

IN THE SUPREME COURT OF OHIO  
2014

STATE OF OHIO,

Case No. 14-363

Plaintiff-Appellee,

-vs-

On Appeal from  
the Clark County  
Court of Appeals, Second  
Appellate District

TRAVIS BLANKENSHIP,

Court of Appeals  
No. 2012-CA-74

Defendant-Appellant.

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

Ron O'Brien 0017245  
Franklin County Prosecuting Attorney  
Steven L. Taylor 0043876 (Counsel of  
Record)  
Chief Counsel, Appellate Division  
373 South High Street, 13th Floor  
Columbus, Ohio 43215  
Phone: 614-525-3555  
Fax: 614-525-6103  
E-mail: staylor@franklincountyohio.gov  
Counsel for Amicus Curiae Franklin  
County Prosecutor Ron O'Brien

Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
Phone: 614-466-5394  
Fax: 614-752-5167  
E-mail: katherine.ross-  
kinzie@opd.ohio.gov

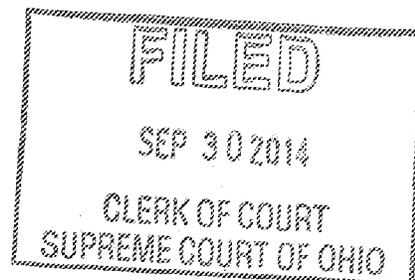
and

Katherine R. Ross-Kinzie 0089762  
Assistant State Public Defender  
Counsel for Defendant

D. Andrew Wilson 0073767  
Clark County Prosecuting Attorney  
Ryan A. Saunders 0091678 (Counsel of  
Record)  
Assistant Prosecuting Attorney  
50 East Columbia Street, Suite 449  
Springfield, Ohio 45502  
Phone: 937-521-1770  
Fax: 937-328-2657  
E-mail: rsaunders@clarkcountyohio.gov

Counsel for Amicus Listed on Certificate  
of Service

Counsel for State of Ohio



## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES</b>	ii
<b>STATEMENT OF AMICUS INTEREST</b>	1
<b>STATEMENT OF FACTS</b>	1
<b>ARGUMENT</b>	1
<b>Proposition of Law:</b> The Adam Walsh Act does not impose “punishment” for federal constitutional purposes and does not impose “cruel and unusual punishment” under either the federal or Ohio constitutions.	1
<b>CONCLUSION</b>	24
<b>CERTIFICATE OF SERVICE</b>	25

## TABLE OF AUTHORITIES

### CASES

<i>Arnold v. Cleveland</i> , 67 Ohio St.3d 35, 616 N.E.2d 163 (1993).....	20
<i>California v. Greenwood</i> , 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).....	24
<i>Chapman v. United States</i> , 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).....	4
<i>Conn. Dept. of Public Safety v. Doe</i> , 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). 8, 16	
<i>DeVeau v. Braisted</i> , 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960).....	9
<i>Doe v. Pataki</i> , 120 F.3d 1263 (2nd Cir. 1997).....	12
<i>Flemming v. Nestor</i> , 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960).....	9
<i>Harmelin v. Michigan</i> , 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).....	5, 6
<i>Hawker v. New York</i> , 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898).....	9, 11
<i>Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.</i> , 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976).....	21
<i>Howard v. Kentucky</i> , 200 U.S. 164, 26 S.Ct. 189, 50 L.Ed. 421 (1906).....	21
<i>In re Bruce S.</i> , 134 Ohio St.3d 477, 2012-Ohio-5696, 983 N.E.2d 350.....	2
<i>In re C.P.</i> , 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729 .....	2, 20
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) .....	10, 14
<i>Lockyer v. Andrade</i> , 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).....	5
<i>McDougle v. Maxwell</i> , 1 Ohio St.2d 68, 203 N.E.2d 334 (1964).....	5
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) .....	passim
<i>Solem v. Helm</i> , 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).....	5
<i>State ex rel. Dickman, v. Defenbacher</i> , 164 Ohio St. 142, 128 N.E.2d 59 (1955) .....	22, 23

