

IN THE SUPREME COURT OF OHIO
2010

STATE OF OHIO,

Case No. 09-88

Appellee,

-vs-

On Appeal from
the Warren County
Court of Appeals, Twelfth
Appellate District

GEORGE WILLIAMS,

Court of Appeals
No. CA2008-02-029

Appellant.

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

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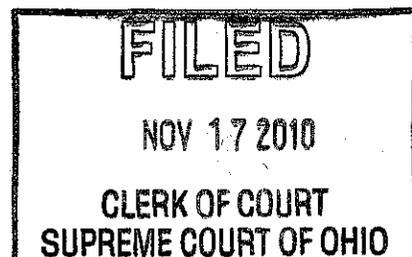


TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF AMICUS INTEREST	1
STATEMENT OF FACTS	1
ARGUMENT	1
RESPONSE TO PROPOSITION OF LAW	
OHIO’S ADAM WALSH ACT (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.	1
<u>A. Standard of Review</u>	3
<u>B. Law before and after AWA</u>	4
<u>C. Ex Post Facto Analysis</u>	6
<u>1. Non-Retroactivity</u>	6
<u>2. Increased Registration Duties do not inflict “Punishment.”</u>	11
<u>D. Section 28 Retroactivity Analysis</u>	15
<u>E. Ferguson</u>	15
<u>F. No De Minimis Standard</u>	19
<u>G. Appellate Courts Have Rejected Ex Post Facto and Retroactivity Claims</u>	20
<u>H. AWA Satisfies Rational Basis Scrutiny</u>	23
<u>I. No Need for Individualized Risk-Based Assessment</u>	29
<u>J. Residency Restriction</u>	35

<u>K. Additional Information Requirements are Proper</u>	41
<u>L. Bodyke Holding Does Not Aid Defendant</u>	44
CONCLUSION	49
CERTIFICATE OF SERVICE	49

TABLE OF AUTHORITIES

CASES

<i>Abbott Labs v. Gardner</i> (1967), 387 U.S. 136.....	35
<i>Adkins v. McFaul</i> (1996), 76 Ohio St.3d 350.....	33
<i>Am. Assoc. of Univ. Professors v. Central State University</i> (1999), 87 Ohio St.3d 55 .34, 40	
<i>B.F. Goodrich v. Peck</i> (1954), 161 Ohio St. 202.....	47
<i>Benjamin v. Columbus</i> (1957), 167 Ohio St. 103.....	33
<i>Blackburn v. State</i> (1893), 50 Ohio St. 428.....	11
<i>Boswell v. State</i> , 12th Dist. No. CA2010-01-006, 2010-Ohio-3134.....	45
<i>Brecht v. Abrahamson</i> (1993), 507 U.S. 619.....	47
<i>Conn. Dept. of Public Safety v. Doe</i> (2003), 538 U.S. 1.....	8
<i>Dandridge v. Williams</i> (1970), 397 U.S. 471.....	34
<i>DeMoise v. Dowell</i> (1984), 10 Ohio St.3d 92.....	33
<i>DeVeau v. Braisted</i> (1960), 363 U.S. 144.....	10
<i>Doe v. Miller</i> (C.A. 8, 2005), 405 F.3d 700.....	39
<i>Doe v. Pataki</i> (C.A. 2, 1997), 120 F.3d 1263.....	18

<i>Doe v. Ronan</i> , ___ Ohio St.3d ___, 2010-Ohio-5072	7, 11
<i>East Liverpool v. Columbiana Cty. Budget Comm.</i> , 114 Ohio St.3d 133, 2007-Ohio-3759	4, 7, 48
<i>FCC v. Beach Communications</i> (1993), 508 U.S. 307	33, 34
<i>Flemming v. Nestor</i> (1960), 363 U.S. 603	10, 18
<i>Green v. State</i> , 1 st Dist. No. C-090650, 2010-Ohio-4371	45
<i>Harrold v. Collier</i> , 107 Ohio St.3d 44, 2005-Ohio-5334	4
<i>Hawker v. New York</i> (1898), 170 U.S. 189	9, 10, 35
<i>Heller v. Doe</i> (1993), 509 U.S. 312	34, 40, 41
<i>Hyle v. Porter</i> , 117 Ohio St.3d 165, 2008-Ohio-542	36, 38
<i>Hyle v. Porter</i> , 170 Ohio App.3d 710, 2006-Ohio-5454	36, 38
<i>Ignazio v. Clear Channel</i> , 113 Ohio St.3d 276, 2007-Ohio-1947	2
<i>In re Adrian R.</i> , 5 th Dist. No. 08-CA-17, 2008-Ohio-6581	31
<i>In re G.E.S.</i> , 9 th Dist. No. 24079, 2008-Ohio-4076	23
<i>Jacobson v. United States</i> (1992), 503 U.S. 540	32
<i>Kansas v. Hendricks</i> (1997), 521 U.S. 346	12, 20
<i>Kraly v. Vannewirk</i> (1994), 69 Ohio St.3d 627	2
<i>Kramer v. United States</i> (C.A. 6, 1945), 147 F.2d 756	38
<i>Lakengren v. Kosydar</i> (1975), 44 Ohio St.2d 199	15
<i>Landgraf v. USI Film Products</i> (1994), 511 U.S. 244	7
<i>Lynce v. Mathis</i> (1997), 519 U.S. 433	6
<i>Meyer v. Nebraska</i> (1923), 262 U.S. 390	38

