

In 1998, Mr. Divo pled guilty to one count of sexual battery. Sentenced to 30 days in the Justice Center and three years of community control, Mr. Divo was not informed at

sentencing that he was required to register as a sex offender. Mr. Divo was first informed that he had to register in 2007; in July of that year, the court ordered Mr. Divo to register once per year for ten years, but gave him credit for all the time that had passed since his sentencing. That order, which was issued after the effective date of the Adam Walsh Act, provided for reporting no later than December of 2008. Nevertheless, pursuant to S.B. 10 and the new R.C. 2950, Mr. Divo was reclassified as a Tier III offender, subject to reporting every 90 days for life.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Retroactive Application of Senate Bill 10 Violates the Prohibition of *Ex Post Facto* Laws in Article I, Section 10 of the United States Constitution.

The *Ex Post Facto* Clause of Article I, Section 10 of the United States Constitution prohibits, among other things, any legislation that "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed."[1] A challenged statute violates the federal prohibition on *ex post facto* laws if the General Assembly intended to create a retroactive criminal punishment or, even if the Assembly intended to impose a civil penalty, if the statutory scheme is "so punitive in effect as to negate the State's intention to deem it civil."[2]

In determining the General Assembly's intent, courts must first "ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or

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1 *Miller v. Florida* (1987), 482 U.S. 423, 429, 107 S.Ct. 2446, 96 L.Ed.2d 351 (quoting *Calder v. Bull* (1798), 3 Dall. 386, 390, 1 L.Ed. 3).

2 *State v. Cook* (1998), 83 Ohio St.3d 404, 415, 700 N.E.2d 570; *Smith v. Doe* (2003), 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164.

impliedly a preference for one label or the other."[3] Unlike the 1997 Megan's Law, which the Ohio Supreme Court held was intended to be a "narrowly tailored attack on th[e] problem" of protecting the community from sex offenders, Senate Bill 10's classification is not tied to the individual's ongoing threat to the community.[4] Rather, classification flows directly from the offense of conviction, transforming Megan's Law's narrowly tailored solution into a categorical and punitive statutory scheme. This conclusion that the Assembly intended Senate Bill 10 to be punitive is further supported by its decision to place the Bill within Ohio's Criminal Code and to impose criminal prosecution and penalties on individuals who do not comply with its registration, verification, or notification requirements.[5]

Even if this Court determines that the General Assembly intended Senate Bill 10 to operate as a remedial statute, the bill has a "punitive effect so as to negate a declared remedial intention."[6] Factors for assessing the punitive effects of a statute include whether the obligations were historically regarded as punishment; operate as a disability or restraint; further traditional notions of punishment; bear a rational connection to non-punitive purpose; and/or are excessive in relation to the alternative purposes assigned.[7]

Senate Bill 10 meets all these factors. At its mildest, it imposes "mild personal embarrassment to social ostracism," and its residency restrictions resemble colonial punishments of "public shaming, humiliation, and banishment."[8] Senate Bill 10 subjects

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3 *Id.*; *Hudson v. United States* (1997), 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450.

4 *Cook*, 83 Ohio St.3d at 417.

5 See, generally, R.C. 2950.99. See, *Smith*, 538 U.S. at 94.

6 *Allen v. Illinois* (1985), 478 U.S. 364, 369, 106 S.Ct. 2988, 92 L.Ed.2d 296.

7 *Smith*, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez* (1963), 373 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644).

8 See, *Smith*, 538 U.S. at 98.

offenders to significant restraints on their liberty not shared by the general citizenry, akin to parole and probation, as a direct consequence of criminal conduct. This furthers traditional notions of punishment and deterrence and is not "narrowly tailored to comport with the respective danger and recidivism levels of the different classifications of sex offenders."[9] The imposition of obligations or burdens regardless of whether they are necessary in a particular case is clearly punitive in effect.

<u>Proposition of Law No. 2</u>: The Retroactive Application of Senate Bill 10 Violates the Prohibition on Retroactive Laws in Article II, Section 28 of the Ohio Constitution.

