

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2009-1974
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Trumbull County
v.	:	Court of Appeals,
	:	Eleventh Appellate District
LAMBERT DEHLER,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 2008-T-0061
	:	

**MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
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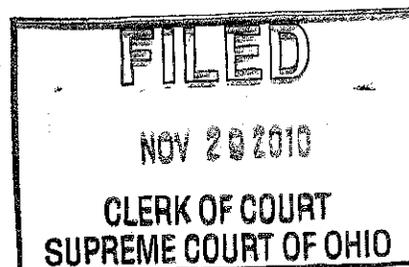


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF AMICUS INTEREST	4
THE HISTORY OF SEX OFFENDER LAWS IN OHIO	4
A. The General Assembly enacted Megan’s Law to create a comprehensive sex offender registration and notification system in Ohio.....	4
B. The General Assembly revised Megan’s Law in S.B.5.....	8
C. Congress enacted the Adam Walsh Act to create a national system for sex offender registration and notification.....	9
D. The General Assembly passed S.B.10 to comply with the Walsh Act.....	11
E. The General Assembly applied S.B.10 retroactively to offenders who committed their crimes before July 1, 2007.....	12
F. In <i>State v. Bodyke</i> , this Court found that S.B.10’s reclassification provisions violated separation of powers as to those offenders who had previously been classified through judicial orders.....	13
STATEMENT OF CASE AND FACTS	14
ARGUMENT.....	17
<u>Attorney General’s Proposition of Law No. I:</u>	
<i>The constitutionality of S.B.10 cannot be challenged by a litigant who faces no threat of direct or concrete injury from its provisions.</i>	17
<u>Attorney General’s Proposition of Law No. II:</u>	
<i>Retroactive application of S.B.10 does not violate the separation-of-powers doctrine in the Ohio Constitution.</i>	18
A. Dehler waived further review of his separation-of-powers claim when he failed to raise it in the court of appeals.	19

B.	S.B.10’s classification of Dehler as a Tier III offender does not offend separation of powers because it does not disturb a final judgment or divest the judiciary of an inherent power.	19
C.	S.B.10’s classification of Dehler did not violate <i>Bodyke</i> ’s severance remedy.	23

Attorney General’s Proposition of Law No. III:

	<i>Retroactive application of S.B.10 does not violate the Ex Post Facto Clause because S.B.10 is a civil, remedial law.</i>	25
A.	The General Assembly intended to create a civil, remedial scheme.	25
B.	S.B.10 has a civil, remedial effect.	29
1.	S.B.10 does not impose an affirmative disability or restraint on offenders.	29
2.	S.B.10’s registration and notification provisions do not resemble historical punishments.	31
3.	S.B.10 does not contain a scienter requirement.	33
4.	S.B.10 does not materially advance the traditional aims of punishment.	34
5.	Any punishment under S.B.10 flows from a new violation.	35
6.	S.B.10 serves the remedial purpose of protecting the public.	35
7.	S.B.10 is not excessive in relation to that purpose.	36

Attorney General’s Proposition of Law No. IV:

	<i>Retroactive application of S.B.10 does not violate the Retroactivity Clause of the Ohio Constitution because the law is remedial, not substantive or punitive.</i>	39
--	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

Attorney General’s Proposition of Law No. V:

	<i>Retroactive application of S.B.10 does not violate double jeopardy because it does not impose a second criminal punishment.</i>	42
--	-----------------------------------------------------------------------------------------------------------------------------------------	----

Attorney General’s Proposition of Law No. VI:

	<i>A claim that sex offenders have a constitutional right to counsel to challenge their S.B.10 classifications is not properly before the Court; in any event, the claim has no merit because the offender is not threatened with a deprivation of liberty or a fundamental right.</i>	43
A.	Dehler waived his due process claim by not raising it before the trial court or the Eleventh District.	43

B. State-appointed counsel is not required because S.B.10 is not a criminal statute.44

C. State-appointed counsel is not required because S.B.10’s classification process does not threaten an offender’s liberty or a fundamental right.45

 1. Dehler’s personal liberty is not at stake in his S.B.10 classification challenge.....45

 2. Dehler’s fundamental rights are not at risk in his S.B.10 classification challenge. ...47

CONCLUSION.....50

CERTIFICATE OF SERVICEunnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Ahmad v. AK Steel Corp.</i> , 119 Ohio St. 3d 1210, 2008-Ohio-4082	24
<i>Barlett v. State</i> (1905), 73 Ohio St. 54	20
<i>City of E. Liverpool v. Columbiana Cty. Budget Comm'n</i> , 114 Ohio St. 3d 133, 2007-Ohio-3759	41
<i>City of E. Liverpool v. Columbiana Cty. Budget Comm'n</i> , 116 Ohio St. 3d 1201, 2007-Ohio-5505	44
<i>Cutshall v. Sundquist</i> (6th Cir. 1999), 193 F.3d 466	<i>passim</i>
<i>Cuyahoga Cty. Bd. of Comm'rs v. State</i> , 112 Ohio St. 3d 59, 2006-Ohio-6499	2, 17
<i>Doe v. Bredesen</i> (6th Cir. 2007), 507 F.3d 998	30, 33, 39
<i>Fairview v. Giffee</i> (1905), 73 Ohio St. 183	19
<i>Hale v. State</i> (1896), 55 Ohio St. 210	21
<i>Hudson v. United States</i> (1997), 522 U.S. 93	34
<i>Hyle v. Porter</i> , 117 Ohio St. 3d 165, 2008-Ohio-542	<i>passim</i>
<i>In re Fisher</i> (1974), 39 Ohio St. 2d 71	46
<i>In re Gault</i> (1967), 387 U.S. 1	46
<i>Kansas v. Hendricks</i> (1997), 521 U.S. 346	26
<i>Kennedy v. Mendoza-Martinez</i> (1963), 372 U.S. 144	<i>passim</i>

<i>Lassiter v. Dep't of Social Servs. of Durham Cty.</i> (1981), 452 U.S. 18	45, 47, 48
<i>Lynce v. Mathis</i> (1997), 519 U.S. 433	30
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102 (1996).....	47
<i>Meyer v. United Parcel Serv., Inc.</i> , 122 Ohio St. 3d 104, 2009-Ohio-2463	24
<i>S. Euclid v. Jemison</i> (1986), 28 Ohio St. 3d 157	19, 20
<i>Smith v. Doe</i> (2003), 538 U.S. 84	<i>passim</i>
<i>State ex rel. Bray v. Russell</i> (2000), 89 Ohio St. 3d 132	22
<i>State ex rel. Cody v. Towner</i> (1983), 8 Ohio St. 3d 22	48
<i>State ex rel. Heller v. Miller</i> (1980), 61 Ohio St. 2d 6	48
<i>State ex rel. Porter v. Cleveland Dep't of Pub. Safety</i> (1998), 84 Ohio St. 3d 258	2, 19, 42, 43
<i>State ex rel. Specht v. Oregon City Bd. of Educ.</i> (1981), 66 Ohio St. 3d 178	43
<i>State ex rel. White v. Koch</i> (2002), 96 Ohio St. 3d 395	18
<i>State v. Bodyke</i> , 126 Ohio St. 3d 266, 2010-Ohio-2424	<i>passim</i>
<i>State v. Childs</i> (1968), 14 Ohio St. 2d 56	43
<i>State v. Cook</i> (1998), 83 Ohio St. 3d 404	<i>passim</i>
<i>State v. Dehler</i> (8th Dist.), No. 65716, 1994 Ohio App. Lexis 3103 (“ <i>Dehler P</i> ”).....	14, 15

<i>State v. Dehler</i> (9th Dist.), Nos. 65006, 66020, 1994 Ohio App. Lexis 2269 (“ <i>Dehler II</i> ”)	15
<i>State v. Dehler</i> (8th Dist.), No. 2008-T-0061, 2009-Ohio-5059 (“ <i>Dehler III</i> ”)	17, 19, 23, 44
<i>State v. Ferguson</i> , 120 Ohio St. 3d 7, 2008-Ohio-4824	<i>passim</i>
<i>State v. Hayden</i> , 96 Ohio St. 3d 211, 2002-Ohio-4169	<i>passim</i>
<i>State v. Hochhausler</i> , 76 Ohio St. 3d 455	21
<i>State v. Martello</i> , 97 Ohio St. 3d 398, 2002-Ohio-6661	40, 42
<i>State v. McConville</i> , 124 Ohio St. 3d 556, 2010-Ohio-958	12
<i>State v. Sterling</i> , 113 Ohio St. 3d 255, 2007-Ohio-1790	22
<i>State v. Williams</i> (2000), 88 Ohio St. 3d 513	7, 32, 42, 48
<i>Vitek v. Jones</i> (1980), 445 U.S. 480	46, 47

Statutes, Rules and Constitutional Provisions

42 U.S.C. § 16911	10
42 U.S.C. § 16912	10
42 U.S.C. § 16913	10
42 U.S.C. § 16914	10
42 U.S.C. § 16915	10
42 U.S.C. § 16916	10
42 U.S.C. § 16918	10
42 U.S.C. § 16919	10
42 U.S.C. § 16921	10

42 U.S.C. § 16924.....	10
42 U.S.C. § 16925.....	10
42 U.S.C. § 3750.....	10
Former R.C. 2929.19 (1998).....	28
Former R.C. 2929.21 (1998).....	28
Former R.C. 2950.01 (1996).....	4, 16, 21, 40
Former R.C. 2950.01 (1998).....	4, 5
Former R.C. 2950.03 (1998).....	28
Former R.C. 2950.031 (2006).....	9
Former R.C. 2950.04 (1998).....	6, 7, 16
Former R.C. 2950.04 (2006).....	28
Former R.C. 2950.05 (1996).....	4
Former R.C. 2950.06 (1998).....	6, 16
Former R.C. 2950.06 (2006).....	6, 8
Former R.C. 2950.07 (1996).....	4
Former R.C. 2950.07 (1998).....	6, 16
Former R.C. 2950.07 (2006).....	8
Former R.C. 2950.081 (2006).....	8, 28
Former R.C. 2950.10 (1998).....	6
Former R.C. 2950.11 (1998).....	6, 31
Former R.C. 2950.13 (2006).....	8, 28
Former R.C. 2950.99 (1998).....	6
Ohio Const., Art. II, § 28	39
R.C. 109.02	4, 44
R.C. 120.16	43

R.C. 149.45	29
R.C. 2151.86	22
R.C. 2919.27	27
R.C. 2923.13	22
R.C. 2930.01 <i>et seq.</i>	26
R.C. 2950.01	11
R.C. 2950.02	26
R.C. 2950.03	11, 13
R.C. 2950.031	13, 23, 24
R.C. 2950.032	<i>passim</i>
R.C. 2950.034	12, 30
R.C. 2950.04	12
R.C. 2950.05	11, 12
R.C. 2950.06	11
R.C. 2950.07	11, 18
R.C. 2950.11	3, 12, 31, 43
R.C. 2953.01 <i>et seq.</i>	26
R.C. 2981.05	26
R.C. 3113.31	27

Other Authorities

152 Cong. Rec. S 8012 (July 20, 2006)	9, 36
Bob E. Vasquez et al., <i>The Influence of Sex Offender Registration and Notification Laws in the United States</i> (2008), 54 <i>Crime & Delinq.</i> 175	38
J.J. Prescott & Jonah E. Rockoff, <i>Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?</i> (2008)	38
Senate Session (May 16, 2007)	11

INTRODUCTION

The appellant, Lambert Dehler, sexually molested a ten-year-old girl over the course of two years. He later raped the victim's sixteen-year-old sister on two occasions. The State prosecuted Dehler in separate criminal proceedings, the juries found Dehler guilty of multiple sex offenses, and the trial courts *sentenced him to life in prison*. Dehler entered prison in 1993, and he is first eligible for parole in 2070.