<i>State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas</i> , 9 Ohio St.2d 159, 224 N.E.2d 906 (1967) .....	21
<i>State v. Burnett</i> , 93 Ohio St.3d 419, 755 N.E.2d 857 (2001) .....	3
<i>State v. Campa</i> , 1st Dist. No. C-010254, 2002-Ohio-1932 .....	4
<i>State v. Chaffin</i> , 30 Ohio St.2d 13, 282 N.E.2d 46 (1972) .....	5
<i>State v. Cook</i> , 83 Ohio St.3d 404, 700 N.E.2d 570 (1998) .....	passim
<i>State v. Farris</i> , 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985 .....	18
<i>State v. Ferguson</i> , 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110 .....	7
<i>State v. Hairston</i> , 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073 .....	18, 20
<i>State v. Hayden</i> , 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502 .....	16
<i>State v. Howard</i> , 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341 .....	17
<i>State v. Kennedy</i> , 295 Ore. 260, 666 P.2d 1316, 1323 (1983) .....	24
<i>State v. Martello</i> , 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250 .....	19
<i>State v. Morris</i> , 55 Ohio St.2d 101, 378 N.E.2d 708 (1978) .....	4
<i>State v. Payne</i> , 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306 .....	3
<i>State v. Taylor</i> , 138 Ohio St.3d 194, 2014-Ohio-460 .....	4
<i>State v. Thompkins</i> , 75 Ohio St.3d 558, 664 N.E.2d 926 (1996) .....	4
<i>State v. Weitbrecht</i> , 86 Ohio St.3d 368, 715 N.E.2d 167 (1999) .....	5
<i>State v. Williams</i> , 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108 .....	2
<i>State v. Williams</i> , 88 Ohio St.3d 513, 728 N.E.2d 342 (2000) .....	8, 12
<i>State, ex rel. Owens, v. McClure</i> , 48 Ohio St.2d 1, 354 N.E.2d 921 (1976) .....	4
<i>State, ex rel., v. Jones, Auditor</i> , 51 Ohio St. 492, 504, 37 N.E. 945 (1894) .....	21

*United States v. Felts*, 674 F.3d 599 (6th Cir. 2012) .....2  
*Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) .....20

**STATUTES**

R.C. 2950.02.....10  
R.C. 2950.02(A) & (B) ..... 10

**CONSTITUTIONAL PROVISIONS**

Article I, Section 9, of the Ohio Constitution.....2, 18, 20  
Eighth Amendment, United States Constitution.....passim

## STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecutor prosecutes thousands of cases every year. Representation over the past several years has included representing the State in proceedings related to the constitutionality of the Adam Walsh Act, the Act which amended Ohio's sex-offender registration requirements as of January 1, 2008. Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues related to the classification and registration of sex offenders and child-victim offenders. In the interest of aiding this Court's review of the present appeal, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the constitutionality of AWA.

## STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the procedural history of the case as set forth in the Second District's opinion and as set forth in the merit brief of plaintiff-appellee State of Ohio.

## ARGUMENT

**Proposition of Law:** The Adam Walsh Act does not impose "punishment" for federal constitutional purposes and does not impose "cruel and unusual punishment" under either the federal or Ohio constitutions.

Considerable care must be exercised in addressing the constitutional claims raised by defendant. He claims that his 25-year registration requirement amounts to "cruel and unusual punishment" under the Eighth Amendment of United States Constitution and

Article I, Section 9, of the Ohio Constitution. Amicus questions the premise of whether the AWA imposes “punishment” for purposes of the Eighth Amendment.

Under the controlling decision in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), the AWA is not “punishment.” The decision in *Smith v. Doe* continues to set the federal standard, with federal courts upholding the federal SORNA on that basis. See, e.g., *United States v. Felts*, 674 F.3d 599, 605-606 (6th Cir. 2012)

To be sure, under *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, this Court concluded that the changes made by the AWA in the aggregate were “punitive.” But *Williams* was strictly a ruling under the retroactive-law prohibition of the Ohio Constitution. It constitutes no precedent at all that the AWA would be “punitive” or “punishment” under the federal constitution. The *Williams* Court expressly eschewed discussing whether the AWA violated the United States Constitution.