The Retroactivity Clause of Article II, Section 28 of the Ohio Constitution expressly forbids the enactment of retroactive laws, affording Ohio citizens greater protection against retroactive laws than the *Ex Post Facto* Clause of the United States Constitution.[10]

In *Van Fossen v. Babcock & Wilcox Co.*, the Ohio Supreme Court established a two-part inquiry to determine whether a particular statute is unconstitutionally retroactive.[11] The first step is to determine whether the General Assembly clearly expressed its intent for the statute to apply retrospectively.[12] If not, then the statute cannot be applied retroactively.[13] If the General Assembly clearly expressed its intent to apply the statute

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9 See, *Cook*, 83 Ohio St.3d at 421-22.

10 Section 28, Article II, Ohio Constitution ("The general assembly shall have no power to pass retroactive laws * * *."); *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 105, 522 N.E.2d 489.

11 *Id.* at 105-06.

12 *Id.* at 106.

13 *Id.*

retrospectively, the court must determine whether the statute is substantive or remedial.[14] If the statute is determined to be substantive, it violates the Retroactivity Clause.[15]

Ohio courts have held that the General Assembly clearly intended to apply Senate Bill 10's tier-classification and registration provisions retroactively.[16] First, a sexual offender must be given notice of the duty to register "regardless of when the person committed the sexually oriented offense."[17] Second, the tier classifications apply to offenders who registered under former R.C. Chapter 2950 prior to December 1, 2007.[18] Third, every "offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense," must register "[r]egardless of when the sexually oriented offense was committed."[19] Fourth and last, Senate Bill 10 provides for the reclassification of offenders who were classified under former R.C. Chapter 2950.[20]

With such clear intent, for Senate Bill 10 to apply retrospectively, it is rendered unconstitutional because it is a substantive law. First, Senate Bill 10 retroactively vacates a court order limiting Appellant's registration duties. Second, Senate Bill 10 retroactively affects accrued substantive rights conferred by former Chapter 2950 by impermissibly changing the registration and notification requirements for previously-adjudicated sex offenders. Where an appellant was provided an end date for registration requirements based on former Chapter 2950, he or she justifiably relied on that limitation and the Ohio

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14 *Id.* at 105.

15 *Id.* at 106.

16 See *Sewell v. State* (Feb. 27, 2009), 1st Dist. No. C-080503, 2009-Ohio-872, at ¶ 10.

17 R.C. 2950.03; R.C. 2950.03(A)(1), (2).

18 R.C. 2950.03(A)(5).

19 R.C. 2950.04.

20 R.C. 2950.031; R.C. 2950.032.

Constitution requires that the General Assembly honor that limitation.[21] Third, Senate Bill 10 indisputably "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."[22] Although "where no vested right has been created, a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration * * * created at least a reasonable expectation of finality."[23] Appellant here had a vested right and a reasonable expectation of finality. Accordingly, Senate Bill 10 is a substantive law and violates the Retroactivity Clause.

Proposition of Law No. 3: Reclassification of Appellant Constitutes a Violation of the Separation of Powers' Doctrine.

The legislative and executive branches' attempt to reclassify Appellant under Senate Bill 10 violates the separation of powers doctrine by interfering with a prior judicial adjudication regarding Appellant's sex offender status, and is therefore unconstitutional.

Prior to the enactment of Senate Bill 10, the determination of whether and how an offender had to register as a sexual offender was reserved to the judiciary.[24] The General Assembly impermissibly altered this judicial determination by enacting Senate Bill 10.

The Eleventh Appellate District recently held that the Adam Walsh Act violates the separation of powers doctrine to the extent it "attempts to modify the existing final sentencing judgments."[25] That holding was correct because, as the court noted, "[t]here is

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21 See, *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749.

22 *Van Fossen*, 36 Ohio St.3d at 106.

23 *Cook*, 83 Ohio St.3d at 412.

24 Cf. *State v. Eppinger* (2001), 91 Ohio St.3d 158, 166, 743 N.E.2d 881.

25 *Spangler v. Ohio* (Ohio App. 11th Dist. June 30, 2009), No. 2008-L-062, 2009-Ohio-3178, ¶55-58. *But see Ohio v. Maggy* (Ohio App. 11th Dist. June 30, 2009), No.

no exception to the rule that final judgments may not be legislatively annulled in situations where the Legislature has enacted new legislation."[26]

<u>Proposition of Law No. 4</u>: Reclassification of Petitioner Constitutes Impermissible Multiple Punishment Under the Double Jeopardy Clauses of the Ohio and United States Constitutions.