<i>Montgomery v. Leffler</i> , 6 th Dist. No. H-08-011, 2008-Ohio-6397	21
<i>Ohio Apt. Assn. v. Levin</i> , ___ Ohio St.3d ___, 2010-Ohio-4414	2
<i>Ohio v. Akron Center for Reproductive Health</i> (1990), 497 U.S. 502	43
<i>Personal Serv. Ins. Co. v. Mamone</i> (1986), 22 Ohio St.3d 107	15
<i>Reno v. Flores</i> (1993), 507 U.S. 292	40
<i>Smith v. Doe</i> (2003), 538 U.S. 84	passim
<i>State ex rel. Elyria Foundry Co. v. Industrial Comm.</i> (1998), 82 Ohio St.3d 89	35
<i>State ex rel. Matz v. Brown</i> (1988), 37 Ohio St.3d 279	10, 15
<i>State ex rel. O'Brien v. Heimlich</i> , 10th Dist. No. 08AP-521, 2009-Ohio-1550	38
<i>State ex rel. Plavcan v. School Emp. Retirement Sys. of Ohio</i> (1994), 71 Ohio St.3d 240	7
<i>State ex rel. Public Institutional Bldg. Auth. v. Griffith</i> (1939), 135 Ohio St. 604	48
<i>State ex rel. White v. Billings</i> , 12 th Dist. No. CA2006-72, 2007-Ohio-4356	38
<i>State ex rel. Yost v. Slack</i> , 5 th Dist. No. 06CA-22, 2007-Ohio-1077	38
<i>State v. Barnes</i> (2002), 94 Ohio St.3d 21	4
<i>State v. Benson</i> (1992), 81 Ohio App.3d 697	33
<i>State v. Bodyke</i> , 126 Ohio St.3d 266, 2010-Ohio-2424	passim
<i>State v. Clayborn</i> , 125 Ohio St.3d 450, 2010-Ohio-2123	2, 36, 37
<i>State v. Cook</i> (1998), 83 Ohio St.3d 404	passim
<i>State v. Countryman</i> , 4 th Dist. No. 08CA12, 2008-Ohio-6700	22
<i>State v. Davis</i> , 116 Ohio St.3d 404, 2008-Ohio-2	3
<i>State v. Ferguson</i> , 120 Ohio St.3d 7, 2008-Ohio-4824	passim

<i>State v. Gilfillan</i> , 10 th Dist. No. 08AP-317, 2009-Ohio-1104.....	20, 36
<i>State v. Hayden</i> , 96 Ohio St.3d 211, 2002-Ohio-4169.....	32
<i>State v. King</i> , 2 nd Dist. No. 08-CA-02, 2008-Ohio-2594	20, 31
<i>State v. Payne</i> , 114 Ohio St.3d 502, 2007-Ohio-4642	47
<i>State v. Peak</i> , 8 th Dist. No. 90255, 2008-Ohio-3448.....	36, 38
<i>State v. Pierce</i> , 8 th Dist. No. 88470, 2007-Ohio-3665	36
<i>State v. Reagle</i> (1991), 9 th Dist. No. 14601	11
<i>State v. Swank</i> , 11th Dist. No. 2008-L-019, 2008-Ohio-6059	22
<i>State v. Thompkins</i> (1996), 75 Ohio St.3d 558	33, 48
<i>State v. Vanhorn</i> (1983), 8 th Dist. No. 44655	11
<i>State v. Waller</i> (1976), 47 Ohio St.2d 52	47
<i>State v. Williams</i> (2000), 88 Ohio St.3d 513	passim
<i>State v. Williams</i> , 2 nd Dist. No. 22574, 2010-Ohio-3537	45
<i>State v. Wilson</i> , 113 Ohio St.3d 382, 2007-Ohio-2202	21
<i>United Engineering & Foundry Co. v. Bowers</i> (1960), 171 Ohio St. 279.....	7
<i>United States v. Salerno</i> (1987), 481 U.S. 739	4
<i>Valentyne v. Ceccacci</i> , 8 th Dist. No. 83725, 2004-Ohio-4240	38
<i>Washington v. Glucksberg</i> (1997), 521 U.S. 702.....	32, 33, 39
<i>Webster v. Fall</i> (1925), 266 U.S. 507.....	46

STATUTES

Former R.C. 2950.01(D)4
Former R.C. 2950.01(O)5
Former R.C. 2950.031.....35
Former R.C. 2950.04, .05, .06, & .07.....4
Former R.C. 2950.04(C)43
Former R.C. 2950.06(B)(1).....5
Former R.C. 2950.07(B)(1).....5
Former R.C. 2950.07(B)(2).....5
Former R.C. 2950.09.....4
Former R.C. 2950.09(B)(3) & (E).....14
Former R.C. 2950.11.....5
Former R.C. 2950.11(F)(1)(c).....5
R.C. 2929.13(I).....14, 37
R.C. 2929.19(B)(4)13
R.C. 2950.01(E), (F), & (G).....5
R.C. 2950.01(F)(1)(b)6
R.C. 2950.02.....12, 15
R.C. 2950.02(A) & (B)12
R.C. 2950.03(A)(1).....14
R.C. 2950.05(B)(1)6

R.C. 2950.05(B)(2)	6
R.C. 2950.05(B)(3)	6
R.C. 2950.05(D)	43
R.C. 2950.06(B)(1)	6
R.C. 2950.06(B)(2)	6
R.C. 2950.06(B)(3)	6
R.C. 2950.08(A)	44
R.C. 2950.11	6
R.C. 2950.13(A)(1).....	44
R.C. 2950.13(A)(1)(a) to (i)	44
R.C. 2950.13(A)(11).....	44

OTHER AUTHORITIES

CRCC website.....	25, 26
House Bill 180.....	4
TAASA website	passim

CONSTITUTIONAL PROVISIONS

Article II, Section 28, of the Ohio Constitution.....	15
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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 nearly three years has included representing the State in proceedings in which sex offenders have challenged the constitutionality of Senate Bill 10 (“Adam Walsh Act” or “AWA”). 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 appeal, 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 and factual history of the case set forth in the State’s merit brief.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW

**OHIO’S ADAM WALSH ACT (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.**

Defendant raises retroactivity, ex post facto, and due process challenges to the changes effected by AWA. 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. These cases repeatedly, in statement after statement, have provided statements of law and analysis that support the constitutionality of Ohio's new scheme. They 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 imposing an additional "punishment."