Under Ohio's old sex offender registration scheme, Megan's Law, Dehler was automatically classified as a "sexually oriented offender" by virtue of his convictions. Megan's Law would have directed the trial court to hold a hearing shortly before Dehler's release date to determine whether he should be further classified as a "sexual predator." That finding would determine the frequency and duration of Dehler's sex offender reporting requirement, and whether Dehler would be subject to community notification.

That process will not occur. On July 1, 2007, the General Assembly passed Senate Bill 10 (S.B.10) to revise Ohio's sex offender registration and notification law. The key feature of S.B.10 is its classification method: It automatically places every adult sex offender into one of three tiers based on his crime of conviction. The more severe the crime, the higher the tier. The tier designation then determines the frequency and duration of the offender's registration requirement—that is, his obligation to verify his contact information periodically with the county sheriff. The tier designation also determines whether the offender will be subject to community notification. Sheriffs must notify victims and certain community members whenever a Tier III offender—those individuals, like Dehler, convicted of the most severe crimes (among them, rape, sexual battery, and murder with a sexual motivation)—moves into a neighborhood.

Dehler filed a petition under R.C. 2950.032(E) challenging his S.B.10 classification. He does not allege any factual error in his Tier III designation. Rather, he asserts that S.B.10

violates the separation-of-powers doctrine and the Ex Post Facto, Retroactivity, and Double Jeopardy Clauses of the U.S. and Ohio Constitutions. Dehler also claims entitlement to state-appointed counsel under the federal Due Process Clause to assist him in his litigation.

Dehler's appeal fails even before assessing the merits. First, Dehler has no standing because he has not "suffered or [been] threatened with a direct and concrete injury." *Cuyahoga Cty. Bd. of Comm'rs v. State*, 112 Ohio St. 3d 59, 2006-Ohio-6499, ¶ 22 (internal quotations and citation omitted). Dehler began serving his sentence in 1993. He has never had to register as a sex offender, he has never been subject to community notification, and he has never had his residency choices restricted. More important, there is no likelihood that Dehler will ever experience these duties and constraints because he received a life sentence. Due to the lack of a direct or concrete injury, Dehler lacks standing to challenge the constitutionality of S.B.10, and therefore the Court should dismiss this case.

Second, Dehler has waived most of his constitutional claims. He failed to assert his due process right-to-counsel claim in the trial court and the Eleventh District. And he failed to present his separation-of-powers and double jeopardy claims to the Eleventh District. Because this Court "do[es] not consider questions not presented to the court [below]," it should at the very least dismiss these claims as improvidently accepted. *State ex rel. Porter v. Cleveland Dep't of Pub. Safety* (1998), 84 Ohio St. 3d 258, 259.

On the merits of his claims, Dehler fares no better. His separation-of-powers claim fails because, in this case, reclassification under S.B.10 does not disturb a final judgment of a court, vest executive branch officials with the power to review judicial decisions, or divest the judiciary of any of its inherent powers. As Judge Grendell concisely explained below, "Dehler has not been previously classified as a sexual offender" "by a court of competent jurisdiction," thus

“there is no constitutional impediment to his classification” under the separation-of-powers doctrine.

Dehler’s other challenges similarly lack merit. S.B.10 is a civil law and therefore presents no Ex Post Facto issue. The law uses the same remedial tools as Megan’s Law, which this Court upheld in *State v. Cook* (1998), 83 Ohio St. 3d 404, and *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824. S.B.10 requires that sex offenders periodically verify their contact information with the county sheriff—“a *de minimus* administrative requirement” “comparable to renewing a driver’s license.” *Cook*, 83 Ohio St. 3d at 418. The community notification provision is also tailored narrowly. It applies only to Tier III offenders, notification “is restricted to those most likely to have contact with the offender,” *id.* at 422, and trial courts have broad discretion to remove the requirement under R.C. 2950.11(F)(2).

Nor does S.B.10 offend the Retroactivity Clause. That provision is triggered only when a “past transaction or consideration create[s] at least a reasonable expectation of finality.” *Cook*, 83 Ohio St. 3d at 412. (citation omitted). But a criminal transaction does not (and cannot) create such an expectation: “[F]elons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” *Id.* (citation and emphasis omitted). Because Dehler had no reasonable expectation of finality with respect to his sex offense, he has no rights under the Retroactivity Clause to vindicate.

At bottom, Dehler objects to the automatic, offense-based manner in which S.B.10 classifies sex offenders. The problem with that position is twofold. First, automatic classification was a staple of the old Megan’s Law regime, which this Court upheld. Second, the U.S. Supreme Court has expressly approved the constitutionality of automatic, offense-based classification systems for sex offenders. See *Smith v. Doe* (2003), 538 U.S. 84, 104.

Under this Court's well-established precedents, S.B.10 is constitutional.

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General is the chief law officer for the State. R.C. 109.02. The Attorney General has a strong interest in defending the legislative actions of the General Assembly and in ensuring the proper administration of Ohio's sex offender laws.

THE HISTORY OF SEX OFFENDER LAWS IN OHIO

Ohio first enacted a sex offender registration law in 1963. Any person "convicted two or more times, in separate criminal actions, for commission of any of the [enumerated] sex offenses" was deemed a "habitual sex offender." Former R.C. 2950.01(A) (1996). Upon entering a jurisdiction, he had to provide his name, photograph, and fingerprints with the police chief or the county sheriff. Former R.C. 2950.07 (1996). The offender also had ten days to inform law enforcement of any changes to his address. Former R.C. 2950.05 (1996).

The General Assembly revised the law on three occasions. In 1997, the legislature enacted House Bill 180 ("H.B.180"), known as "Megan's Law," to establish a comprehensive system for sex offender classification and registration. In 2003, the General Assembly passed Senate Bill 5 ("S.B.5"), which modified that system. And in 2007, the General Assembly passed Senate Bill 10 ("S.B.10")—the subject of this action—to align Ohio's classification and registration system with the provisions of the federal Adam Walsh Child Protection and Safety Act of 2006.

A. The General Assembly enacted Megan's Law to create a comprehensive sex offender registration and notification system in Ohio.

Under the old Megan's Law, sex offenders were divided into three categories: The "sexually oriented offender" designation—the default category—was placed on any individual convicted of a "sexually oriented offense" listed in former R.C. 2950.01(D).

The “habitual sex offender” designation—the middle category—was given to “a person who [was] convicted of or plead[ed] guilty to a sexually oriented offense and who previously ha[d] been convicted of or pleaded guilty to one or more sexually oriented offenses.” Former R.C. 2950.01(B) (1998).

The most severe designation, “sexual predator,” was reserved for an individual who “ha[d] been convicted of or pleaded guilty to committing a sexually oriented offense and [was] likely to engage in the future in one or more sexually oriented offenses.” Former R.C. 2950.01(E) (1998).

The lower classifications—the “sexually oriented offender” designation and the “habitual offender” designation—attached automatically by operation of law. If the defendant’s criminal history met the statutory criteria, the trial court had to impose the classification. The process did not require a hearing or judicial fact-finding. See *State v. Hayden*, 96 Ohio St. 3d 211, 2002-Ohio-4169, ¶ 16.

The “sexual predator” designation was different—in some cases, it attached automatically; in others, it attached at the judge’s discretion. If the offender was charged with and then “convicted of or plead[ed] guilty to a sexually violent predator specification,” he was “automatically classifie[d]... as a sexual predator.” Former R.C. 2950.09(A) (1998). Otherwise, the prosecutor could seek—and the trial court could affix—a sexual predator designation on a convicted offender through a special statutory process. The court would schedule a hearing at which the offender had the right to counsel, the right to testify, and the right to call and cross examine witnesses. Former R.C. 2950.09(B)(1), (C)(2) (1998). The trial court then considered a list of statutory factors—the offender’s age, criminal record, mental state, and mental capacity, the victim’s age, and the nature of the offense—to determine if the offender was likely to re-offend. Former R.C. 2950.09(B)(2)(a)-(j) (1998).

Megan's Law required all sex offenders to register with their county sheriff by providing a current home address, the name and address of their employer, a photograph, a signature, and any other information requested by the bureau of criminal investigation. Former R.C. 2950.04(B)-(C) (1998). Offenders with "sexual predator" designations were also required to disclose the license plate number of any vehicle registered in their name. Former R.C. 2950.04(C)(2) (1998). The offenders then verified their home addresses with the sheriff at periodic intervals depending on their classification: (1) for sexually oriented offenders, annual verification for ten years; (2) for habitual sex offenders, annual verification for twenty years; and (3) for sexual predators, quarterly registration for life. Former R.C. 2950.06(B), 2950.07(B) (1998). The law imposed criminal penalties on an offender who failed to register. Former R.C. 2950.99 (1998).

Megan's Law also created a system of victim and community notification for certain offenders—all sexual predators and those habitual sex offenders designated by the trial court. Former R.C. 2950.10(A), 2950.11(A) (1998). When an eligible offender registered with his county sheriff, the sheriff was to notify particular victims and members of the community—local law enforcement, neighbors, nearby schools, children's agencies, day care centers, and the like—of the offender's name, address, and offense of conviction. Former R.C. 2950.10, 2950.11 (1998). These notification provisions did not apply to sexually oriented offenders.

Under Megan's Law, offenders with "sexual predator" designations could, at certain intervals, petition the trial court to remove the designation. Former R.C. 2950.09(D) (1998). The offender had to establish "by clear and convincing evidence that [he was] unlikely to commit a sexually oriented offense in the future." Former R.C. 2950.09(D)(1) (1998).

The General Assembly applied Megan's Law retroactively to sex offenses committed before its effective date. Former R.C. 2950.04(A) (1998). Beginning on January 1, 1997, the trial courts would impose the Megan's Law designation at the offender's sentencing hearing. Former R.C. 2950.09(B)(1) (1998). The General Assembly created a special classification process for those sex offenders already "serving a term of imprisonment in a state correctional institution." Former 2950.09(C)(1) (1998). Before the offender's release, the Department of Rehabilitation and Correction would prepare a recommendation to the trial court on whether the offender should be classified as a sexual predator. *Id.* The trial court could then schedule a hearing to determine whether the offender was a sexual predator. Former R.C. 2950.09(C)(2) (1998). Absent such a hearing and finding, the offender automatically received one of the lower designations—sexually oriented offender or habitual offender—by operation of law. Thus, under Megan's Law, some sex offenders were classified through a court hearing and some offenders' classifications were self-executing.

This Court considered a series of constitutional challenges to Megan's Law. In *State v. Cook* (1998), 83 Ohio St. 3d 404, the Court unanimously rejected claims that the retroactive application of the law violated the Retroactivity Clause of the Ohio Constitution or the Ex Post Facto Clause of the U.S. Constitution. The Court held that the registration and notification requirements in Megan's Law were civil in nature, not criminal penalties, and that they were remedial, not substantive. In *State v. Williams* (2000), 88 Ohio St. 3d 513, the Court unanimously held that Megan's Law complied with the Double Jeopardy, Bill of Attainder, and Equal Protection Clauses of the U.S. Constitution, and with Article I, Section 1 of the Ohio Constitution. And in *State v. Hayden*, 96 Ohio St. 3d 211, 2002-Ohio-4169, the Court

determined that the automatic imposition of the “sexually oriented offender” designation without a hearing did not violate due process.

In *Smith v. Doe* (2003), 538 U.S. 84, the U.S. Supreme Court reached the same conclusions. The Court found that Alaska’s sex offender registration and notification law was a civil, regulatory scheme that “alert[s] the public to the risk of sex offenders in their community.” *Id.* at 103 (citation omitted). Because the law was “nonpunitive,” “its retroactive application d[id] not violate the Ex Post Facto Clause.” *Id.* at 105-06.