*Williams*, ¶ 7.

In this Court’s decision in *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶11, this Court adopted the premise from *Williams* that the AWA scheme is “punitive” and ultimately reached the conclusion that automatic application of an AWA Tier III lifetime classification to a juvenile sex offender was “cruel and unusual punishment” under the federal and state constitutions. But the question of whether the AWA scheme was really “punitive” under the controlling federal-law *Smith v. Doe* standard went entirely unaddressed and therefore *In re C.P.* does not constitute binding precedent on that point. *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, 983 N.E.2d 350, ¶ 6 (express language of earlier case’s syllabus not dispositive because earlier case “never addressed the discrete issue presented here”); *State v. Payne*, 114

Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶¶ 10-12 (“perceived implications” of earlier decisions/dispositions not binding and “entitled to no consideration whatever as settling \* \* \* a question not passed upon or raised at the time of the adjudication.”).

A comparison of *Williams* with *Smith v. Doe* reveals that *Williams* made no effort to apply the *Smith v. Doe* standard. The majority opinion in *Williams* did not even mention *Smith v. Doe*. Insofar as sex offenders seek to rely on *Williams* for federal constitutional purposes, the federal-law standard of *Smith v. Doe* is controlling, not *Williams*. Indeed, as discussed below, much of the *Williams* analysis is directly contrary to what the United States Supreme Court said in *Smith v. Doe*. This Court is bound by *Smith v. Doe* for federal constitutional purposes, not *Williams*. *State v. Burnett*, 93 Ohio St.3d 419, 422, 755 N.E.2d 857 (2001).

In the end, this Court should recognize that *Williams* is a narrow state-law constitutional ruling alone, not a federal constitutional ruling, and that *Williams* does not control or even apply for federal constitutional purposes. Defendant’s claim under the federal standard of cruel and unusual punishment fails because there is no “punishment” under the *Smith v. Doe* standard.

Given that conclusion, this Court should recognize that defendant’s state-law cruel-and-unusual-punishment claim should fail for the same reason. There is no persuasive reason to deviate from the federal standard under these circumstances. See Part F, *infra*.

Defendant’s challenges under both the federal-law and state-law provisions also fail because mandatory registration for a convicted sex offender is not cruel and unusual. Defendant does not satisfy the standard of proving unconstitutionality beyond a

reasonable doubt. *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998).

A.

Even if “punishment” is involved, defendant falls far short of showing that his 25-year mandatory registration requirement amounts to cruel and unusual punishment.

Mandatory sentencing falls well within the General Assembly’s prerogatives. “Pursuant to its police powers, the General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment.” *State v. Thompkins*, 75 Ohio St.3d 558, 560, 664 N.E.2d 926 (1996). The legislature has broad, plenary discretion in prescribing crimes and fixing punishments. *State v. Morris*, 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978); see, also, *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, ¶ 12. “[A]t all times it is the power of the General Assembly to establish crimes and penalties.” *Morris*, 55 Ohio St.2d at 112-13. “[T]he power to define crimes and establish penalties rests with the General Assembly alone.” *Id.* at 113.

This legislative prerogative includes “the power to define criminal punishments without giving the courts any sentencing discretion.” *Chapman v. United States*, 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). “Mandatory sentencing laws enacted pursuant to this authority do not usurp the judiciary’s power to determine the sentence of individual offenders.” *State v. Campa*, 1st Dist. No. C-010254, 2002-Ohio-1932.

Mandatory-sentencing requirements are constitutional. *State, ex rel. Owens, v. McClure*, 48 Ohio St.2d 1, 354 N.E.2d 921 (1976).

Although the United States and Ohio Constitutions prohibit the infliction of “cruel and unusual punishments,” the standard for showing a constitutional violation is still very high. These constitutional provisions afford the legislature substantial leeway in prescribing

available punishments. Reviewing courts must give substantial deference to the legislature's broad discretion. *Harmelin v. Michigan*, 501 U.S. 957, 999, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (controlling plurality).