Although the foregoing Ohio cases are not fully "controlling" because they were not ruling on a registration scheme in all ways identical to AWA, the cases cannot merely be disregarded either. These cases repeatedly recognize the propriety of having registration schemes for sex offenders, and these cases recognize basic truths about the non-punitive purposes and goals behind such schemes generally, and the non-punitive purposes and goals behind the Ohio regulatory scheme in particular. Disregarding these basic truths established in *Cook*, *Williams*, and *Ferguson* would violate stare decisis.¹

Of course, in addressing the ex post facto question under the federal constitution, this Court is bound by *Smith v. Doe* and its holding that the Alaska scheme did not violate federal ex post facto principles. Ohio's current AWA scheme bears striking similarities to the conviction-based approach of the Alaska scheme, and so *Smith v. Doe* cannot easily be "distinguished" here.

This Court's recent decision in *State v. Clayborn*, 125 Ohio St.3d 450, 2010-Ohio-

¹ Based on the plurality opinion in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶ 37, amicus ACLU contends that stare decisis has no application to constitutional questions. But the plurality opinion was grounded in the vote of only three justices, and all three have already abandoned that position by subsequently concurring in *Ohio Apt. Assn. v. Levin*, ___ Ohio St.3d ___, 2010-Ohio-4414, ¶¶ 30-31, 57. In the absence of a fourth vote, the views of the *Bodyke* plurality on this point were not precedential anyway. *Kraly v. Vannewirk* (1994), 69 Ohio St.3d 627, 633; *Ignazio v. Clear Channel*, 113 Ohio St.3d 276, 2007-Ohio-1947, ¶ 10.

2123, supports the position that the registration requirements are non-punitive. The Court recognized that “we have held that the classification, registration, and notification system enacted as part of Megan’s Law, as amended, is civil and remedial * * *,” although classification is often addressed in a “criminal case.” *Clayborn*, ¶ 10. The Court further stated that a criminal court’s recognition of an offender’s AWA classification is a “civil matter” addressed within the confines of a “criminal case.” *Id.* ¶ 11 (“While sex-offender-classification proceedings are civil in nature and require a civil manifest-weight-of-the-evidence standard, we hold that an appeal from a sexual offender classification judgment is a civil matter within the context of a criminal case.”). This analysis confirms that SORN requirements are fundamentally civil, remedial, and non-punitive in nature, as recognized in the prior decisions in *Cook*, *Williams*, *Smith*, and *Ferguson*.

Finally, challenges to the new scheme fall far short of showing that the new scheme is irrational. Indeed, the website of one of defendant’s amici indicates that sex offenders need the aid of “external controls” like registration and community notification to help control their behaviors. See pp. 24-28, *infra*.

A. Standard of Review

Defendant bears the burden of proving unconstitutionality beyond a reasonable doubt. *Cook*, 83 Ohio St.3d at 409. Because these issues were not raised in the trial court, see 12th District Opinion, ¶ 6, the issues are forfeited. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. “A forfeited claim will still be considered under plain-error analysis.” *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 375. “However, the test for plain error is stringent. A party claiming plain error must show that (1) an error occurred; (2) the error was obvious; and (3) the error affected the outcome of the trial.”

Id. ¶ 375, citing *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. In addition, the error must be “ ‘plain’ at the time that the trial court committed it.” Id. at 28. Defendant cannot satisfy all of these requirements for the plain-error standard.

It should be noted that any facial-constitutional claim would fail, as defendant cannot establish that the statute is unconstitutional in all applications. *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. Defendant is therefore left to contend that the statute is unconstitutional as applied to him, i.e., as applied to an offender who engaged in unlawful sexual conduct with a 14-year-old minor.

B. Law before and after AWA

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). Former R.C. 2950.07(B)(2) (eff. 7-31-03 – 20-year duty for small subset of adult habituals; for all other adult habituals, “the offender’s duty to comply with those sections continues until the offender’s death.”).

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).

Another category was added in 2002 and expanded in 2003 for “aggravated sexually oriented offenses,” 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).

Under the Megan’s Law scheme, defendant would have been at least a sexually oriented offender, and he would have been subject to a hearing to determine whether he was a habitual or predator.

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

Effective January 1, 2008, Tier I offenders must register for 15 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 25 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.

Under AWA, defendant is a Tier II offender who must register for 25 years and must periodically verify every 180 days. R.C. 2950.01(F)(1)(b). Defendant does not face community notification as a Tier II offender, and therefore he cannot maintain any as-applied challenge in that respect.

C. 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 case, 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. This amicus 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. Plavcan 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.

In *Doe v. Ronan*, ___ Ohio St.3d ___, 2010-Ohio-5072, this Court recently concluded that a statute using a pre-existing conviction to disqualify the offender from starting or continuing employment after the effective date was “prospective in application.”

Id. at ¶ 27. As this Court stated:

{¶ 27} Doe’s contention notwithstanding, the background-check legislation in R.C. 3319.391 is prospective in application. This legislation simply imposed a new

restriction on the school district regarding the qualifications of persons it could employ after a specific date, with a focus on those persons who have had felony convictions. This legislation does not go back to the date of the employee's initial hire, terminate that person effective as of the hire date and eliminate any of that person's accrued benefits. Doe has not been deprived of any pay, retirement credit, or other benefits he accrued during his tenure with CPS. Instead, the conduct that the background-check legislation prohibits, i.e., continued employment after a disqualifying criminal-background check, occurs only after the effective date of the statute, November 14, 2007.

Just as the statute in *Doe* was prospective in regulating future or continued employment on the basis of pre-existing convictions, the lengthened registration duty and increased frequency of verification imposed by AWA regulate the offender's registration requirements on a prospective basis. AWA 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 in the future 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 ongoing 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.* “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.* 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 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 approach can be seen at work in this Court’s recent decision in *Doe v. Ronan*, discussed above.