B. The General Assembly revised Megan’s Law in S.B.5.

In 2003, the General Assembly revised Megan’s Law through the enactment of S.B.5. The legislature removed the provision that previously allowed offenders to seek revocation of their “sexual predator” designation. That designation would remain for life. Former R.C. 2950.07(B)(1) (2006). The new law also instructed the county sheriffs to collect additional information. Sex offenders now had to periodically verify the address of their school or employer, whereas previously, they only had to verify their home address. Former R.C. 2950.06(B) (2006). Finally, S.B.5 clarified that any statements, information, photographs, or fingerprints provided by sex offenders to the county sheriff were public records available for inspection. Former R.C. 2950.081 (2006). The information was also to be included in a public Internet database maintained by the Attorney General. Former R.C. 2950.13(A)(11) (2006).

All three provisions applied retroactively to sex offenders who had been classified before S.B.5’s effective date. In *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824, this Court rejected claims that such retroactive application violated the Retroactivity Clause of the Ohio Constitution and the Ex Post Facto Clause of the U.S. Constitution. Relying on its decision in *Cook*, the Court ruled that S.B.5’s elimination of the possible removal of the sexual predator classification, its more onerous registration and reporting requirements, and the collection and

dissemination of more information about offenders were not driven by a punitive intent, but by a desire to protect the public.

S.B.5 also added a new residency restriction. Sex offenders could not “establish a residence or occupy residential premises within one thousand feet of any school premise.” Former R.C. 2950.031(A) (2006). In *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, a sex offender challenged this provision, claiming that it violated the Retroactivity Clause of the Ohio Constitution. The Court, however, determined that the constitutional question was misplaced, as the General Assembly had not expressly made this residency provision retroactive. Because that provision does not “appl[y] to acts committed or facts in existence prior to the effective date,” *id.* ¶ 19, there was no viable retroactivity claim, *id.* ¶ 24.

C. Congress enacted the Adam Walsh Act to create a national system for sex offender registration and notification.

Ohio was not alone in enacting Megan’s Law. In the 1990s, “all fifty states . . . enacted sex offender registration laws of varying degrees.” *Cook*, 83 Ohio St. 3d at 406. But each State used different standards and requirements, frustrating the ability to coordinate the systems across state lines. Of the estimated 550,000 sex offenders nationwide in 2006, the States had lost track of 150,000 of them. 152 Cong. Rec. S 8012, 8014 (July 20, 2006) (Statement of Sen. Biden, quoting statistics from the National Center for Missing and Exploited Children).

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act “to sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders.” *Id.* at 8012 (Statement of Sen. Hatch). In an effort to create national uniform standards in classification and reporting, Congress instructed all fifty states and the territories to “maintain a jurisdiction-wide sex offender registry conforming to the requirements of [the Act].” 42 U.S.C. § 16912.

The Walsh Act requires all sex offenders to register the address of their residence, school, and employment with law enforcement in their jurisdiction upon leaving prison or beginning a probationary sentence. *Id.* § 16913(a)-(b). The offender must also provide his name, aliases, social security number, and license plate number of the time of registration, *id.* § 16914(a), and he must update any changes to that information within three business days, *id.* § 16913(c). Furthermore, the States shall provide felony criminal penalties for an offender's failure to register. *Id.* § 16913(e).

The Walsh Act also mandates a three-tiered system for sex offender classification. The law sets an offender's tier solely by his offense of conviction. *Id.* § 16911(2)-(4). The tier determines the frequency and duration of the sex offender's reporting requirement: A Tier I offender must register annually for 15 years, a Tier II offender must register biannually for 25 years, and a Tier III offender must register quarterly for life. *Id.* §§ 16915, 16916.

The Walsh Act requires all jurisdictions to publish sex offender information (other than social security numbers) on a publicly accessible Internet website. *Id.* § 16918. Jurisdictions must also notify a number of entities—the U.S. Attorney General, local law enforcement, area schools, public housing agencies, social services organizations, volunteer groups that have contact with minors, and any person or organization that requests such notification—whenever an offender registers or revises his information. *Id.* § 16921(b).

The Walsh Act originally directed the States to comply within three years of its effective date. *Id.* § 16924(a). The U.S. Attorney General has since extended that deadline. *Id.* § 16924(b). A jurisdiction that fails to implement the Act risks losing ten percent of its annual federal law-enforcement grant money. *Id.* § 16925(a) (citing 42 U.S.C. § 3750). At present, four states—Delaware, Florida, Ohio, and South Dakota—have fully implemented the Act.

D. The General Assembly passed S.B.10 to comply with the Walsh Act.

In June 2007, the General Assembly overwhelmingly passed S.B.10 to align Ohio's sex offender laws with the Walsh Act. The legislature's motive was "to protect the public, in particular . . . our children, their families, their neighborhoods." Senate Session (May 16, 2007) (Statement of Sen. Austria). S.B.10 "restructur[ed] Ohio's sex offender registration and community notification laws . . . so they can be consistent with federal law." *Id.* It created "a more comprehensive, more nationalized system for registered sex offenders," thereby "ensur[ing] that law enforcement and members of the public have access to the same information across the United States." *Id.*

S.B.10 imposes the same type of obligations on sex offenders—the periodic verification of personal, residency, employment, and other information with the county sheriffs—as Megan's Law did. R.C. 2950.06(A). And like the old law, S.B.10 imposes a duty on the offenders to notify the county sheriff of any changes to that information. R.C. 2950.05.

S.B.10 repealed the old Megan's Law classifications and replaced them with the three-tiered system outlined in the Walsh Act. Each adult sex offender is assigned a tier based on his offense of conviction. As the severity of the crime increases, the offender's tier increases. R.C. 2950.01(E)-(G).

An offender's tier level determines the frequency and duration of his registration duties: Tier I offenders register annually with their county sheriffs for 15 years, Tier II offenders register bi-annually for 25 years, and Tier III offenders register quarterly for life. R.C. 2950.06(B); R.C. 2950.07(B). The statutory classification is automatic; no judicial determinations are involved in placing an offender within a particular tier. The trial court, however, notifies the offender of his tier classification "at the time of sentencing." R.C. 2950.03(A)(2).

S.B.10 further requires community notification for Tier III offenders (but not Tier I or Tier II offenders). R.C. 2950.11(F)(1). When a Tier III offender first registers with his sheriff under R.C. 2950.04, or when he changes his registration information under R.C. 2950.05, the sheriff must provide certain members of the community—local law enforcement, neighbors, school districts, day care centers, children’s services agencies, and certain volunteer organizations—with notice of his name, address, offense, and photograph, R.C. 2950.11. Community notification is *not* mandatory for every Tier III offender: S.B.10 grants broad discretion to trial courts to suspend the requirement under R.C. 2950.11(F)(2); accord *State v. McConville*, 124 Ohio St. 3d 556, 2010-Ohio-958.

The General Assembly also retained the 1,000-foot residency restriction from the prior version of the law, but S.B.10 expands it to include preschools and daycare centers. R.C. 2950.034(A). The provision is otherwise identical to the provision reviewed by this Court in *Hyle*.

S.B.10’s effective date was July 1, 2007. The new tier classifications, and the accompanying registration responsibilities, came into force on January 1, 2008. On September 23, 2009, the Department of Justice announced that the State of Ohio had successfully implemented the Walsh Act.

E. The General Assembly applied S.B.10 retroactively to offenders who committed their crimes before July 1, 2007.

The General Assembly applied S.B.10 retroactively to offenders who committed their crimes before July 1, 2007—the effective date of the statute. These offenders received tier classification in two ways.

For those offenders who had been convicted and sentenced *before* July 1, 2007, the law instructed the Attorney General to reclassify them from Megan’s Law into the Walsh Act.

R.C. 2950.031; R.C. 2950.032. For this group of some 26,000 sex offenders, the Attorney General identified each offender's tier classification under the Walsh Act and then provided him written notice of his new obligations under S.B.10. Appellant Dehler falls into this class.

For those offenders who were convicted and sentenced *after* July 1, 2007, the trial court imposed the Walsh Act tier classification at the time of sentencing. R.C. 2950.03(A).

F. In *State v. Bodyke*, this Court found that S.B.10's reclassification provisions violated separation of powers as to those offenders who had previously been classified through judicial orders.

Many sex offenders filed legal challenges, claiming that the retroactive application of S.B.10 violates several constitutional provisions: the Ex Post Facto, Contract, Double Jeopardy, Due Process, and Cruel and Unusual Punishment Clauses of the United States Constitution, the Retroactivity and Contract Clauses of the Ohio Constitution, and separation of powers.

In *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, the Court entertained the last claim. It held that the reclassification provisions of S.B.10—R.C. 2950.031 and R.C. 2950.032—violated the separation-of-powers doctrine. The General Assembly could not “require the attorney general to reclassify sex offenders” (1) “who have already been classified by court order under [Megan’s] law”; or (2) “whose classifications have already been adjudicated by a court and made the subject of a final order.” *Id.* at syl. ¶¶ 2, 3.

The Attorney General sought clarification of that decision because *Bodyke*'s syllabus indicated a narrow scope: The reclassification provisions of S.B.10 may not be applied to offenders “already . . . classified by court order.” *Id.* But other language in the opinion suggested that the Court invalidated all S.B.10 reclassifications, regardless of whether the offender received a prior judicial order under Megan’s Law. The Court declined the Attorney General’s request. See *State v. Bodyke*, 126 Ohio St. 3d 1235, 2010-Ohio-3737.

In the absence of such clarification, the Attorney General interpreted *Bodyke* narrowly to cover only those sex offenders who had received a prior judicial adjudication of their Megan's Law status. He immediately directed his staff to perform an individualized review of all 26,000 reclassified offenders. In this time-intensive process, staff members (1) identify whether the offender received a prior judicial order specifying a Megan's Law classification; (2) confirm the offender's classification under either Megan's Law or S.B.10; (3) recalculate the length of the offender's registration period; and (4) provide written notice to the offender and his county sheriff if any information has changed. To date, the Attorney General's Office has reviewed the files of over 19,000 offenders.

A number of reclassified offenders, including Appellant Dehler, do not fall within the parameters of *Bodyke*. These offenders were incarcerated before the effective date of Megan's Law, and they received lengthy prison terms that extended past July 1, 2007 (the effective date of S.B.10). These offenders never received a judicial adjudication of their Megan's Law status, thus the Attorney General has construed *Bodyke* as being inapplicable to them and has therefore left their S.B.10 designations in place.

STATEMENT OF CASE AND FACTS

In 1988, Lambert Dehler, befriended Aurora Timko—a single mother with two young daughters, Alyssa and Michelle. See *State v. Dehler* (8th Dist.), No. 65716, 1994 Ohio App. Lexis 3103 ("*Dehler I*"), at *3. Timko and her daughters often spent the night at Dehler's home, and Dehler would frequently "massage the shoulders and the backs of Aurora, Alyssa, [and] Michelle." *Id.*

In 1989, Dehler molested Alyssa, then ten years old. *Id.* He climbed into her bed, massaged her breasts, and digitally penetrated her. *Id.* When Alyssa began to scream, Dehler covered her mouth and pinned her to the bed. *Id.* Dehler then forced Alyssa to masturbate him

while he placed his penis in contact with her vagina. *Id.* Dehler warned Alyssa not to tell her mother. *Id.* That molestation continued for two years, until Alyssa reported the encounters to a school psychiatrist. *Id.* at *4. (Dehler later indicated that “he fell in love with Alyssa since she reminded him physically of his ex-wife,” and claimed “that Alyssa seduced him and was receptive to his sexual acts even though Alyssa was between the ages of ten and twelve.” *Id.* at *9.)

In 1992, Dehler assaulted Michelle, then sixteen years old. On two occasions, he entered Michelle’s bedroom, covered her mouth, and raped her. See *State v. Dehler* (8th Dist.), Nos. 65006, 66020, 1994 Ohio App. Lexis 2269 (“*Dehler II*”), at *2-3. Dehler also told Michelle not to report the incidents. *Id.* at *3.