“As a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.” *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). A punishment is cruel and unusual only if it is “so greatly disproportionate to the offense as to shock the sense of justice of the community.” *State v. Weitbrecht*, 86 Ohio St.3d 368, 371, 715 N.E.2d 167 (1999), quoting *State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46 (1972). “[C]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.” *Weitbrecht*, 86 Ohio St.3d at 371, quoting *McDougle*, 1 Ohio St.2d at 70.

In non-capital cases, successful claims of disproportionality are exceedingly rare. *Solem v. Helm*, 463 U.S. 277, 289-90, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Harmelin*, 501 U.S. at 1001 (controlling plurality). Even “[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.” *Harmelin*, 501 U.S. at 994-95 (majority opinion). “The gross disproportionality principle reserves a constitutional violation for only the extraordinary case.” *Lockyer v. Andrade*, 538 U.S. 63, 77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Courts must keep in mind that “the Eighth Amendment does not mandate adoption

of any one penological theory. *Harmelin*, 501 U.S. at 999 (controlling plurality). Legislatures can accord “different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.” *Id.* “Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.” *Solem*, 463 U.S. at 290. “In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.” *Id.* at 290 n. 16.

B.

Defendant engaged in sexual conduct with a minor under age 16. He was at least 5 years older than the minor. The Court of Appeals opinion references that he committed the crime twice. He used the Internet to meet the victim. He violated a no-contact order by meeting with the victim during the pendency of the criminal case, and then he lied about it afterwards.

Given the seriousness of the offense, it is not cruel and unusual punishment that defendant would need to register on a biannual basis for 25 years. Even if this Court could delve into the particular facts of defendant’s case to assess the proportionality of the registration requirement, the facts actually confirm why the General Assembly would be concerned about offenders like defendant and why the General Assembly would impose such registration requirements.

Defendant’s use of the Internet establishes a mode of contact that indicates defendant could readily target other children.

Defendant's decision to commit the crime with a 15-year-old minor confirms his willingness to violate the law and his interest in teenage victims, who often lack the maturity to effectively protect themselves from Internet predators.

Defendant's commission of multiple offenses, even though convicted on just one count, confirms a demonstrated pattern of illegal activity.

Defendant's violation of the no-contact order serves to confirm defendant's general inability to abide by the law.

The Court of Appeals correctly rejected the unusual contention by defendant's expert that defendant is not a "sex offender." As a matter of law, defendant is a sex offender by reason of his conviction. Even so, the expert provided *further* reasons to uphold the registration requirement by conceding that defendant poses a low-to-moderate risk of re-offense. The expert estimates that defendant has a 12% risk of reoffending in the next five years and 19% risk over the next fifteen years. These numbers indicate that the risk is *increasing* over time.

The General Assembly was required to deal with the cold and hard fact that sex offenders reoffend in substantial numbers. Even if defendant is not likely to reoffend, a risk of recidivism up to 19% still provides a rational basis for legislative action. This Court's "role is not to determine which view is the better-reasoned or more empirically accurate one, or to judge the wisdom of the General Assembly's conclusions" about recidivism risks. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 7 n. 2.

C.

As stated earlier, the AWA registration requirements do not impose "punishment"

under the controlling federal-law *Smith v. Doe* standard. Until the *Williams* decision in 2011, this Court and the United States Supreme Court had repeatedly upheld sex-offender registration schemes as permissibly using prior convictions in a non-punitive manner to regulate the problem of sex-offender recidivism. See *Cook*, supra; *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000); *Smith v. Doe*, supra; *Ferguson*, supra.

Although the AWA largely ties an offender's Tier classification to the offender's prior conviction, the old system in large measure did that as well, and it was constitutional. *Cook*, supra. The ultimate concern remains the danger of recidivism, which is an on-going matter of concern. The General Assembly could adopt a categorical system, as it has now done, largely dependent on prior conviction(s).