The Double Jeopardy Clauses of the United States and Ohio Constitutions preclude the imposition of multiple punishments in separate proceedings for the same substantive offense.[27] "The protections afforded by the two Double Jeopardy Clauses are coextensive."[28]

In analyzing Appellant's double jeopardy protections, the Court must first determine whether the legislature "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other."[29] Second, even in those cases where the legislature "has indicated an intention to establish a civil penalty," the statute may violate the Double Jeopardy Clauses where "the statutory scheme was so punitive

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2008-T-0078, 2009-Ohio-3180 (opinion published the same day as *Spangler* holding S.B. 10 to be constitutional -- critically, the "separation of powers" challenge that guided the holding in *Spangler* appears to have not been raised in *Maggy*); *Ohio v. Charette* (Ohio App. 11th Dist. June 19, 2009), No. 2008-L-069, 2009-Ohio-2952 (explicitly rejecting the "separation of powers" challenge).

26 *Id.* at ¶ 60 (emphasis added).

27 See, *Blockburger v. United States* (1931), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306; *United States v. Benz* (1930), 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354; *Brown v. Ohio* (1977), 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed.2d 187; *State v. Gustafson* (1996), 76 Ohio St.3d 425, 437, 668 N.E.2d 435 ("The Double Jeopardy Clause affords protection not only from multiple prosecutions, but also from imposition of multiple punishments in separate and successive proceedings.").

28 *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, at ¶ 7.

29 *Cook*, 83 Ohio St.3d at 415 (quoting *United States v. Ward* (1980), 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742).

either in purpose or effect, * * * as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty."[30]

As explained in Proposition of Law No. I ("Federal Ex Post Facto"), *supra*, the obligations and burdens imposed by Senate Bill 10 are punitive in both intent and effect and therefore constitute additional punishment. If the State is permitted to reclassify Appellant under Senate Bill 10, Appellant will have been punished twice in successive proceedings in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Proposition of Law No. 5: The Residency Restrictions of Senate Bill 10 Violate Due Process.

The residency restrictions enhanced by Senate Bill 10 violate the right to privacy guaranteed by Section 1, Article I of the Ohio Constitution. In addition, they violate the substantive component of the Due Process Clauses in the Fourteenth Amendment of the United States Constitution and in Section 16, Article I of the Ohio Constitution "which forbid[] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[31] Even when a fundamental liberty interest is not implicated, the due process clause requires state legislation to "rationally advanc[e] some legitimate governmental purpose."[32]

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30 *State v. Uskert*, 85 Ohio St.3d 593, 598, 1999-Ohio-289, 709 N.E.2d 1200 (internal quotations and citations omitted).

31 *Reno v. Flores* (1993), 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (emphasis in original); *State v. Burnett*, 93 Ohio St.3d 419, 428, 2001-Ohio-1581, 755 N.E.2d 857.

32 *Reno*, 507 U.S. at 306; see, also, *Fabrey v. McDonald Village Police Dep't* (1994), 70 Ohio St.3d 351, 354, 639 N.E.2d 31.

Reclassification under Senate Bill 10 prohibits Appellant from residing within 1000 feet of a school, pre-school, or child day-care center, restricting Appellant's choice of a home and "loom[ing]" over any residence selected by Appellant because of "the possibility of being repeatedly uprooted and forced to abandon homes" if a pre-school or day-care center opens near his residence.[33] These restrictions operate as a direct restraint on Appellant's liberty and infringe his fundamental right to live where he wishes as well as his right to privacy.

Freedom from physical restraint has always been recognized "as the core of the liberty protected by the Due Process Clause," and residency restrictions are just such a "restraint[] not shared by the public generally."[34] The residency restriction also violates Appellant's right to "live and work where he will" and establish a residence of his own choosing by restricting him to residences that are not located within 1000 feet of any school, pre-school, or day-care facility.[35]

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33 R.C. 2950.034; see, *Mann v. Georgia Dept. of Corr.* (2007), 282 Ga. 754, 756, 759, 653 S.E.2d 740.

34 *Kansas v. Hendricks* (1997), 521 U.S. 346, 356, 117 S.Ct. 2072, 138 L.Ed.2d 501 (quoting *Foucha v. Louisiana* (1992), 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437); see, also, *Youngberg v. Romeo* (1982), 457 U.S. 307, 316, 102 S.Ct. 2452, 73 L.Ed.2d 28; see, *Jones v. Cunningham* (1963), 371 U.S. 236, 240, 83 S.Ct. 372, 9 L.Ed.2d 285 (explaining that parole constitutes such a restraint); *Hensley v. Municipal Court, San Jose Milpitas Judicial Dist.* (1973), 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (explaining that an individual released on "his own recognizance" is subject to such restraints).