The State prosecuted Dehler in two proceedings. With respect to Alyssa, the jury found Dehler guilty of five counts of felonious sexual penetration and thirteen counts of gross sexual imposition. See *Dehler I*, 1994 Ohio App. Lexis 3103, at *1-2. The trial court ordered him to serve a life sentence. *Id.* at *11. On direct appeal, the Eighth District affirmed Dehler’s convictions. *Id.* at *39.

With respect to Michelle, the jury found Dehler guilty of two counts of rape and two counts of gross sexual imposition. See *Dehler II*, 1994 Ohio App. Lexis 2269, at *1. The trial court sentenced Dehler to seven-to-25-year prison terms for each rape, to be served consecutively, plus two 18-month prison terms for each count of gross sexual imposition (to be served concurrently with the rape sentences). On direct appeal, the Eighth District affirmed the two rape convictions, but vacated the gross sexual imposition counts under the allied offenses doctrine. *Id.* at *12.

Dehler began serving his life sentence. He is eligible for parole in March 2070, when he would be 114 years old. See Dep't. of Rehabilitation and Correction, Offender Details: Lambert F. Dehler (attached as Ex. A).

Under Ohio's original sex offender law, Dehler was a "habitual sex offender." That label—and the accompanying registration duties—attached automatically by virtue of Dehler's criminal record. See Former R.C. 2950.01(A) (1996). No evidentiary hearing was held, and no judicial factfinding was performed.

On January 1, 1997, the General Assembly enacted Megan's Law. Because Dehler had a prior conviction for a sexually oriented offense, Megan's Law automatically labeled him a "sexually oriented offender." That designation required Dehler to register as a sex offender within seven days of his release from prison, Former R.C. 2950.04(A) (1998), and to repeat that process annually for ten years. Former R.C. 2950.06(B), 2950.07(B) (1998). No court proceeding occurred for this classification. Prison officials would inform Dehler of his Megan's Law duties shortly before his release date. Former R.C. 2950.03(A)(1) (1998).

On July 1, 2007, the General Assembly enacted S.B.10, which automatically redesignated Dehler a Tier III offender by virtue of his rape convictions. Upon release from prison, Dehler must register as a sex offender with his county sheriff. R.C. 2950.04(A)(2)(a). And he must repeat that process every 90 days for life. R.C. 2950.06(B); R.C. 2950.07(B). Again, no court proceeding occurred for this classification. The Attorney General notified Dehler of his Tier III designation—and his new responsibilities—by written letter on November 30, 2007.

Dehler filed a petition to contest the Tier III classification on numerous statutory and constitutional grounds. The trial court denied the petition without a hearing, and the Eleventh District affirmed. See *State v. Dehler* (9th Dist.), No. 2008-T-0061, 2009-Ohio-5059 ("*Dehler*

III”). The court rejected all of Dehler’s constitutional claims. *Id.* at ¶ 92. Judge Grendell concurred, explaining that Dehler’s S.B.10 classification did not violate the separation-of-powers doctrine. *Id.* at ¶ 103. Judge Cannon dissented on procedural grounds, arguing that the trial court erred in denying Dehler’s petition without a hearing. *Id.* at ¶ 117.

Dehler appealed to this Court, and the case was initially stayed for *Bodyke*. The Court’s separation-of-powers holding, however, did not expressly implicate Dehler because he had not previously been classified by a court under Megan’s Law. The Court accordingly lifted the stay and ordered briefing on the unresolved constitutional issues.

ARGUMENT

Attorney General’s Proposition of Law No. I:

The constitutionality of S.B.10 cannot be challenged by a litigant who faces no threat of direct or concrete injury from its provisions.

Dehler attacks S.B.10’s registration, reporting, notification, and residency provisions under a host of constitutional theories. But his brief ignores one critical fact. Dehler is not now subject to any of those provisions, and as a practical matter, he never will be. As such, he lacks standing to maintain his constitutional challenges.

When adjudicating constitutional disputes, this Court first performs “[a] preliminary inquiry in[to]. . . the issue of standing,” asking “whether [the] litigant is entitled to have a court determine the merits of the issues presented.” *Cuyahoga Cty. Bd. of Comm’rs v. State*, 112 Ohio St. 3d 59, 2006-Ohio-6499, ¶ 22 (internal quotations and citation omitted). “In Ohio, it is well established that standing to attack the constitutionality of a legislative enactment exists only where a litigant has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused

the injury, and that the relief requested will redress the injury.” *Id.* (internal quotations and citation omitted).

Dehler has suffered no direct or concrete injury from S.B.10. He entered prison in 1993 and is still there now. Thus, he has never had to register as a sex offender with a county sheriff, he has never been subjected to community notification, and he has never attempted to establish residency near a preschool or day-care center.

Nor is Dehler likely to suffer direct or concrete injury from S.B.10 in the near future—or *ever*, for that matter. His S.B.10 duties “commence[] on the date of [his] release from a prison term.” R.C. 2950.07(A)(3). But Dehler is serving a life sentence for his crimes, and his first opportunity for parole will not occur until March 2070 (when he is 114 years old). Because it is virtually certain Dehler will spend the rest of his life in prison, he will never perform any registration or reporting duties under S.B.10. Likewise, he will never be affected by S.B.10’s residency restrictions or community notification provisions. In short, Dehler cannot show a likelihood of concrete injury from S.B.10 and therefore has no standing to challenge the law.

At bottom, Dehler is asking this Court for an advisory opinion on the constitutionality of S.B.10. Nothing about *his life* will change if the law is invalidated. Given this Court’s steadfast refusal to “indulge in advisory opinions” on constitutional disputes, *State ex rel. White v. Koch* (2002), 96 Ohio St. 3d 395, 399, it should dismiss this case as improvidently allowed.

Attorney General’s Proposition of Law No. II:

Retroactive application of S.B.10 does not violate the separation-of-powers doctrine in the Ohio Constitution.

Even if Dehler had standing to contest the constitutionality of S.B.10, his invocation of the separation-of-powers doctrine fails on both procedure and substance. First, he waived the claim

by not raising it before the Eleventh District. Second, he has not demonstrated that his S.B.10 classification unconstitutionally infringes on the judicial branch.

A. Dehler waived further review of his separation-of-powers claim when he failed to raise it in the court of appeals.

As his brief notes, Dehler pressed a separation-of-powers claim in the trial court. Br. at 5. But he did not raise this claim to the Eleventh District. Dehler's five assignments of error do not mention "separation of powers." See *Dehler III*, 2009-Ohio-5059, at ¶¶ 11-15. Indeed, Dehler's brief to the Eleventh District did not even use the term "separation of powers." He limited his arguments to the Ex Post Facto Clause, the Retroactivity Clause, and substantive due process. See Br. of Lambert Dehler, *State v. Dehler* (11th Dist), No. 2008-TR-61, at 25-34 (on file with Clerk's Office).

"[R]eviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *State ex rel. Porter v. Cleveland Dep't of Pub. Safety* (1998), 84 Ohio St. 3d 258, 259. A litigant therefore "waiv[es] his appellate claims" by "fail[ing] to raise the[m] . . . in the court of appeals." *Id.* In this case, Dehler did not advance a separation-of-powers claim to the Eleventh District. He cannot revive that claim now in his brief to this Court.

B. S.B.10's classification of Dehler as a Tier III offender does not offend separation of powers because it does not disturb a final judgment or divest the judiciary of an inherent power.

"[T]he concept of separation of powers . . . is implicitly embedded in the entire framework of . . . the Ohio Constitution." *S. Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 159. This doctrine ensures that "each of the three grand divisions of the government [are] protected from encroachments by the others." *Fairview v. Giffie* (1905), 73 Ohio St. 183, 187.

The separation-of-powers doctrine prohibits those laws that "impermissibly threaten[] the institutional integrity of the Judicial Branch." *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-

2424, ¶ 53 (citation omitted). Although defining this boundary “is not always easy,” *id.* at ¶ 50, this Court has announced four key principles.

First, a state law may not “vest[] officials in the executive branch with the power to review judicial decisions.” *Id.* at ¶ 53 (citation omitted). In *Jemison*, for instance, the Court invalidated a statute that authorized the Registrar of Motor Vehicles to review and reverse a trial court order suspending a driver’s license, certificate of registration, or registration plates. 28 Ohio St. 3d at 160-61. That law unconstitutionally “grant[ed] appellate review to an executive administrator, in a manner that conflicts with the constitutional powers of the courts of appeals.” *Id.* at 161.

No such infirmity exists in this case. As Dehler himself acknowledges, his Megan’s Law sex offender “designation attached as a matter of law,” not as a result of a judicial decision. Br. at 8. Thus, the Attorney General’s administrative reclassification of Dehler to a Tier III offender did not involve a review or reversal of any prior judicial decision.

Second, a legislative act offends separation of powers if it attempts to “annul, reverse, or modify a judgment of a court already rendered.” *Barlett v. State* (1905), 73 Ohio St. 54, 58. The Court invoked that principle in *Bodyke*. There, the three individuals had prior judicial adjudications of their sex offender status under Megan’s Law. *Bodyke*, 2010-Ohio-2424, at ¶ 29. This Court held that those “classification[s] constituted a final judgment” of a court, and “the General Assembly c[ould] not vest authority in the attorney general to reopen and revise the final decision[s] of a judge classifying a sex offender.” *Id.* at ¶¶ 56-57 (citation omitted).

Dehler is not analogous to the offenders in *Bodyke* because, unlike those offenders, he never received a prior judicial adjudication of his Megan’s Law status. Thus, his reclassification under S.B.10 did not annul, reverse, or modify a final judgment of a court.

Third, the General Assembly may not enact a law that “abridge[s] . . . power . . . inherent and necessary to the exercise of judicial functions.” *Hale v. State* (1896), 55 Ohio St. 210, syl. ¶ 1. This Court’s decision in *State v. Hochhausler*, 76 Ohio St. 3d 455, illustrates this principle. There, a driver challenged the constitutionality of his administrative license suspension. He also requested a stay of the suspension pending resolution of the litigation, but state law specified that any judicial stay of the suspension order “shall not be given administrative effect.” *Id.* at 463. Invoking the separation-of-powers doctrine, this Court struck down the law because it deprived the judicial branch of its inherent “power to grant or deny stays” of executive branch actions. *Id.* at 464.

The question here is whether S.B.10 limits any inherent power of the judiciary. Dehler asserts that S.B.10 deprives courts of their inherent power “to conduct a hearing to determine [his] risk of future dangerousness, and . . . his sexual-offender classification.” Br. at 11. He is wrong. The judiciary has no inherent authority to conduct hearings and perform individualized assessments of a sex offender’s future dangerousness. That power was conferred by the General Assembly in 1997 under Megan’s Law—and only then for the limited purpose of determining whether a sex offender should receive the most severe “sexual predator” designation.

Automatic offense-based classification has long been the law in Ohio. The State’s original sex offender law, enacted in 1963, contained no individualized hearing element. Anyone convicted of two sex offenses was automatically labeled a sex offender. See Former R.C. 2950.01(A) (1996). Megan’s Law also used automatic offense-based classifications for its two lower designations (“sexually oriented offender” and “habitual offender”). There was no judicial factfinding: “The trial court . . . merely engage[d] in the ministerial act of rubber-stamping the registration requirement on the offender.” *State v. Hayden*, 96 Ohio St. 3d 211, 2002-Ohio-4169,

¶ 16. Other civil disabilities likewise attach to convictions without regard to an offender’s future dangerousness. See, e.g., R.C. 2151.86 (felony conviction precludes child-care center employment); R.C. 2923.13 (felony conviction precludes gun ownership). This history demonstrates that the choice of how a civil disability attaches—whether automatically by operation of law or selectively through individualized judicial determinations—is left up to the legislature. So long as the disability is “civil,” the judiciary has no inherent authority to require individualized hearings before the disability attaches.