The United States Supreme Court said so in *Smith v. Doe*. Such categories "are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith*, 538 U.S. at 102. "Sex offenders are a serious threat in this Nation." *Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) (quoting another case). "The risk of recidivism posed by sex offenders is frightening and high," see *Smith*, 538 U.S. at 103 (internal quotation marks omitted), and the General Assembly could conclude that "a conviction for a sex offense provides evidence of substantial risk of recidivism." *Id.* at 103. The General Assembly could make "reasonable categorical judgments that conviction of specific crimes should entail particular regulatory consequences." *Id.* at 103. The General Assembly can "legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness," and "can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information

about the registrants' convictions \* \* \*." Id. at 104.

Attaching regulatory consequences to prior convictions is not "punishment." In *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court upheld against ex post facto challenge a New York statute that prohibited persons with felony convictions from practicing medicine. The Court determined that New York had good grounds for being concerned about the character of its physicians.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offences is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practise medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that and nothing more. *The State is not seeking to further punish a criminal*, but only to protect its citizens from physicians of bad character.

Id. at 196 (emphasis added); see, also, *DeVeau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) ("New York sought not to punish ex-felons, but to devise what was felt to be a much needed scheme of regulation of the waterfront"); *Flemming v. Nestor*, 363 U.S. 603, 614, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960) (disqualification provision related to status "is not punishment even though it may bear harshly upon one affected.").

#### D.

The federal standard for determining what constitutes "punishment" proceeds along a specific two-prong analysis, and this Court notably did not employ that analysis in arriving at its "punitive" conclusion in *Williams*.

As stated by the United States Supreme Court:

The categorization of a particular proceeding as civil or criminal “is first of all a question of statutory construction.” We must initially ascertain whether the legislature meant the statute to establish “civil” proceedings. If so, we ordinarily defer to the legislature’s stated intent. \* \* \*

Although we recognize that a “civil label is not always dispositive,” we will reject the legislature’s manifest intent only where a party challenging the statute provides “the clearest proof” that “the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention” to deem it “civil.” In those limited circumstances, we will consider the statute to have established criminal proceedings for constitutional purposes.

*Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (citations omitted). A party faces a “heavy burden” when, despite a non-punitive legislative intent, he is claiming the statute imposes “punishment.” *Id.* This test was reiterated in *Smith v. Doe*, including the “clearest proof” requirement. *Smith*, 538 U.S. at 92.

Under this federal-law standard, the AWA registration scheme does not constitute criminal “punishment.” The General Assembly expressly stated its intent that registration would be non-punitive and would be meant to serve the non-criminal purposes of aiding law enforcement, providing helpful information to the public, and protecting the public. R.C. 2950.02(A) & (B). “Although the General Assembly’s stated intent is not dispositive, it is an important consideration in determining whether a statute is punitive.” *Ferguson*, ¶ 36 n. 5. “We thus weigh it heavily.” *Id.*

Offenders cannot show by the “clearest proof” that the purpose or effect of registration is so punitive as to negate the General Assembly’s intent that it be treated as remedial.

“Registration with the sheriff’s office allows law enforcement officials to remain

vigilant against possible recidivism by offenders. Thus, registration objectively serves the remedial purpose of protecting the local community.” *Cook*, 83 Ohio St.3d at 417.

“Registration allows local law enforcement to collect and maintain a bank of information on offenders. This enables law enforcement to monitor offenders, thereby lowering recidivism.” *Id.* at 421. “Registration has long been a valid regulatory technique with a remedial purpose.” *Id.* at 418. “R.C. Chapter 2950 has the remedial purpose of providing law enforcement officials access to a sex offender’s registered information in order to better protect the public.” *Id.* at 419. Registration and notification provisions “have the remedial purpose of collecting and disseminating information to relevant persons to protect the public from registrants who may reoffend.” *Id.* at 420.

AWA’s deletion of the likelihood-of-reoffense criterion did not change the foregoing analysis. Under the federal-law standard, the General Assembly could regulate in a categorical way tied to the nature of the conviction. *Smith*, *supra*.