35 *Meyer v. Nebraska* (1923), 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042; *Kramer v. United States* (C.A.6, 1945), 147 F.2d 756, 759; *Valentyne v. Ceccacci* (Aug. 12, 2004), 8th Dist. No. 83725, 2004-Ohio-4240, at ¶ 47; see also, *State v. Williams*, 88 Ohio St.3d 513, 525, 2000-Ohio-428, 728 N.E.2d 342 (an individual's right to privacy under Section 1, Article I of the Ohio constitution "runs parallel to those rights of privacy guaranteed by the Fourteenth Amendment to the United States Constitution").

Given that the residency restriction impairs a fundamental liberty interest, it must be struck down unless it serves a compelling state interest and is "narrowly tailored [to] target[] and eliminate[] the exact source of the 'evil' it seeks to remedy."[36] Even assuming that the residency restrictions were designed to promote the safety of children and that this constitutes a compelling state interest, the State cannot demonstrate that the statute is narrowly tailored. The restrictions are not rationally related, let alone narrowly tailored, to serve the interest of protecting children from sex offenders because they fail to discriminate between offenders who present an ongoing risk to children and those who do not. In addition, empirical research indicates that the residency restrictions are ineffective as a mechanism for protecting children and may even be counterproductive.[37]

Accordingly, because R.C. 2950.034 burdens fundamental liberty interests and is not narrowly tailored to serve a compelling state interest, it must be struck down as unconstitutional.

Proposition of Law No. 6: Reclassification of Appellant Constitutes a Breach of Contract.

The State of Ohio's retroactive application of Senate Bill 10 to reclassify Appellant and impose new and additional obligations constitutes a breach of the plea agreement. A plea agreement is a contract that binds the State, and "the law in effect at the time a plea

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36 *Burnett*, 93 Ohio St. 3d at 429 (quoting *Frisby v. Schultz* (1998), 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420).

37 See, e.g., Minn. Dep't of Corrections, Level Three Sex Offenders Residential Placement Issues, 2003 Report to the Legislature, 9 (2003) ("Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact;" "[N]o evidence points to any effect on offense rates of school proximity residential restrictions;" "[B]lanket proximity restrictions on residential locations of [sex offenders] do not enhance community safety").

agreement is entered is part of the contract."[38] A breach of a plea agreement may be remedied by specific performance. When Appellant entered into his plea agreement, a different sex offender law was in effect and was a part of the agreement. Retroactive application of Senate Bill 10 materially breach the plea agreement by imposing enhanced sex offender classifications with more onerous obligations. Appellant is therefore entitled to specific performance of the State's obligation to impose sex offender requirements that were contemplated by the law in effect at the time of the plea agreement.

Proposition of Law No. 7: Senate Bill 10 Violates the Right to Contract Under the Ohio and United States Constitutions.

The breach of Appellant's plea agreement also involves an impairment of an obligation of contract prohibited by the Ohio and United States Constitutions.[39] Courts employ a three-step test to determine whether a law violates either the federal or Ohio Contract Clauses. First, a plaintiff must show that a change in the law resulted in a substantial impairment of a contractual relationship.[40] If a substantial impairment exists, the Court must determine whether the impairment was "reasonable and appropriate in the service of a legitimate and important public purpose."[41] If there is such a purpose, then the last step is to determine " * * * whether adjustment of 'the rights and responsibilities of

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38 *State v. Butts* (1996), 112 Ohio App.3d 683, 686, 679 N.E.2d 1170; *Layne v. Ohio Adult Parole Authority* (2002), 97 Ohio St.3d 456, 780 N.E.2d 548; see, also, *Ridenour v. Wilkinson* (Nov. 8, 2007), 10th Dist. No. 07AP-200, 2007-Ohio-5965, at ¶ 21.

39 Section 28, Article II, Ohio Constitution; Clause 1, Section 10, Article I, United States Constitution ("No State shall * * * pass any * * * Law impairing the Obligation of Contracts").

40 *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 76, 697 N.E.2d 644; *Quick Communications, Inc. v. Mich. Bell Tel.* (C.A.6, 2008), 515 F.3d 581, 587.