Fourth, the General Assembly may not “authorize[] the executive branch to prosecute and impose punishment for a crime.” *State v. Sterling*, 113 Ohio St. 3d 255, 2007-Ohio-1790, ¶ 31. In *State ex rel. Bray v. Russell* (2000), 89 Ohio St. 3d 132, for instance, the Court invalidated a state law that authorized the parole board to extend a prisoner’s sentence if he committed a criminal offense while in prison, regardless of whether the prisoner was actually prosecuted. *Id.* at 135. This law unconstitutionally enlarged the role of the executive branch, the Court said, because “[t]he determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary.” *Id.* at 136.

In this case, the General Assembly has not sought to determine Dehler’s guilt or extend his criminal sentence, nor has it assigned those tasks to the Attorney General. Dehler nevertheless complains that the General Assembly is acting as “judge, prosecutor, and jury” by “automatically plac[ing] . . . offender[s] into a specific tier based on the[ir] crime” of conviction. Br. at 11. Nothing about that approach is novel or unconstitutional. As discussed above, the use of an automatic offense-based classification system goes back to 1963. And Megan’s Law used automatic offense-based classifications for two of its three designations. At no point has this Court (or any other court) found a separation-of-powers infirmity in a system where an

individual’s “conviction for a sexually oriented offense automatically confer[s] on him” a sex offender designation. *Hayden*, 2002-Ohio-4169, at ¶ 16.

Judge Grendell’s concurring opinion below correctly applied the separation-of-powers doctrine: Where a sex offender “has been previously classified . . . in a valid judgment entry rendered by a court of competent jurisdiction, that judgment may not be impaired by subsequent legislative enactment.” *Dehler III*, 2009-Ohio-5059, at ¶ 102. In this case, however, “Dehler has not been previously classified as a sexual offender” by a court. *Id.* at ¶ 103. Thus, “the application of the Adam Walsh Act to Dehler does not disturb the settled judgment of a court of competent jurisdiction,” and “there is no constitutional impediment to his classification” under S.B.10. *Id.* This Court should adopt that sound reasoning here and affirm Dehler’s classification.

C. S.B.10’s classification of Dehler did not violate *Bodyke*’s severance remedy.

Dehler next contends that, “[e]ven if [his] reclassification does not . . . encroach on a judicial function,” it “violates the severance remedy that this Court developed in *State v. Bodyke*.” Br. at 11. In other words, Dehler claims that the *Bodyke* Court reached past the facts and circumstances of that case to invalidate *all classifications* under S.B.10, not just those classifications that impermissibly reopened and modified a final court judgment. He then cites one specific passage from *Bodyke* to buttress his position. See 2010-Ohio-2424 at ¶ 66 (“We therefore hold that R.C. 2950.031 and 2950.032 are severed and . . . may not be enforced.”).

To be sure, that one sentence, if read in isolation, supports Dehler’s view that all S.B.10 classifications are now invalid. An examination of the entire *Bodyke* opinion, however, confirms that the Court’s remedy was far more tailored. It invalidated only those S.B.10 classifications that offended the separation-of-powers doctrine. The Court emphasized that it was only “excising the unconstitutional component” of S.B.10—that is, the component directing “the

attorney general to reopen and revise *the final decision of a judge* classifying a sex offender.” *Bodyke*, 2010-Ohio-2424, at ¶¶ 57, 66 (emphasis added). That remedy left “the remainder of the AWA, ‘which is capable of being read and of standing alone, . . . in place.’” *Id.* at ¶ 66 (citation omitted). The Court again reaffirmed the narrow scope of its remedy in the final line of its opinion: “R.C. 2950.031 and 2950.032 may not be applied to offenders *previously adjudicated by judges* under Megan’s Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated.” *Id.* (emphasis added).

This language demonstrates that the *Bodyke* Court chose a scalpel, and not a sledgehammer, for its remedy. It invalidated only those S.B.10 sex offender classifications that purported to modify a final court judgment. The Court did not address—nor did its remedy touch on—the constitutionality of any other S.B.10 classification.

In asserting otherwise, Dehler ignores this Court’s well-established tradition of judicial restraint. In *Bodyke*, three sex offenders with prior judicial adjudications of their Megan’s Law status alleged a separation-of-powers violation. This Court agreed. The question of S.B.10’s constitutionality with respect to those sex offenders who never received a prior judicial adjudication was not before the Court. For Dehler to now say that *Bodyke* decided that question would mean that this Court “answer[ed] a hypothetical question merely for the sake of answering it”—something that it does not do. *Ahmad v. AK Steel Corp.*, 119 Ohio St. 3d 1210, 2008-Ohio-4082, ¶ 3 (O’Connor, J., concurring). After all, the “hallmark of judicial restraint is to rule only on . . . an actual controversy.” *Id.*; accord *Meyer v. United Parcel Serv., Inc.*, 122 Ohio St. 3d 104, 2009-Ohio-2463, ¶ 53 (“[T]he cardinal principle of judicial restraint [is that] if it is not necessary to decide more, it is necessary not to decide more.”) (citation omitted).

This Court lifted its stay and directed the parties to submit briefing for a reason: It recognized that *Bodyke*'s separation-of-powers holding and remedy did not resolve this case. And for the reasons discussed above, the General Assembly's decision to classify Dehler under S.B.10 did not violate separation of powers because Dehler never received a prior sex offender designation from a court.

Attorney General's Proposition of Law No. III:

Retroactive application of S.B.10 does not violate the Ex Post Facto Clause because S.B.10 is a civil, remedial law.

The Ex Post Facto Clause of the U.S. Constitution prohibits the enactment of “[a]ny statute which punishes as a crime an act previously committed.” *State v. Cook*, 83 Ohio St. 3d 404, 414 (citation omitted). When evaluating an Ex Post Facto claim, this Court uses the “intent-effects test.” *Id.* at 415. First, the Court “determine[s] whether the General Assembly . . . indicated either expressly or impliedly a preference for” a civil purpose or a criminal purpose. *Id.* (citation omitted). If the legislature intended a criminal penalty, the law cannot be applied retroactively to conduct before its effective date. But if the legislature “indicated an intention to establish a civil penalty,” the Court then asks “whether the statutory scheme [is] so punitive either in purpose or effect as to negate that intention.” *Id.* (citation omitted).

Applying this two-step framework, Dehler claims that the intent and effect of S.B.10 is punitive. He is wrong on both counts.

A. The General Assembly intended to create a civil, remedial scheme.

When determining legislative intent, this Court “look[s] to the language and purpose of the statute.” *Cook*, 83 Ohio St. 3d at 416; accord *Smith v. Doe* (2003), 538 U.S. 84, 92 (examining “the statute’s text and its structure to determine the legislative objective”).

“Nothing on the face of [S.B.10] suggests that the legislature sought to create anything other than a civil scheme designed to protect the public from harm.” *Kansas v. Hendricks* (1997), 521 U.S. 346, 361. The General Assembly declared that when “the public is provided adequate notice and information about offenders and delinquent children who commit sexually oriented offenses,” they “can develop constructive plans to prepare themselves and their children.” R.C. 2950.02(A)(1). It further stated that the “protection of members of the public from sex offenders . . . is a paramount governmental interest,” and that “[t]he release of information about sex offenders . . . to public agencies and the general public will further [that] interest[.]” R.C. 2950.02(A)(2), (A)(6). Finally, the General Assembly expressed its “intent to protect the safety and general welfare of the people of this state.” R.C. 2950.02(B).

In *Cook*, this Court construed identical statements in Megan’s Law as conclusive proof that the legislature intended to create a civil, remedial scheme. 83 Ohio St. 3d at 416-17. The same conclusion must be reached here with respect to S.B.10.

Dehler nevertheless urges this Court to look past the General Assembly’s plain words and divine a hidden retributive purpose to the legislature. His evidence is unavailing.

First, Dehler notes that S.B.10 “is primarily codified within Title 29, Ohio’s Criminal Code.” Br. at 16. But Ohio has codified its sex offender registration law in the same section—R.C. Chapter 2950—since 1963, and this Court has consistently deemed the law civil in nature. Furthermore, Title 29 contains many statutes that do not involve criminal punishments. See, e.g., R.C. 2930.01 *et seq.* (victim’s rights); R.C. 2953.01 *et seq.* (post-conviction remedies); R.C. 2981.05 (civil forfeiture). As the U.S. Supreme Court has observed, the codification of a sex offender law “in the State’s criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive.” *Smith*, 538 U.S. at 95.

Second, Dehler observes that S.B.10's "classification and registration duties are a direct consequence of the offense of conviction"; "there is no . . . independent determination as to the likelihood that a given offender would commit another crime." Br. at 16, 20. This is irrelevant. As discussed above, two of the Megan's Law classifications (the "sexually oriented offender" and "habitual offender" designations) were directly tied to the offender's crimes of conviction. "The trial court . . . merely engage[d] in the ministerial act of rubber-stamping the registration requirement on the offender." *State v. Hayden*, 96 Ohio St. 3d 211, 2002-Ohio-4169, ¶ 16 (citation omitted). That the General Assembly now defines the most severe classification, Tier III, solely by offense of conviction does not establish a retributive motive. As the U.S. Supreme Court has recognized, "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determinations of their dangerousness, does not make the statute a punishment." *Smith*, 538 U.S. at 104.

Third, Dehler highlights S.B.10's penalty provision, noting that "the failure to comply with registration, verification, or notification requirements subjects an individual to criminal prosecution and penalties." Br. at 16. That feature does not transform S.B.10 into a punitive law. Many regulatory laws contain similar penalty provisions. For instance, Ohio courts have authority to issue *civil* protection orders, see R.C. 3113.31(E), and individuals who violate those orders are subject to *criminal* prosecution, see R.C. 2919.27. This background threat of prosecution does not defeat the "civil" nature of the protective order. Furthermore, the penalty provision in S.B.10 is not a recent innovation. Ohio's original sex offender law (passed in 1963) included a criminal sanction for non-registration, as did Megan's Law, see *Cook*, 83 Ohio St. 3d at 421, and Alaska's sex offender law at issue in *Smith*, 538 U.S. at 96. Those laws were deemed to be civil, remedial schemes, and S.B.10 is no different.

Fourth, Dehler complains that S.B.10's tier classification is imposed at a defendant's sentencing hearing. Br. at 17. But Megan's Law employed that same practice. It instructed trial courts to inform the offender of his registration obligations at sentencing. See Former R.C. 2950.03(A)(2) (1998). Megan's Law further instructed the trial court to "include in the offender's sentence" a statement of the offender's status as a sexual predator. See Former R.C. 2929.19(B)(4), 2929.21(G) (1998). Despite these features, the *Cook* Court found no punitive intent behind Megan's Law. Because the State must provide notice to the sex offender of his obligations, "it is effective to make it part of the plea colloquy or the judgment of conviction." *Smith*, 538 U.S. at 96. That "does not render the statutory scheme itself punitive." *Id.*

Fifth, Dehler argues that S.B.10's disclosure requirements reveal the General Assembly's retributive purpose. Br. at 18. What he fails to acknowledge is that nearly all of his listed objections were features of Megan's Law. It was Megan's Law that first required an offender to disclose his name, photograph, signature, residential address, employer's address, school address, license plate numbers, and other information requested by the bureau of criminal investigation. Former R.C. 2950.04(C) (2006). It was Megan's Law that first opened this information up to public inspection. Former R.C. 2950.081 (2006). And it was Megan's Law that instructed the Attorney General to create an Internet sex offender registry with the offender's name, address, photograph, and other identifying information. Former R.C. 2950.13(A)(11) (2006). The Court has already recognized the remedial nature of these provisions. See *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824, ¶ 36. While the General Assembly added several more disclosure requirements in S.B.10—e-mail addresses, Internet identifiers, telephone numbers, and the like—to reflect changing technology, Dehler puts forward no evidence to show

that these additional requirements were “designed to . . . punish the offender” rather than “protect the public.”¹ *Id.* at ¶ 38.

Neither the text nor the structure of S.B.10 reveals a hidden retributive purpose. The General Assembly’s purpose in enacting the law was civil—to protect the public and to bring Ohio’s sex offender classification and notification laws into conformity with national standards.