This principle also can be seen at work in cases upholding laws prohibiting convicted felons from possessing firearms. Even when the 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 for the highest Tier 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*. The old system already regulated in this categorical, conviction-based approach as to "sexually oriented offenders," "habitual sex offenders," and "aggravated sexually oriented offenses."

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 * * *." *Id.* at 104. States can "impos[e] regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." *Id.* "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.

Some have argued 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 * * *.” A similar provision applies to offenders in other Tiers and requires that the sentencing court “shall include in the sentence a summary of the offender’s duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties.” R.C. 2929.13(I). But these provisions are consistent with the law’s remedial purpose. To ensure compliance, the law requires that the ODRC and/or the court will provide notifications to an offender regarding his registration duties. R.C. 2950.03(A)(1) and (A)(2); R.C. 2929.13(I). These provisions requiring that the trial court include a “statement” or a “summary” will help ensure that the ODRC and/or the offender fully understand the applicable Tier level. 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.”).

Language about the “statement” or “summary” 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). A system wishing to ensure compliance will have these kinds of mechanisms in place, and such mechanisms are not a “smoking gun” showing punitive intent.

If anything, a requirement that a “statement” or “summary” be included “in” the “sentence” is a recognition that the “statement” or “summary” is not itself a “sentence.” A

“statement” or “summary” 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. Provisions for giving registration information to the offender do not constitute the “clearest proof” that the registration scheme as a whole is punitive.

D. 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.” The AWA 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 is also remedial, so that it 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.

E. 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 AWA 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*, ¶ 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." *Id.*

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*, ¶ 28. "In light of that legislative intent, we have held consistently that R.C. Chapter 2950 is a remedial statute." *Id.* ¶ 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*, ¶ 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*, ¶ 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*, ¶ 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*, ¶ 37 (citing *Smith*).

The *Ferguson* Court emphasized that the "Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment." *Ferguson*, ¶ 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*, ¶ 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*, ¶ 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*, ¶ 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*, ¶ 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*, ¶ 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*, ¶ 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*, ¶ 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*, ¶ 39 (quoting another case); see, also, *Smith*, 538 U.S. at 100.

F. 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 recognized in *Ferguson*., including deportation, deprivation of employment, and, in *Hendricks*, involuntary commitment. *Ferguson*, ¶ 39; see, also, *Smith*, 538 U.S. at 100.

G. Appellate Courts Have Rejected Ex Post Facto and Retroactivity Claims

A number of Ohio appellate courts have rejected retroactivity and ex post facto challenges. 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.

Representative is the Second District’s decision in *State v. King*, 2nd Dist. No. 08-CA-02, 2008-Ohio-2594, appeal allowed, 119 Ohio St.3d 1471, 2008-Ohio-4911, dismissed, 120 Ohio St.3d 1441, 2008-Ohio-6417. *King* 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, 2008-Ohio-5198, ¶ 21, appeal allowed, 121 Ohio St.3d 1424, 2009-Ohio-1296. “[W]e conclude that the S.B. 10 amendments at issue here are remedial and civil in nature.” *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397, ¶ 22.

{¶ 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 * * *.

State v. Countryman, 4th Dist. No. 08CA12, 2008-Ohio-6700, appeal allowed, 121 Ohio St.3d 1449, 2009-Ohio-1820.

{¶ 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.

State v. Swank, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, appeal allowed, 121 Ohio St.3d 1439, 2009-Ohio-1638.

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.

In re G.E.S., 9th Dist. No. 24079, 2008-Ohio-4076, appeal allowed, 120 Ohio St.3d 1504, 2009-Ohio-361, ¶ 24.

H. AWA Satisfies Rational Basis Scrutiny

The briefing of amici Cleveland Rape Crisis Center (“CRCC”) and the Texas

Association Against Sexual Assault (“TAASA”) appear to contend 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 and misinformation,” not actual danger.

The General Assembly was not bound by these views of what constitutes enlightened policy, especially a purported “enlightened” policy that would involve an enforced ignorance on the part of the public. The General Assembly was required to deal with the cold and hard fact that sex offenders reoffend in substantial numbers. Even the amici briefing concedes varying recidivism rates of 5.3%, 11% and/or 14%. See Amici Brief, at 4. They concede that such “official recidivism data (for any offense type) underestimates actual re-offense rates * * *.” Id. at 4.

On their face, 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*, ¶ 7 n. 2.

But things are far worse than these recidivism statistics suggest. The websites for these amici concede that sex crimes are massively underreported. The TAASA website states that “[r]esearch has shown the majority of individuals who abuse sexually will not end up in the criminal justice system.” It further states:

The occurrence of forcible rape in our country appears to be on the rise. The Senate Judiciary Committee in its Majority Staff Report entitled Violence Against Women:

The Increase of Rape in America determined that more women were raped in 1990 than in any other year in American history.

The rate of rape will continue to increase without appropriate prevention and response. In 1993, the Senate Judiciary Committee concluded that only two percent of rapists are imprisoned. Attitudes about women who are raped and rapists continue to present barriers to justice. Because we doubt the validity of victims' experiences, rape remains the silent crime, reported at least less than 15 percent of the time it occurs.

- More than 226,000 children and 104,000 adults are raped every year in Texas.
- The United States has the highest rape rate of any industrialized nation.
- In one survey, 42 percent of rape victims reported that they had told no one about the assault. Only five percent reported to the police.
- In a survey of college men, 35 percent anonymously admitted they would commit rape if they knew they could get away with it.
- One of every five college women reported being forced to have sexual intercourse.

(TAASA website, viewed 11-2-10; footnotes omitted) Given such massive underreporting, the available statistics of known recidivism, which are usually tied to actual re-imprisonment or re-arrest, would themselves fall massively short in indicating how often the sex offenders have committed further sex offenses.

The underreporting extends to the number of victims as well. The CRCC reports on its website that “[a]pproximately 70 percent of sexual offenders of children have between 1 and 9 victims. About 20-25 percent has 10 to 40 victims.” (CRCC website, viewed 11-2-10) “Serial child molesters have as many as 400 victims in their lifetimes.”