41 *Smith v. Denihan* (1990), 63 Ohio App.3d 559, 570-71, 579 N.E.2d 527 (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983), 459 U.S. 400, 412, 103 S.Ct. 697, 74 L.Ed.2d 569).

contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' * * * "[42] When a law impairs a State's own obligation, however, "complete deference to a legislative assessment of reasonableness and necessity is *not appropriate because the State's self-interest is at stake.*"[43]

As discussed in Proposition of Law No. 6, a plea agreement is a contract that binds the State and "the law in effect at the time a plea agreement is entered is part of the contract." Here, Appellant resolved the criminal charges against him by entering into a plea agreement with the State of Ohio. Appellant's sex offender classification and the attendant obligations imposed by the sex offender law in existence *at the time* of petitioner's plea were material parts of petitioner's plea agreement. Senate Bill 10 changed the law and substantially impaired the contract between the State and Appellant by imposing additional burdens on Appellant. In addition, Senate Bill 10 is unreasonable because it requires that Appellant be classified solely on the crime of his conviction, instead of assessing whether Appellant is actually a danger to others. Furthermore, Senate Bill 10 may require Appellant to register information that is unrelated to his conviction of record. Finally, for Tier III offenders, Senate Bill 10 may require community notification regardless of whether the offender committed an offense against a child or an adult. Accordingly, Senate Bill 10 is not "reasonable and appropriate" legislation, and Senate Bill 10 unconstitutionally impairs a contract between the Appellant and the State.

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42 *Denihan*, 63 Ohio App.3d at 571 (quoting *Energy Reserves Group*, 459 U.S. 400 at 412).

43 *U.S. Trust Co. of New York v. New Jersey* (1977), 431 U.S. 1, 25-26, 97 S.Ct. 1505, 52 L.Ed.2d 92 (emphasis added).

Proposition of Law No. 8: Senate Bill 10 Violates the Prohibition Against Cruel and Unusual Punishment in the United States Constitution.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment and guarantees individuals the right not to be subjected to excessive sanctions.[44] The prohibition against cruel and unusual punishments must be "interpreted according to its text by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design" and must refer "to 'the evolving standards of decency that mark the progress of maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[45]

As discussed above, Senate Bill 10 is not a pure civil remedy. The new duties, obligations, restrictions, and penalties associated with a failure to comply with Senate Bill 10 drastically altered the provisions of Ohio's sex offender registration laws and imposed a punishment that is excessive for the crime. Accordingly, Senate Bill violates the United State Constitution's prohibition on cruel and unusual punishment.

CONCLUSION

For the reasons discussed above, this Court should accept jurisdiction, adopt Appellant's Propositions of Law, hold the provisions of Senate Bill 10 unconstitutional, and reverse the decision of the Court of Appeals.

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44 *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335. See also *Furman v. Georgia* (1972), 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (per curium) (provision is applicable to the states through the Fourteenth Amendment); *Robinson v. California* (1962), 370 U.S. 660, 666-67, 82 S.Ct. 1417, 8 L.Ed.2d 758; *Louisiana ex rel. Francis v. Resweber* (1947), 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (plurality opinion).

45 *Id.* at 561 (quoting *Trop v. Dulles* (1958), 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (plurality opinion)).

Respectfully Submitted,

Michael J. Newman (0042684)
Christopher R. McDowell (0072218)
Kurt R. Hunt (0084362)
DINSMORE & SHOHL, LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
Phone: (513) 977-8588
Fax: (513) 977-8141
cmcdowel@dinslaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant Thomas Divo was sent via U.S. Mail to Assistant Prosecutor Paula Adams of the Hamilton County Prosecutor's Office, 230 E. 9th Street, Suite 4000, Cincinnati, Ohio 45202 on the 7th day of May, 2010.

Kurt R. Hunt

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

THOMAS DIVO,

Petitioner-Appellant,

vs.

STATE OF OHIO,

Respondent-Appellee.

ENTERED
MAR 2 4 2010

APPEAL NO. C-090396
TRIAL NO. SP-0800236

JUDGMENT ENTRY.