B. S.B.10 has a civil, remedial effect.

In light of the General Assembly’s clear intent to create a civil, remedial law when enacting S.B.10, this Court must proceed to the second step of the Ex Post Facto analysis. Here, “only the clearest proof will be adequate to show that a statute has a punitive effective so as to negate a declared remedial intention.” *Cook*, 83 Ohio St. 3d at 418.

When conducting this inquiry, the Court uses the seven guideposts outlined in *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-69, all of which confirm that S.B.10 is a civil law. Dehler’s arguments to the contrary are nothing but conclusory, unsupported assertions.

1. S.B.10 does not impose an affirmative disability or restraint on offenders.

To satisfy the first *Kennedy* factor, Dehler must show that S.B.10 imposes “an affirmative disability or restraint” on him—that is, “some sanction approaching the infamous punishment of imprisonment.” *Cutshall v. Sundquist* (6th Cir. 1999), 193 F.3d 466, 474 (citation omitted). His brief fails to identify a single example.

First, Dehler complains that S.B.10’s registration obligations “are significant and intrusive.” Br. at 22. He is wrong. S.B.10’s registration duties are no greater than those in Megan’s Law. Offenders with the most severe designation must register quarterly with their sheriff for life. In *Cook*, this Court held that such a duty was *not* an affirmative disability or

¹ S.B.10 requires offenders to provide a social security number, but federal and state laws prohibit disclosure of that information to the public. See 42 U.S.C. § 16918(b); R.C. 149.45.

restraint: “The act of registering does not restrain the offender in any way.” 83 Ohio St. 3d at 418. Rather, it “is a *de minimus* administrative requirement” “comparable to renewing a driver’s license.” *Id.*; accord *Doe v. Bredesen* (6th Cir. 2007), 507 F.3d 998, 1005 (Tennessee’s sex offender “registration, reporting, and surveillance components . . . do not constitute an affirmative disability or restraint”).

Second, Dehler observes that certain county sheriffs “have instituted a fee that must be paid each time an individual registers.” Br. at 22. That is irrelevant to the question at hand. These fees are creatures of *county* ordinance or policy. S.B.10 does not impose, authorize, or contemplate such fees for sex offender registration. Thus, these fees have nothing to do with the issue of S.B.10’s constitutionality.

Third, Dehler argues that S.B.10 “impose[s] significant restraints with respect to where registrants may lawfully reside.” Br. at 23. It is true that S.B.10 prohibits sex offenders from residing within 1,000 feet of a school, preschool, or day-care center. R.C. 2950.034. But this provision operates prospectively only. See *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, ¶ 24. It does not apply retroactively to Dehler or any other sex offender who committed his “acts . . . prior to the effective date of the statute.” *Id.* at ¶ 19. As such, S.B.10’s residency restrictions are irrelevant to the *Kennedy* factors. When determining whether a law violates the Ex Post Facto Clause, the inquiry looks only to those provisions of the law that operate *retrospectively*. See *Lynce v. Mathis* (1997), 519 U.S. 433, 441 (“To fall within the ex post facto prohibition, a law must be retrospective.”).

Fourth, Dehler argues that S.B.10’s community notification provision “must be construed as [a] substantial disabilit[y] for reclassified offenders.” Br. at 23. He is wrong. S.B.10’s community notification provision mirrors the Megan’s Law community notification provision.

In fact, S.B.10 is less aggressive because it affords discretion to trial courts to remove community notification for individual Tier III offenders. See R.C. 2950.11(F)(2). (By contrast, trial courts had no discretion under Megan’s Law to remove community notification for sexual predators.) In any event, this Court has already held that community notification is not an affirmative disability or restraint under the first *Kennedy* factor because “the burden of dissemination is not imposed on the defendant, but rather on law enforcement.” *Cook*, 83 Ohio St. 3d at 418; accord *Cutshall*, 193 F.3d at 474-75 (the “public notification provisions” of a sex offender law “impose[] no restraint whatever upon the activities of a registrant”).

Simply put, Dehler has not shown that he is laboring under an affirmative disability or restraint due to S.B.10. This first *Kennedy* factor cuts against him.

2. S.B.10’s registration and notification provisions do not resemble historical punishments.

Under the second *Kennedy* factor, Dehler must establish that S.B.10 imposes a sanction that, “from a historical perspective . . . has been viewed as punishment.” *Cutshall*, 193 F.3d at 475. None of his three comparisons satisfies that requirement.

First, Dehler contends that S.B.10’s community notification provisions, coupled with the State’s use of an Internet sex offender database, “share a common thread with traditional shaming punishments.” Br. at 23. That assertion ignores well-settled precedent.

This Court has twice rejected the public shaming analogy. In *Cook*, the Court reviewed a community notification provision of near-identical scope.² The Court held that “dissemination of such information in and of itself . . . has never been regarded as punishment when done in furtherance of a legitimate governmental interest.” 83 Ohio St. 3d at 419 (citation omitted).

² Compare Former R.C. 2950.11(A) (1998) (requiring notice to neighbors, law enforcement, public schools, charter schools, children’s agencies, day-care centers, and higher education institutions), with R.C. 2950.11(A) (expanding notice to include building manager, other occupants if offender lives in a multi-unit building, and child volunteer organizations).

Later, in *Ferguson*, the Court reviewed a Megan’s Law amendment that required the Attorney General to maintain an Internet database displaying the offender’s name, photograph, address, and description. That provision, the Court said, was not “akin to colonials’ clearly punitive responses to similar offenses, which ranged from public shaming to branding and exile.” 2008-Ohio-4824, at ¶ 37. After all, “[t]he information at issue”—Dehler’s criminal history—“is a public record, and its characteristic as such does not change depending on how the public gains access to it.” *State v. Williams* (2000), 88 Ohio St. 3d 513, 526.

The U.S. Supreme Court has also eschewed the public shaming analogy. In *Smith*, the Court reviewed an Alaska sex offender law that mandated publication of a sex offender’s name, aliases, address, photograph, physical description, license plate number, employment address, date of birth, crime of conviction, date of conviction, place of conviction, and length of sentence. 538 U.S. at 91. Rejecting the comparison to shaming, the Court held that “[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.” *Id.* at 98. Rather, the Court found that “[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender.” *Id.* at 99.

S.B.10 mandates the same type of community notification and Internet publication. As *Cook*, *Ferguson*, and *Smith* establish, these tools do not constitute shaming punishments.

Second, Dehler argues that S.B.10’s residency restrictions match the historical punishment of expulsion. Br. at 24. As just discussed, S.B.10’s residency restrictions may only be enforced prospectively. See *Hyle*, 2008-Ohio-542 at ¶ 24. Simply put, S.B.10 does not restrict the housing choices of Dehler or any sex offender who committed his crime before July 1, 2007—the effective date of the law. Because such prospective laws do not implicate the ex post facto prohibition, this provision of S.B.10 is not relevant to the *Kennedy* analysis.

Third, Dehler complains that “the registration and reporting scheme” in S.B.10 “is now so onerous that it is becoming difficult to distinguish registration from probation, parole, and other forms of supervised release.” Br. at 24. That characterization is false. S.B.10’s registration scheme does not stray above the maximum ceiling—quarterly registration with the sheriff—upheld in *Cook*. Furthermore, the U.S. Supreme Court has squarely rejected analogies to parole and probation. Registration laws are not “parallel to probation or supervised release,” the Court said, because there is no ongoing supervisory element and no “supervising officer” who may “seek the revocation of probation or release in case of infraction.” *Smith*, 538 U.S. at 101. This Court has also rejected the analogy, see *Cook*, 83 Ohio St. 3d at 418 (“[r]egistration has long been a valid regulatory technique with a remedial purpose”), as has the Sixth Circuit, see *Bredesen*, 507 F.3d at 1005 (“registration . . . components are not of a type that we have traditionally considered as punishment.”).

In sum, nothing in S.B.10 mirrors historical punishment.

3. S.B.10 does not contain a scienter requirement.

In referencing the third *Kennedy* factor, Dehler briefly asserts that S.B.10 “comes into play only upon a finding of scienter.” Br. at 25. He is wrong. This factor asks whether there is a “scienter requirement indicated in [the law]” itself. *Cook*, 83 Ohio St. 3d at 419; see also *Cutshall*, 193 F.3d at 475 (scienter requirement must be found in the statute “on its face”).

S.B.10, like its predecessors, contains no scienter requirement. It “applies to persons convicted of any one of the sex offenses listed in the statute, without inquiry into the offender’s state of mind.” *Cutshall*, 193 F.3d at 475. This third factor therefore favors the State.

4. S.B.10 does not materially advance the traditional aims of punishment.

Discussing the fourth *Kennedy* factor, Dehler argues that S.B.10 was “designed in large part to have both a retributive and deterrent effect” due to “the substantial restraints on physical liberty and the ostracism associated with sex-offender registration and notification.” Br. at 25.

That conclusory statement contains two errors. First, S.B.10 does not impose any physical restraints on Dehler. That Dehler must register with his sheriff four times a year is an “inconvenience . . . comparable to renewing a driver’s license,” but it “does not restrain [him] in any way.” *Cook*, 83 Ohio St. 3d at 418. And “the burden of dissemination” from S.B.10’s community notification program “is not imposed on [Dehler], but rather on law enforcement.” *Id.*

Second, public opprobrium is a consequence of every sex offender law. This Court has acknowledged that “[w]idespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.” *Ferguson*, 2008-Ohio-4824, at ¶ 38 (quoting *Doe*, 538 U.S. at 99). But this Court has also affirmed the “remedial, regulatory” nature of these notification laws, emphasizing that “the sting of public censure does not revert a remedial statute into a punitive one.” *Id.* at ¶ 36-37.

To be sure, S.B.10’s registration and notification provisions (like those in Megan’s Law) will have some collateral deterrent effect on offenders. Nevertheless, “the mere presence of a deterrent purpose” does not transform a valid regulatory scheme into a criminal punishment. *Smith*, 538 U.S. at 102 (quoting *Hudson v. United States* (1997), 522 U.S. 93, 105); accord *Cutshall*, 193 F.3d at 475. As this Court has noted, any deterrent effect from sex offender registration and notification is minimal when juxtaposed with the threat of traditional criminal punishments. *Cook*, 83 Ohio St. 3d at 420 (“[S]tatutes with a much lesser penal effect than

incarceration, such as the notification provisions of R.C. Chapter 2950, will have little deterrent effect, if any.”).

Given the nominal nexus between S.B.10 and the traditional aims of punishment, this fourth *Kennedy* factor leans toward the State, not Dehler.

5. Any punishment under S.B.10 flows from a new violation.

With respect to the fifth *Kennedy* factor, Dehler argues that S.B.10 “applies only to behavior which is already a crime.” Br. at 26. The decisions in *Smith* and *Cook* foreclose his reliance on this factor. It is true that S.B.10’s “regulatory scheme applies only to past conduct, which was, and is, a crime.” *Smith*, 538 U.S. at 105. But S.B.10 does not impose new criminal punishment on that past conduct. Rather, “[t]he obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.” *Id.* And “any . . . punishment flows from a failure to register, a new violation of the statute, not from a past sex offense.” *Cook*, 83 Ohio St. 3d at 421; accord *Cutshall*, 193 F.3d at 476.

6. S.B.10 serves the remedial purpose of protecting the public.

On the sixth *Kennedy* factor, Dehler acknowledges that S.B.10 “advance[s] a legitimate, regulatory purpose: the protection of the public from dangerous sexual offenders.” Br. at 27.

He is right. The U.S. Supreme Court has recognized that sex offender laws advance “a legitimate nonpunitive purpose of ‘public safety, which is advanced by alerting the public to the risk of sex offenders in their community.’” *Smith*, 538 U.S. at 102-03 (citation omitted); accord *Cutshall*, 193 F.3d at 476 (sex offender laws “aid law enforcement and protect the public”). This Court in *Cook* likewise recognized that sex offender registration “allows local law enforcement to collect and maintain a bank of information on offenders” and that community notification “allow[s] dissemination of relevant information to the public for its protection.” 83 Ohio St. 3d

at 421. In *Ferguson*, the Court re-emphasized that sex offender registration and notification helps protect and educate the public. See 2008-Ohio-4824, ¶¶ 35-38.