(Id.) For sexual assaults generally, “60 percent of sexual assaults are unreported.” (Id.) Given these statistics, a single offender very well could have abused several child victims or could have raped multiple adult victims before being caught.

Along these same lines, the CRCC website reports that “1 out of 7 women, or nearly 635,000 women in Ohio, has been a survivor of forcible rape sometime in her lifetime.” (Id.) It also reports that “[r]ape is the most underreported crime.” (Id.) And “Ohio is in a region of the nation that has a higher-than-average rape prevalence.” (Id.)

Nationally, the CRCC reports that “[s]exual assault is one of the most under reported crimes, with 60% still being left unreported.” (Id.) “1 out of every 6 American adult women has been the victim of an attempted or completed rape in her lifetime (14.8% completed rape; 2.8% attempted rape).” (Id.)

In short, the General Assembly was not bound to conclude that sexual reoffending occurs at only the reduced rates suggested in the amici briefing. The General Assembly could conclude that such recidivism rates, based on re-imprisonment or re-arrest, are the tip of a very large iceberg.

The General Assembly could also rationally conclude that society needs the modest protection afforded by longer and more frequent registration than was afforded before. The TAASA website concedes that offenders cannot be “cured”, and not all offenders can learn to manage their behaviors. The TAASA website states that “[a] ‘cure’ for sex offending is no more available than is a ‘cure’ for high blood pressure. But with specialized offense specific treatment by qualified individuals, the majority of sex offenders can learn to manage their behaviors.” (TAASA website, viewed 11-2-10; footnotes omitted)

Treatment apparently can be problematic in many cases, however, as TAASA concedes that “[s]ex offender behaviors are extremely resistant to change * * *.” (TAASA website, viewed 11-2-10; footnotes omitted) Sex offenders are “highly manipulative,” and they “continually test boundaries.” (Id.)

Ironically, the TAASA website emphasizes that sex offenders need the assistance of “external controls,” including, “i.e., * * * registration * * * and community notification” to help control their behaviors. (Id.) As stated on the TAASA website:

Sex Offender Behaviors

Not all sex offenders share all of the following characteristics, and the absence of a particular characteristic does not mean the individual is not a sex offender.

- Secrecy and dishonesty is a major component of sex offending behavior. Sex crimes flourish in deception and silence.
- Sex offenders typically have developed complicated and persistent psychological and social systems constructed to assist them in denying and minimizing the harm they inflict on others, and often they are very accomplished at presenting others a façade designed to conceal the truth about themselves.
- Cognitive distortions allow the sex offender to justify, rationalize, and minimize the impact of their deviant behavior (i.e. “I was drunk”, “We were in love”, “She came on to me”, “The child wanted it and I did not have the heart to say no”, “I only fondled the child”).
- Sex offenders are highly manipulative and will triangulate/split those around them. The skills used to manipulate victims are employed to manipulate family members, friends, co-workers, supervision officers, treatment providers, and case managers.

- Grooming activities are not solely for potential victims. Offenders will groom parents to obtain access to their children.
- Grooming is well-organized and can be long term.
- The longer a sex offender knows an individual the better they are at “zeroing in” their grooming (“I can read people like a book. I know what others need and I am available to help out”.)
- Sex offenders are generally personable and seek to “befriend” those around them (“My smile is my entrée”. “I’m like a salesman but I’m never off work”.)
- Sex offenders will continually test boundaries (personal/professional space).
- Sex offenders exploit relationships and social norms to test boundaries.
- Sex offenders seek professions that allow them access to victims.

Sex offender behaviors are extremely resistant to change, so sanctions to both control and punish deviant behaviors are necessary in protecting public safety. In order to manage their behavior, sex offenders must have external controls (i.e. supervision, support system, law enforcement, registration, child safety zones, electronic or global positioning satellite monitoring, and community notification) and develop internal controls (i.e. identifying triggers and deviant thoughts that precede their offending so it does not lead to the act). Without external restraints many offenders will not follow through with treatment. Internal motivation improves prognosis, but it does not guarantee success.

(TAASA website, viewed 11-2-10; footnotes omitted)

These statistics and contentions reveal the sober and serious concerns with which the General Assembly must grapple. Sex offenses are chronically underreported, and

convicted sex offenders are generally in need of external controls because many offenders will not follow through and many are manipulative. Registration for such crimes and for such a group of offenders is rationally based, and, indeed, highly appropriate.

The amici arguments are particularly misplaced in focusing on the statistic that only 7% of child sex offenders were “strangers” to the child victim. This is one of the very points of the registration scheme, as the scheme makes information available to the public so that the public itself can take appropriate measures to determine who their child associates with. As the TAASA website information shows, substantial “grooming” takes place whereby the offender insinuates himself into the life of the child so that the child can be exploited. The very modus operandi of the offender is to get to know the child. With registration and, if applicable, community notification, parents are aided in determining which persons the child should stay away from in the neighborhood.

Sex offenders have no right to seek out or maintain meaningful relationships with the children of others or with other adults who would find the information valuable and decline to engage in such relationships if fully informed.

I. No Need for Individualized Risk-based Assessment

Part of the amici briefing is based on the assertion that Ohio has switched from a “risk-based” system to a system that wrongly classifies the offender by the nature of the offense. But the former system in large measure was not “risk based.” Without finding any “risk,” the offender was automatically classified as a sexually oriented offender. Habitual sex offenders were subject to that classification without any individualized assessment of “risk,” based on the existence of a prior and current conviction of a sexually oriented offense. Likewise, many child rapists and forcible rapists were treated

like predators solely because of their conviction for “aggravated sexually oriented offenses.” For these three categories of offenders, courts did not engage in some finely-tuned assessment of risk; the classification applied as a matter of law based on current and/or prior conviction(s). In short, the prior system now touted by defendant and his amici as “risk based” was in large measure based on the conviction-based approach for which they now criticize AWA.