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

In 1998, petitioner-appellant Thomas Divo pleaded guilty to and was convicted of sexual battery. He was not notified about his duty to register as a sexual offender under former R.C. Chapter 2950. In 2007, an audit revealed that Divo had not been registering as a sex offender. On July 12, 2007, the trial court journalized an entry requiring Divo to register until December 8, 2008. Essentially, the court ordered Divo to register as a sexually-oriented offender under former R.C. Chapter 2950, requiring him to annually register as a sexual offender for ten years, with credit for the time he should have been but had not been registering.

Divo received a notice from the Ohio Attorney General stating that he had been reclassified under Am.Sub.S.B. No. 10 ("Senate Bill 10") as a Tier III sex offender and that he was required to register with the local sheriff every 90 days for life. Divo filed

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

EXHIBIT
A
Blumberg No. 5208

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Constitution, or the separation-of-powers doctrine.[4] Divo's arguments under the United States Constitution are also overruled on *Sewell's* reasoning.

Divo's fifth assignment of error is overruled. Divo has no standing to challenge Senate Bill 10's residency restriction because he has not shown that he lives in or owns property within the restricted area or that he has been forced to move outside the restricted area.[5] We note that the Ohio Supreme Court held in *Hyle v. Porter*[6] that because the residency restriction in former R.C. 2950.031 was not expressly made retrospective, it could not be applied to an offender who had bought his home and committed his offense before the effective date of the statute.

Divo's sixth and seventh assignments of error, which allege that reclassifying him as a Tier III sex offender under Senate Bill 10 constituted a breach of his plea agreement and an impairment of an obligation of contract, in violation of Section 28, Article II of the Ohio Constitution and Clause I, Section 10, Article I of the United States Constitution, are overruled.[7] The retroactive application of Senate Bill 10's tier-classification and registration requirements to a sex offender who pleaded guilty to a sexually-oriented offense pursuant to a plea bargain does not violate the Contract Clause of the Ohio and United States Constitutions, because when the offender entered his plea he had no reasonable expectation that his sex offense would never be made the subject of future legislation and no vested right concerning his

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[4] Id.
[5] See *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112; *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059; *State v. Duncan*, 3rd Dist. No. 7-08-03, 2008-Ohio-5830.
[6] 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899.
[7] Judge Hendon agrees that the sixth and seventh assignments of error are without merit not for the reasons given in the body of this judgment entry, but because there is no evidence in the record that Divo's registration requirement was a term of any plea agreement.

ENTERED
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registration duties.[8] Senate Bill 10's tier-classification and registration requirements are remedial, collateral consequences of the underlying criminal sex offense, and they do not affect a plea agreement previously entered between the state and the offender.[9]

The eighth assignment of error, alleging that the retroactive application of Senate Bill 10's registration requirements constitutes cruel and unusual punishment, is overruled because the statutes are civil and remedial, not punitive.[10] Therefore, the registration requirements cannot be viewed as punishment.[11]

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 24, 2010

per order of the Court _____.
Presiding Judge

[8] See *White v. State*, 1st Dist. No. C-090177, 2010-Ohio-234; *Burbrink v. State*, 1st Dist. No. C-081075, 2009-Ohio-5346.
[9] See id.
[10] See *Sewell v. State*, supra, at fn. 3.
[11] See id.; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051.

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THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

ENTERED
JUN 04 2009

STATE OF OHIO	:	NO. SP0800236
	:	(Judge Mallory)
Respondent		
vs.	:	**ENTRY DENYING PETITION CONTESTING RECLASSIFICATION AND NEW REGISTRATION REQUIREMENTS PURSUANT TO R.C. 2950.031(E), AND REMOVING THE COMMUNITY NOTIFICATION REQUIREMENT**
THOMAS DIVO	:	
Petitioner	:	

Pursuant to R.C. 2950.031(E), the court has considered all relevant information and/or testimony presented by all parties in this matter and finds that the Petitioner has not proven by clear and convincing evidence that the new registration requirements do not apply to him in the manner specified in the Attorney General's letter to him nor has the Petitioner proven by clear and convincing evidence that the new registration requirements do not apply at all to him.

Petitioner was previously notified of his duties to register as a Sexually Oriented Offender in 2007 by the Hamilton County Sheriff's Department. Therefore, the court orders that the registration requirements as set out in R.C. 2950.04; R.C. 2950.05, and R.C. 2950.06 as applicable to a **Tier III offender** apply to the Petitioner, and that he is **not** subject to the community notification provisions under R.C. 2950.11.

6-4-09

William Mallory, Judge
Hamilton County Court of Common Pleas

EXHIBIT
B