S.B.10 advances another remedial purpose—it aligns Ohio’s system with the national sex offender registry and other state systems. Under the old Megan’s Law regimes, the States were losing track of over twenty percent of sex offenders due to a lack of coordination and standards among their different systems. See 152 Cong. Rec. S 8012 (July 20, 2006) (Statement of Sen. Hatch). Congress passed the Walsh Act in an effort to “sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders.” *Id.* It created uniform standards for sex offender registration and community notification, 42 U.S.C. §§ 16913-16918, 16921, and it established one national repository within the Department of Justice, *id.* § 16919. S.B.10 therefore advances a legitimate nonpunitive purpose of aligning Ohio’s sex offender registration and notification scheme with those national standards, thereby enhancing its efficacy.

7. S.B.10 is not excessive in relation to that purpose.

The seventh *Kennedy* factor asks whether the provisions of S.B.10 are excessive in relation to the law’s remedial purpose. This “is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy,” but “whether the regulatory means chosen are reasonable in light of the nonpunitive objective.” *Smith*, 538 U.S. at 105. Dehler offers only two arguments on this score.

Dehler first contends that S.B.10 is excessive because his “classification is tied solely to the fact of conviction as opposed to any finding of future dangerousness.” Br. at 27. To the contrary, there is nothing unreasonable about the General Assembly’s decision to classify Dehler as a Tier III offender solely by reference to his criminal offense.

This Court has already said so. Two classifications under the old Megan’s Law—the “sexually oriented offender” designation and the “habitual offender” designation—were tied solely to the offender’s convictions. “The trial court [did] not ‘determine’ anything. It merely engage[d] in the ministerial act of rubber-stamping the registration requirement on the offender.” *Hayden*, 2002-Ohio-4169, at ¶ 16 (citation omitted). Notwithstanding the automatic nature of those classifications, this Court affirmed their constitutionality in *Cook* and *Ferguson*.

The U.S. Supreme Court has said so as well. In *Smith*, it found no constitutional deficiency in Alaska’s offense-based sex offender classification system: “The 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 under the Ex Post Facto Clause.” 538 U.S. at 104.

In S.B.10, the General Assembly “ma[de] reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.” *Id.* at 103-04. The Walsh Act tiers are commensurate with the severity of the offender’s conduct: Tier I consists of lesser offenses (e.g., importuning, voyeurism, pandering), Tier II consists of more serious offenses (e.g., compelling prostitution, pandering involving a minor, illegal use of a minor for nudity-oriented material), and Tier III consists of the most severe crimes (e.g., rape, sexual battery, aggravated murder with sexual motivation, kidnapping of a minor for sexual activity). As the severity of the crime increases, the frequency and duration of the offender’s reporting period lengthens. Given the pronouncements from this Court and the U.S. Supreme Court, such an offense-based calibration is eminently reasonable.

Dehler next asserts that S.B.10 is “excessive in relation to any public safety goal” because “empirical evidence . . . demonstrates the inefficacy of sex-offender registration laws in actually protecting the public from harm.” Br. at 27. But Dehler’s own evidence undercuts that claim.

On page 25 and 26 of his brief, Dehler offers two lone empirical studies. In the first, the authors examined rape statistics in ten states with various sex offender laws. See Bob E. Vasquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States* (2008), 54 *Crime & Delinq.* 175. They next analyzed whether a statistically significant change occurred in the monthly incidences of rapes after the effective date of each law. *Id.* at 184. Although some state laws did not prompt a change, Ohio’s did: “The rape incidences in Hawaii, Idaho, and Ohio . . . *significantly decreased* after the introduction of the sex offender notification laws.” *Id.* at 186 (emphasis added). In Dehler’s second study, the authors compared trends in national crime data to the effective date of sex offender laws in various states—including Ohio. See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* (2008). They found “evidence that sex offender registration and notification laws decreased the total frequency of sex offenses in the states . . . examine[d].” *Id.* at 4. Notably, the authors concluded that “[t]he registration of released sex offenders alone is associated with a *significant decrease* in the frequency of crime.” *Id.* (emphasis added). Therefore, Dehler’s own studies confirm—or, at the very least, support—the General Assembly’s view that S.B.10 promotes public safety.

Simply put, Dehler has not substantiated his claim that sex offender registration and notification “do[] very little to advance public safety.” Br. at 27. Plenty of evidence—aneecdotal and empirical—exists to the contrary. Because S.B.10 has “a rational connection to a nonpunitive purpose,” and because “the means chosen”—an offense-based classification

system—“are reasonable,” *Bredesen*, 507 F.3d at 1006-07, this final *Kennedy* factor provides further proof of S.B.10’s constitutionality.

Examining the same seven *Kennedy* factors, all the federal circuit courts—including the Sixth Circuit—have “consistently and repeatedly rejected ex post facto challenges to state statutes that retroactively require sex offenders convicted before their effective date to comply with similar registration, surveillance, or reporting requirements.” *Bredesen*, 507 F.3d at 1007 (collecting cases). Dehler has offered this Court no basis for going in the opposite direction.

Attorney General’s Proposition of Law No. IV:

Retroactive application of S.B.10 does not violate the Retroactivity Clause of the Ohio Constitution because the law is remedial, not substantive or punitive.

The Retroactivity Clause of the Ohio Constitution provides that “[t]he general assembly shall have no power to pass retroactive laws.” Ohio Const., Art. II, § 28. When evaluating a Retroactivity Clause claim, the Court uses a two-part test. It first determines “whether the General Assembly expressly made the statute retroactive.” *Hyle*, 2008-Ohio-542, at ¶ 8. If so, the Court then assesses “whether the statutory restriction is substantive or remedial.” *Id.* A remedial law does not violate the Retroactivity Clause, even if applied retroactively. *Id.* at ¶ 7.

The first prong is not in dispute. The registration and notification requirements in S.B.10 apply retroactively to sex offenders who committed their crimes before July 1, 2007. (S.B.10’s residency restriction is the exception; it applies prospectively only.)

As to the second prong, a statute is “‘substantive’ if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right.” *Cook*, 83 Ohio St. 3d at 411. A statute is “remedial” if it “affect[s] only the remedy provided” or “merely substitute[s] a new or more appropriate remedy.” *Id.*

Dehler offers three arguments for why S.B.10 is a “substantive” law. First, he contends that S.B.10’s classification and notification system is “a form of punishment,” and thus “affect[s] [his] substantive right to due process and the prohibition against double jeopardy.” Br. at 30. This is a mere rehash of his Ex Post Facto argument. As Dehler admits, the line between a civil, remedial statute and a punitive status turns on an “analysis of the *Kennedy* factors.” Br. at 31; accord *State v. Martello*, 97 Ohio St. 3d 398, 2002-Ohio-6661, ¶ 21 (referencing *Kennedy* factors in assessing whether a sanction is civil or criminal for double jeopardy purposes). And as explained above, those seven factors demonstrate that S.B.10 is a civil remedial, law.

Second, Dehler asserts that S.B.10 “attach[es] new duties to a past transaction: the original offense of conviction.” Br. at 31. That argument fails because, under the Retroactivity Clause, Dehler had no reasonable expectation of finality in his past criminal transactions.

This Court addressed this very argument in *Cook*. In June 1996, Tony Cook engaged in sexual activity with two minor children. He pled guilty to one count of gross sexual imposition. 83 Ohio St. 3d at 404. Under the law then in effect, Cook had *no* sex offender registration or notification duties. That law reached only those persons “convicted two or more times, in separate criminal actions” of a sex offense. Former R.C. 2950.01(A) (1996). The General Assembly then enacted Megan’s Law. Beginning July 1, 1997, all sex offenders had a legal duty to register with the county sheriffs. See *Cook*, 83 Ohio St. 3d at 408. The General Assembly also applied Megan’s Law retroactively to those individuals, like Cook, who committed their crimes before the statute’s effective date. *Id.* at 410.

At sentencing, the trial court classified Cook as a sexual predator under Megan’s Law and ordered him to register quarterly with his county sheriff for the rest of his life. *Id.* at 404. Cook objected to the classification under the Retroactivity Clause, arguing that the General

Assembly had “significantly changed the law as it existed when [his] offense was committed” and “impos[ed] additional duties and attach[ed] new disabilities to past transactions.” *Id.*

This Court disagreed, rejecting Cook’s argument that the General Assembly “had attached a new disability” to his past conduct. *Id.* at 412. Rather, the Court reaffirmed the rule that “a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration created at least *a reasonable expectation of finality.*” *Id.* (emphasis added and citation omitted). It then found that Cook lacked such an expectation of finality with respect to his felonious conduct: “[E]xcept with regard to constitutional protections against ex post facto laws . . . felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” *Id.* at 412 (emphasis and citation omitted). Thus, the General Assembly’s decision to apply Megan’s Law retroactively to Cook “d[id] not violate the ban on retroactive laws.” *Id.* at 413.

Dehler stands in the same shoes as Cook. He committed his sex offense before the effective date of S.B.10, and he now claims that retroactive application of S.B.10 “imposes new or additional burdens as to [that] past transaction.” Br. at 31. This argument fails because, like Cook, Dehler has no reasonable expectation of finality with respect to his criminal transaction. See *Cook*, 83 Ohio St. 3d at 412. Therefore, S.B.10 did “not burden or attach a new disability to [that] past transaction . . . in the constitutional sense.” *Id.* (citation omitted).

Third, Dehler briefly contends that S.B.10 “has the effect of impairing the vested rights” of sex offenders. Br. at 32. At no point, however, does Dehler identify a “vested right” that he acquired under contract or prior statute. Indeed, this Court in *Cook* summarily dismissed the offender’s assertion that a “vested right had been created” in Ohio’s prior sex offender law. 83 Ohio St. 3d at 412; accord *City of E. Liverpool v. Columbiana Cty. Budget Comm’n*, 114 Ohio

St. 3d 133, 2007-Ohio-3759, ¶ 33 (“[N]o one has a vested right in having the law remain the same over time.”).

In short, none of Dehler’s three theories amounts to a Retroactivity Clause violation.

Attorney General’s Proposition of Law No. V:

Retroactive application of S.B.10 does not violate double jeopardy because it does not impose a second criminal punishment.

Dehler next claims that the retroactive application of S.B.10 violates double jeopardy because its “registration and notification requirements operate as a second punishment.” Br. at 32. This proposition fails both procedurally and substantively.

As to procedure, Dehler failed to raise his double jeopardy claim in the Eleventh District. His brief did not even mention the term “double jeopardy.” See Br. of Lambert Dehler, *State v. Dehler* (11th Dist), No. 2008-TR-61, at 25-34 (on file with Clerk’s Office). By failing to advance this claim below, Dehler waived further consideration of it. See *Porter*, 84 Ohio St. 3d at 259.

As to substance, Dehler’s double jeopardy claim is tied to his Ex Post Facto claim. When determining whether a law operates as a “second punishment” within the meaning of double jeopardy, this Court uses the same seven *Kennedy* factors as it applies to Ex Post Facto claims. See *Martello*, 2002-Ohio-6661, at ¶ 21; *Williams*, 88 Ohio St. 3d at 528. As explained above, those factors demonstrate that S.B.10 is a civil, remedial law. Dehler’s double jeopardy claim therefore fails.

Attorney General's Proposition of Law No. VI:

A claim that sex offenders have a constitutional right to counsel to challenge their S.B.10 classifications is not properly before the Court; in any event, the claim has no merit because the offender is not threatened with a deprivation of liberty or a fundamental right.