Their real complaint is that the top category in AWA, Tier III, is not based on an individualized risk assessment, but, rather, based on the General Assembly’s own conclusion that the most serious offenses should have the highest tier. But, 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, and defendant’s amici concede that there are such risks of reoffense.

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.

In re Adrian R., 5th Dist. No. 08-CA-17, 2008-Ohio-6581, ¶ 33, appeal allowed, 121 Ohio St.3d 1472, 2009-Ohio-2045; 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 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 constitutionality of the law. A law should not be found unconstitutional on the chance that isolated incidents of harassment by private individuals might occur, particularly in light of the fact that “ex post facto” and “due process” only protect 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, ¶ 14; *id.* ¶ 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, paragraph six of the syllabus; *DeMoise v. Dowell* (1984), 10 Ohio St.3d 92, 96-97.

Defendant falls 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 and that other offenders should be assigned to other Tiers. “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.

J. Residency Restriction

Defendant includes a challenge to 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. The school-based restriction was already in place at the time of defendant’s May 2007 crime. See former R.C. 2950.031 (eff. 7-31-03). The preschool-based and daycare-based part of the restriction took effect on July 1, 2007, shortly after defendant’s crime. R.C. 2950.034.

There is no indication that the residency issue is ripe for review. The ripeness doctrine generally prevents “courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Abbott Labs v. Gardner* (1967), 387 U.S. 136, 148. “The basic principle of ripeness may be derived from the conclusion that ‘judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.’” *State ex rel. Elyria Foundry Co. v. Industrial Comm.* (1998), 82 Ohio St.3d 89, 89 (quoting law review).

Defendant’s challenge to R.C. 2950.034 appears to be purely hypothetical, as noted by the appellate court. 12th District Opinion, at ¶ 77. There is no apparent indication that he resides within 1,000 feet of a prohibited location, that he has immediate plans to move near a prohibited location, or that he would be forced to move from a residence near a prohibited location. Defendant’s arguments are apparently based on the assumption that he may – someday – be subject R.C. 2950.034.

“[A] defendant lacks standing to challenge the constitutionality of R.C. 2950.031 [now R.C. 2950.034] where the record fails to show whether the defendant has suffered an actual deprivation of his property rights by operation of R.C. 2950.031 [now R.C. 2950.034].” *State v. Pierce*, 8th Dist. No. 88470, 2007-Ohio-3665, ¶ 33, affirmed, 120 Ohio St.3d 321, 2008-Ohio-6248; see, also, *State v. Peak*, 8th Dist. No. 90255, 2008-Ohio-3448, ¶ 8. Because there is no indication of an “actual deprivation of property rights,” defendant lacks standing to appeal on the residency restriction. *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104.

An argument that he may be forced to move if a school, preschool, or daycare center opens near his home also would fail for lack of ripeness. *Hyle v. Porter*, 170 Ohio App.3d 710, 2006-Ohio-5454 (*Hyle I*), ¶ 21, overruled on other grounds, *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542 (*Hyle II*). This argument “would be more appropriately raised at an injunction hearing after the speculative facts of which he now complains have come to fruition.” *Hyle I*, at ¶21.

Even if the constitutional challenge were ripe, defendant still could not raise the challenge in this appeal. Although this Court in *Clayborn* emphasized “that challenges to the constitutionality of S.B. 10 on direct appeal from a criminal judgment are proper,” see *Clayborn*, ¶ 15, the exact reach of a “proper” *Clayborn* appeal is unclear. The Court mentioned allowing a challenge to a registration classification and to registration requirements. *Id.* ¶¶ 14, 15. “Even though the *classification* occurred as a matter of law, to the extent that Clayborn wishes to challenge its application to him, the time to do so was the time frame within which he could challenge on appeal the underlying criminal judgment.” *Id.* ¶ 14 (emphasis added). “From *Cook* to *Ferguson* and all cases in between, appellate

courts have had the ability to review constitutional challenges to sexual-offender *registration requirements* on direct appeal.” Id. ¶ 15 (emphasis added). The syllabus of *Clayborn* focused on “an R.C. Chapter 2950 sexual-offender *classification* judgment.” Id. at syllabus (emphasis added).

In light of the references to *registration* requirements, a fair reading of *Clayborn* is that it was allowing challenges on appeal to registration requirements. Under this reading, a challenge to the residency restriction would not be allowed. A trial court does not impose the residency restriction, the statute does, and the residency restriction is not a “registration requirement,” as the restriction can apply regardless of any extant duty to register. Even after the duty to register expires, the residency restriction still can apply.

Defendant might try to argue that the residency-restriction is reviewable on appeal because the trial court must notify the offender of registration requirements under R.C. 2950.03(A)(2) and/or R.C. 2929.13(I). It is notable, however, that there is no requirement in those statutes that the offender be notified of the 1,000-foot restriction. The residency restriction applies regardless of registration obligations, and even applies to offenders whose registration obligation has expired. Again, defendant’s complaint is with the statute, not with the court’s judgment.

Defendant’s arguments also fail on their merits. Insofar as defendant might be claiming an ex post facto or retroactive challenge to R.C. 2950.034, the State notes that defendant can raise no such challenge as to the 1,000-foot restriction as to schools, which went into effect in 2003 before defendant’s crime. At most, defendant might challenge the 1,000-foot restriction as to daycares and preschools, which went into effect on July 1, 2007.

In any event, Ohio courts have repeatedly found that the 1,000-foot residency restriction does not constitute “punishment” for ex post facto purposes. See, e.g., *Peak*, at ¶ 9; *State ex rel. Yost v. Slack*, 5th Dist. No. 06CA-22, 2007-Ohio-1077, ¶ 6; *State ex rel. White v. Billings*, 12th Dist. No. CA2006-72, 2007-Ohio-4356, ¶¶ 10-18, overruled on other grounds, *Hyle II*; *Hyle I*, at ¶¶ 11-20. Plus, R.C. 2950.034 restricts current circumstances and thus should not be considered “retroactive” at all.