If S.B.10 survives these four constitutional objections (and it should), Dehler still asserts a due process right to state-appointed counsel to contest his Tier III classification under S.B.10. That claim is rife with procedural error. Because Dehler did not present that claim to either the trial court or the Eleventh District, it is not properly before the Court. The claim is also meritless.

A. Dehler waived his due process claim by not raising it before the trial court or the Eleventh District.

This Court has long adhered to the elementary principle that “a constitutional question can not be raised in a reviewing court unless it appears it was urged in the trial court.” *State ex rel. Specht v. Oregon City Bd. of Educ.* (1981), 66 Ohio St. 2d 178, 182. The rationale for this well-worn rule is self evident: “[A]ppellate courts do not sit as self-directed boards of legal inquiry and research.” *Bodyke*, 2010-Ohio-2424, at ¶ 78 (O’Donnell, J., concurring) (citation omitted). Rather, they examine only those “questions . . . presented to the court whose judgment is sought to be reversed.” *Porter*, 84 Ohio St. 3d at 259 (citation omitted). This rule serves as a warning to all litigants that “[c]onstitutional rights may be lost . . . by a failure to assert them at the proper time.” *State v. Childs* (1968), 14 Ohio St. 2d 56, 62.

In this case, Dehler filed a petition in the Trumbull County Court of Common Pleas challenging his S.B.10 classification. He requested the appointment of an attorney, claiming a statutory right to counsel under R.C. 120.16, R.C. 2950.11(F)(2), and R.C. 2950.032(E). See Mot. for Immediate Appt. of Counsel (Trumbull C.P.), No. 2008-CV-402 (on file with Clerk’s Office). The trial court denied his request. On appeal to the Eleventh District, Dehler again

claimed a statutory right to counsel under these same provisions. See Br. of Lambert Dehler, *State v. Dehler* (11th Dist), No. 2008-TR-61, at 19-25 (on file with Clerk's Office). The Eleventh District also denied the claim. See *Dehler III*, 2009-Ohio-5059, at ¶¶ 70-83. Dehler's pleadings to these courts never referenced "due process" or any constitutional concern implicated by his alleged entitlement to counsel—his arguments were purely statutory.

In his merit brief to this Court, Dehler never advances his claim of a *statutory* right to counsel.³ "[I]t is therefore 'deemed to be abandoned.'" *City of E. Liverpool v. Columbiana Cty. Budget Comm'n*, 116 Ohio St. 3d 1201, 2007-Ohio-5505, ¶ 3 (citation omitted). Instead, and for the first time in this litigation, Dehler asserts a *constitutional* right to counsel to challenge his S.B.10 classification. He references a host of federal precedents discussing the right to counsel in civil commitment proceedings, parental rights disputes, and the like—none of which were presented to the courts below.

The Attorney General is not aware of any authority that permits Dehler to raise his claim to this Court in the first instance, nor should this Court establish such a precedent. It should instead dismiss this proposition as improvidently allowed.

B. State-appointed counsel is not required because S.B.10 is not a criminal statute.

Notwithstanding that fatal procedural problem, Dehler's due process claim fails on its merits. Dehler begins with the assertion that S.B.10 is "a quintessentially penal statute" under the seven *Kennedy* factors. Br. at 33-34. He then analyzes whether his petition challenging his Tier III designation "is a critical stage of a criminal proceeding." Br. at 34-37.

³ The Cuyahoga County Public Defender, as amicus, briefly asserts that Dehler is entitled to counsel under R.C. 120.16. Br. at 12. Because Dehler abandoned this claim, the Attorney General will not address it here. He did provide a complete analysis of R.C. 120.16 in earlier litigation. See Supp. Br., *Chojnacki v. Cordray* (June 23, 2009), No. 2008-0991, at 21-23.

This is yet another replay of the Ex Post Facto argument. If Dehler's premise is correct and S.B.10 is a penal statute, under the *Kennedy* factors, then S.B.10 cannot retroactively apply to him. His Tier III classification would be invalid, this entire proceeding would terminate, and the right-to-counsel question would become moot. As the Attorney General explained above, however, S.B.10 is not a criminal statute under the *Kennedy* factors.

C. State-appointed counsel is not required because S.B.10's classification process does not threaten an offender's liberty or a fundamental right.

Because S.B.10 is a civil statute, Dehler must demonstrate that he is entitled to counsel under the Fourteenth Amendment's due process clause. In advancing this claim, Dehler expansively (and erroneously) reinterprets the U.S. Supreme Court's pronouncements on the right to counsel in civil proceedings. The Court has recognized such a right in two limited contexts—where the individual is threatened with a deprivation of liberty or the loss of a fundamental right.

Dehler faces neither threat in this litigation. Thus, he is not entitled to counsel.

1. Dehler's personal liberty is not at stake in his S.B.10 classification challenge.

Dehler correctly observes that a litigant has "an absolute right to appointed counsel in those circumstances in which [he] faces a loss of personal freedom." Br. at 38. A litigant has a right to appointed counsel in civil proceedings "if . . . he may be deprived of his physical liberty." *Lassiter v. Dep't of Social Servs. of Durham Cty.* (1981), 452 U.S. 18, 27.

But S.B.10's registration and notification provisions impose no such physical restraints on sex offenders. In *Cook*, this Court reviewed a Megan's Law classification that required quarterly registration with the county sheriff. It properly recognized that "[t]he act of registering *does not restrain the offender* in any way." 83 Ohio St. 3d at 418 (emphasis added). *Cook* also found no physical disability in a community notification program because "the burden of dissemination is

not imposed on the defendant.” *Id.* The Court reaffirmed these principles in *Hayden*, finding that the offender “ha[d] certainly not suffered any bodily restraint as a result of the registration requirement imposed on him.” 2002-Ohio-4169, at ¶ 14. S.B.10’s provisions operate in the same fashion. They impose no impairment on Dehler’s physical liberty, and thus the right to counsel does not attach.

Dehler instead maintains that “the risk of incarceration” from his S.B. 10 classification is “sufficient to trigger the right to counsel under the Fourteenth Amendment.” Br. at 40. In other words, he contends that the law’s increased reporting duties make his noncompliance—and therefore a future criminal prosecution and conviction—more likely. But that has never been the test for appointment of counsel in civil proceedings. Again, the relevant inquiry is whether the “proceedings . . . may result in commitment to an institution.” *In re Gault* (1967), 387 U.S. 1, 41. If the litigant faces the threat of incarceration or commitment in *that* proceeding, the right to counsel is triggered. See, e.g., *In re Fisher* (1974), 39 Ohio St. 2d 71, 80 (right to counsel in civil commitment proceedings because of the “obvious deprivation of liberty arising from physical restraints upon a committed individual’s freedom”).

In this case, Dehler’s physical liberty is not at risk in his S.B.10 reclassification challenge. Only two outcomes are possible: either the trial court will reduce his tier designation, or it will leave him at Tier III. Under no circumstances can the court order Dehler’s physical confinement to an institution or jail at the close of the proceedings.

Dehler’s reliance on *Vitek v. Jones* (1980), 445 U.S. 480, for the contrary proposition is unavailing. In *Vitek*, the U.S. Supreme Court determined that prisoners contesting an involuntary transfer to a mental hospital were entitled to state-appointed counsel. The reason was that “commitment to a mental hospital produces ‘a massive curtailment of liberty.’” *Id.* at

491 (citation omitted). And because the deprivation of liberty in a mental hospital is “qualitatively different” from the deprivation of liberty in a prison, the inmate was entitled to counsel before the transfer could occur. *Id.* at 493.

Dehler acknowledges as much: “Central to the Court’s decision in *Vitek* was the fact that the prison was subjected to a major change in the conditions of confinement.” Br at 41. In this case, by contrast, there is *no* physical confinement (much less a major change in confinement) of Dehler arising from his S.B.10 reclassification challenge. Absent that possibility, the right to counsel is not triggered.

Dehler’s theory—that a speculative risk of incarceration, premised on his speculative future violation of the law, is sufficient to trigger the right to counsel—finds no support in precedent. Only one circumstance—“where the litigant may lose his physical liberty if he loses the litigation”—triggers the right to counsel in civil proceedings. *Lassiter*, 452 U.S. at 25. And that possibility is not present here. If Dehler loses his S.B.10 reclassification challenge, he faces no new restraint on his physical liberty.

2. Dehler’s fundamental rights are not at risk in his S.B.10 classification challenge.

Absent the threat of the loss of personal freedom, there is a strong presumption against the right to appointed counsel in civil proceedings. See *Lassiter*, 452 U.S. at 27. That presumption can be overcome in only the narrowest of circumstances—where the litigant is threatened with the deprivation of a fundamental right.

In *Lassiter*, the U.S. Supreme Court held that the Fourteenth Amendment guarantees the right to counsel in certain parental termination cases where “the parent’s interests [are] at their strongest, the State’s interests [are] at their weakest, and the risks of error [are] at their peak.” *Id.* at 31. Key to the Court’s decision was the “fundamental” nature of parent’s interests in his or her children. *Id.* at 27; accord *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (“Although both

Lassiter and *Santosky* yielded divided opinions, the Court was unanimously of the view that “the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.”) (citation omitted).

This Court has endorsed *Lassiter*’s analysis. It has afforded the right to counsel to litigants in civil cases when the State seeks the “involuntary, permanent termination of parental rights.” *State ex rel. Heller v. Miller* (1980), 61 Ohio St. 2d 6, 13; accord *State ex rel. Cody v. Towner* (1983), 8 Ohio St. 3d 22 (right to counsel in paternity proceedings). Again, key to this Court’s holding was its finding that parental rights are “fundamental” under the due process clause. *Heller*, 61 Ohio St. 3d at 13.

This case differs in two key respects. First, it is essential to appreciate the origin and posture of Dehler’s S.B.10 classification challenge. It is a civil proceeding *initiated by the offender* against the State under R.C. 2950.032(E). Yet Dehler does not cite, nor is the Attorney General aware of, any authority recognizing a due process right to appointed counsel where the litigant himself initiates the civil proceeding against the government.

Second, Dehler has not explained how any of his fundamental interests are threatened in his classification challenge. Such recognized “fundamental” rights include the right to vote, the right to interstate travel, the right to free speech and free exercise of religion, and the right to procreate. See *Williams*, 88 Ohio St. 3d at 530. But as this Court has already recognized, “there is nothing in R.C. Chapter 2950 that infringes upon any fundamental right of privacy or any other fundamental constitutional right that has been recognized by the United States Supreme Court.” *Id.* at 531.

To be sure, Dehler has a personal stake in the outcome of his S.B.10 classification challenge. The proceeding could theoretically impact his reporting obligations, his reputation, employment prospects, and finances (although this is very much unlikely since Dehler will spend the rest of his life in prison). But many other civil proceedings entail similar consequences. Civil forfeiture proceedings threaten an individual's house, his personal property, and his finances. Civil protection orders (which are enforced through criminal penalties) in domestic violence cases dictate where certain individuals may live and work. In immigration proceedings, the individual is threatened with deportation and the consequent separation from his family, job, and livelihood. And in habeas proceedings, an individual prisoner's life or liberty is centrally at stake. Despite the weighty nature of the interests at stake, none of these civil proceedings triggers a right to counsel under the Due Process Clause.

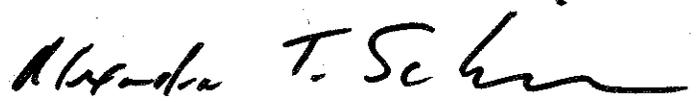
In short, Dehler is not threatened with a deprivation of his liberty or a fundamental right in his S.B.10 classification challenge. Thus, due process does not guarantee him a right to appointed counsel.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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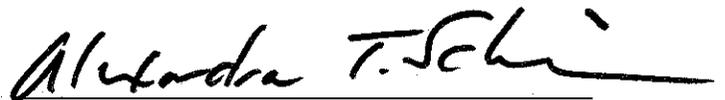
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Appellant State of Ohio was served by U.S. mail this 29th day of November, 2010, upon the following counsel:

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