Equally so, the residency restriction does not violate substantive due process. *State ex rel. O'Brien v. Heimlich*, 10th Dist. No. 08AP-521, 2009-Ohio-1550 (not a fundamental right; restriction passes rational-basis review).

Defendant appears to argue that R.C. 2950.034 restrains his liberty and infringes on his “fundamental right” to live wherever he wants. But a claim that R.C. 2950.034 restrains liberty in a way similar to probation or parole has been rejected before. *Hyle I*, at ¶15 (attempt to analogize residency restriction to probation or parole “is not well taken”).

Moreover, any claim that R.C. 2950.034 is subject to strict-scrutiny review suffers from a faulty premise: there is no “fundamental right” to live wherever one wants. Defendant appears to quote *Meyer v. Nebraska* (1923), 262 U.S. 390, 399, for the proposition that one has a right to “live and work where he (chooses).” But there is no such passage in that opinion. Rather, *Meyer*, in striking down a statute prohibiting the teaching of the German language, merely noted in passing that there is a liberty interest to “establish a home and bring up children.” *Id.* at 399.

While both *Kramer v. United States* (C.A. 6, 1945), 147 F.2d 756, and *Valentyne v. Ceccacci*, 8th Dist. No. 83725, 2004-Ohio-4240, both made passing references to the

right to live and/or work where one wishes, neither case supports an argument that any such right is “fundamental” so as to trigger strict-scrutiny review. *Washington v. Glucksberg* (1997), 521 U.S. 702, also cited by defendant, held that there was no fundamental right to assisted suicide. *Id.* at 728. The case said nothing about any “right” to live wherever one wants, let alone that such a “right” was fundamental. Indeed, if anything, *Glucksberg* counsels *against* recognizing such brand new fundamental rights:

* * * But we “have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” * * * By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” * * * lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court[.]

Id. at 720.

Heeding this warning from *Glucksberg*, the Eighth Circuit, addressing a residency restriction similar to R.C. 2950.034, refused to recognize a fundamental right to live wherever one wants. *Doe v. Miller* (C.A. 8, 2005), 405 F.3d 700, 714. As in *Doe*, defendant here has “not developed any argument that the right to ‘live where you want’ is ‘deeply rooted in this Nation’s history and tradition,’” or “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it] were sacrificed.’” *Id.*, quoting *Glucksberg*, 521 U.S. at 720. “We are thus not persuaded that the Constitution establishes a right to ‘live where you want’ that requires strict scrutiny of a State’s residency restrictions.” *Miller*, 405 F.3d at 714.

Because there is no fundamental right to live wherever one wants, R.C. 2950.034

is subject only to rational-basis review – that is, the statute must be rationally related to a legitimate government interest. *Id*; see, also, *Heller v. Doe* (1993), 509 U.S. 312, 320. Thus, R.C. 2950.034 need not be narrowly tailored; the rational-basis test “demands no more than a ‘reasonable fit’ between governmental purpose [] and the means chosen to advance that purpose.” *Reno v. Flores* (1993), 507 U.S. 292, 305.

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*, 509 U.S. at 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 before an equal protection challenge will be upheld.” *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.” *Univ. Professors*, 87 Ohio St.3d at 58 (quoting another case).

R.C. 2950.034 easily passes rational-basis review. The statute advances a legitimate government interest, which is to protect a vulnerable population, children, from sex offenders and offenders who commit child-oriented offenses. Preventing these offenders from living within 1,000 feet of schools, preschools, or daycares is a rational way to achieve this objective. For example, living near a school would be one of the ways in which the offender could “get to know” the children whom might walk back and forth in front of the offender’s home every school day. Getting to know the victim is the first step toward victimizing him/her. While defendant claims that the residency

restriction is too broad in that it applies to all sex offenders, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” *Heller*, 509 U.S. at 320. This defendant would not have standing to make such a complaint anyway, since his offense involved a 14-year-old victim.

K. 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 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”).

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 has a “punitive” effect, 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.

As for defendant’s complaint that the information is subject to disclosure to the public, the registry is generally *not* open to public inspection. R.C. 2950.08(A); R.C. 2950.13(A)(1). Specified information is included in the publicly-accessible internet database, see R.C. 2950.13(A)(1)(a) to (i), but social security number, driver’s license number, name of school, and name of employer are excluded from that database. R.C. 2950.13(A)(11).

L. *Bodyke* Holding Does Not Aid Defendant

It must be emphasized that defendant’s constitutional challenges are not aided by this Court’s holding in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424. The *Bodyke* plurality and concurrence did not rule on such challenges. *Id.* ¶ 62. In addition, it is clear from *Bodyke* that only those offenders who received a prior judicial classification fall within the separation-of-powers holding in that case. The syllabus to that effect had four votes, and a fifth vote concurred in the conclusion that there was a separation-of-powers violation when there was a prior judicial classification. *Bodyke*, at paragraph two of the syllabus (“offenders who have already been classified by court order”); *Id.* at paragraph three of the syllabus (“offenders whose classifications have already been adjudicated by a court”); *Id.* at ¶¶ 1, 54, 55, 58, 59 (plurality opinion – “as those provisions apply to sex offenders whose cases were adjudicated”; “previously were classified by Ohio judges”; “already classified by judges”; “the final decision of a judge classifying a sex offender”; “revisit a judicial determination”); *Id.* at ¶¶ 68, 75, 91 (O’Donnell, J. – “previously

classified * * * by a member of the judicial branch”; “previously been adjudicated and classified pursuant to a final order of a court”).

Offenders newly sentenced or convicted after January 1, 2008, cannot invoke *Bodyke* because their resulting classification is an initial classification, not a reclassification. *State v. Williams*, 2nd Dist. No. 22574, 2010-Ohio-3537, ¶ 14 (distinguishing *Bodyke*: “Since Williams’ sentencing hearing occurred after January 1, 2008, he was originally classified by the sentencing judge.”).

Some have contended that *Bodyke* is implicated merely when a court has entered a judgment of conviction for a classified sex offense, regardless of whether the court itself mentioned the resulting classification. But such an argument would not aid defendant here, since defendant is appealing from an initial judgment, not from a reclassification following a prior judgment. This argument also severely misreads the holding of *Bodyke*, which repeatedly focused on the prior court order or judgment *classifying* the offender. The syllabus, plurality opinion, and concurring opinion mentioned “classified by court order,” “classifications * * * adjudicated by a court,” and like-minded phrases 16 times. *Bodyke*, at paragraphs two and three of syllabus, and at ¶¶ 54, 55, 56, 57, 59, 60, 61, 66, 67, 68, 75, 91.

As two appellate courts have already recognized, the rule of law set forth in *Bodyke* is clear: a court must have previously pronounced the classification in a ruling, judgment, or order for there to be a separation-of-powers violation. *Green v. State*, 1st Dist. No. C-090650, 2010-Ohio-4371, ¶¶ 5-10; *Boswell v. State*, 12th Dist. No. CA2010-01-006, 2010-Ohio-3134.

The “reinstatement” remedy itself mentioned in the *Bodyke* plurality opinion

shows that a prior judicial classification is required. The plurality indicated that “prior judicial classifications of sex offenders” would be reinstated and that “the classifications and community-notification and registration orders imposed previously by judges are reinstated.” Id. ¶¶ 2, 66. A judgment of conviction without affirmative classification language simply would not fall within this group of prior court orders or judgments, as there otherwise would be no “prior judicial classification” to reinstate.

Some have contended that *Bodyke* reaches offenders who were not judicially classified because one of the offenders in *Bodyke* – offender Phillips – had not been judicially classified but still won appellate relief. But the absence of a prior judicial classification as to Phillips was never mentioned by the plurality opinion or by the concurrence, and their ruling cannot be taken as being a ruling on the basis of some unmentioned fact. Indeed, the relief to be afforded to Phillips – according to the *Bodyke* plurality – was to “reinstate the prior judicial classifications of sex offenders.” *Bodyke*, at ¶ 2. “[C]lassifications and community notification and registration orders imposed previously by judges are reinstated.” Id. ¶ 66. The plurality plainly *thought* that there had been a prior judicial classification as to Phillips, and its holding was limited – over and over again – to offenders who received a prior judicial classifications. Its mistake about the existence of a prior judicial classification as to Phillips cannot be transformed into a holding that no judicial classification is needed.

An appellate court does not necessarily address every possible issue when it rules on a case. Issues often lurk in the record and are not decided by the appellate court. *Webster v. Fall* (1925), 266 U.S. 507, 511. In such circumstances, the court’s decision does not become precedent on the issue that was lurking, assumed, unaddressed, or, as in

this case, mistakenly disregarded. “A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon at the time of the adjudication.” *B.F. Goodrich v. Peck* (1954), 161 Ohio St. 202, paragraph four of the syllabus; *State v. Waller* (1976), 47 Ohio St.2d 52, 53 n. 1 (issue of constitutionality not “presented as an issue for review” in earlier cases; earlier cases therefore do not settle the issue). A decision does not constitute firm precedent on a particular issue unless it “squarely addresses” that issue. See *Brecht v. Abrahamson* (1993), 507 U.S. 619, 630-31.

Although some might argue that *Bodyke* implicitly decided that Phillips had a valid separation-of-powers claim even in the absence of a prior judicial classification, there are no “implicit” precedents. Courts “are not bound by any perceived implications that may have been inferred from” an earlier decision. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 12. If the Court “did not then definitively resolve the issue,” the decision does not constitute binding precedent on the unresolved issue. *Id.* ¶ 10. Appellate courts decide what they decide; if they do not address a particular issue, their ruling is presumed not to have encompassed that issue.

In the absence of a prior judicial classification, it is difficult to discern any separation-of-powers violation from the General Assembly’s decision to modify its prior classification scheme to a Tier-based system. A *legislative* change of a prior *legislative* scheme represents an inherently legislative function that could not possibly intrude on any proper prerogative of another branch of government. As the *Bodyke* plurality conceded, “the authority to legislate is for the General Assembly alone * * *.” *Bodyke*, ¶ 52. Not even the legislative branch itself can bar future legislation, and so neither can another branch of

government. *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.”).

It also must be kept in mind that there is no requirement that courts must occupy a fact-finding role in sex-offender registration schemes. This registration scheme presumptively falls within the General Assembly’s exercise of the police power.

“[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. The exercise of the police power inheres in the *General Assembly*. See *Thompkins*, 75 Ohio St.3d at 560 (“valid exercise of the General Assembly’s police powers”). 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 the exercise of its police power in setting up a regulatory scheme turn on such a factual issue.

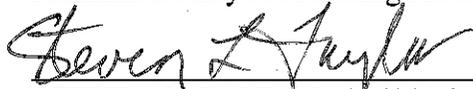
Rather than invading any judicial prerogative, the General Assembly has merely changed its earlier laws; it has not purported to “overrule” or “vacate” a judgment as to this offender. “[N]o one has a vested right in having the law remain the same over time. If by relying on existing law in arranging 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*, ¶ 30. Defendant’s constitutional challenges should be rejected.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 17th day of NOV., 2010, to the following known counsel involved in the case: (1) Michael Greer, Assistant Prosecuting Attorney, Office of the Warren County Prosecutor, Warren County Courthouse, 500 Justice Drive, Lebanon, Ohio 45036; (2) Katherine A. Szudy, Assistant State Public Defender, Office of the State Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215; (3) Jeffrey M. Gamso, Cooperating Counsel, ACLU of Ohio Foundation, Inc., Gamso, Helmick & Hoolahan, 1119 Adams Street, Second Floor, Toledo, Ohio 43604; (4) Margie Slagle, Ohio Justice & Policy Center, 215 East 9th Street, Suite 601, Cincinnati, Ohio 45202


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