Defendant complains about the inability to prove lack of dangerousness as a way to avoid registration duties. But “[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance.” *Smith*, 538 U.S. at 103. The legislature is allowed to make categorical judgments. *Id.* The State can “legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness,” and “can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants’ convictions \* \* \*.” *Smith*, 538 U.S. at 104. “[T]he legislature has power in cases of this kind to make a rule of universal application.” *Id.* (quoting *Hawker*). “Under the rational basis standard, we are to grant substantial deference

to the predictive judgment of the General Assembly.” *Williams*, 88 Ohio St.3d at 531.

A law will not be considered “punishment” merely because it seems “harsh” to the offender. “R.C. Chapter 2950 may pose significant and often harsh consequences for offenders, including harassment and ostracism from the community. \* \* \* We disagree, however, with Ferguson’s conclusion that the General Assembly has transmogrified the remedial statute into a punitive one by the provisions enacted through S.B. 5.” *Ferguson*, at ¶ 32. “Ferguson may be negatively impacted by the amended provisions, just as he was burdened by the former provisions. But ‘the sting of public censure does not convert a remedial statute into a punitive one.’” *Ferguson*, at ¶ 37, quoting *Cook*, 83 Ohio St.3d at 423. Whether a provision is “punitive” is not determined from the defendant’s perspective, as even remedial measures can have a “sting of punishment.” *Id.* A statutory scheme serving a regulatory purpose “‘is not punishment even though it may bear harshly upon one affected.’” *Ferguson*, at ¶ 39, quoting *Flemming*, 363 U.S. at 614. “[C]onsequences as drastic as deportation, deprivation of one’s livelihood, and termination of financial support have not been considered sufficient to transform an avowedly regulatory measure into a punitive one.” *Ferguson*, at ¶ 39, quoting *Doe v. Pataki*, 120 F.3d 1263, 1279 (2nd Cir. 1997). “The Act’s obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive.” *Smith*, 538 U.S. at 100.

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

Even permanent, lifetime registration requirements can be upheld. “[T]he United

States Supreme Court and state appellate courts have upheld provisions similar to the permanent, lifetime classification imposed by S.B. 5's amendments." *Ferguson*, at ¶ 35 (citing *Smith*). "Central to these holdings is the understanding that the legislatures enacting such statutes found recidivism rates of sex offenders to be alarming and that an offender's recidivism may occur years after his release from confinement rather than soon after his initial reentry to society." *Ferguson*, at ¶ 35 (citing *Smith*).

The availability of information through an Internet registry does not make the scheme "punitive." As stated in *Smith v. Doe*, "the stigma \* \* \* results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Smith*, 538 U.S. at 98.

Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the

efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

Id. at 98-99.

Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant.

Id. at 101.

The *Smith v. Doe* Court also determined that the *lifetime* registration requirement therein was not excessive. The Court noted that sex offenders can recidivate several years after release. Id. at 104.

Although *Cook* referenced the inconvenience of registering as the equivalent of the de minimis act of renewing a driver's license, see *Cook*, 83 Ohio St.3d at 418, it is clear from *Cook* that the "renewing driver's license" reference was never meant to be a benchmark in the matter. The real benchmark in *Cook* was *Kansas v. Hendricks*, in which the United States Supreme Court had rejected an ex post facto challenge to the involuntary civil commitment of sexually violent predators. The *Cook* Court found that "the registration/notification provisions of R.C. Chapter 2950 are far less restrictive and burdensome than the commitment statute" in *Hendricks*. *Cook*, 83 Ohio St.3d at 422. The *Cook* Court reasoned that, if the involuntary commitment of a predator was proper as a non-punitive measure, then the registration and notification provisions of R.C. Chapter 2950 were proper as well. Id. at 422-23.

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

E.

The analysis used in *Williams* to find the AWA “punitive” fell short of satisfying the federal standard for what constitutes “punishment.” Several parts of the *Williams* discussion were flawed under the federal standard.

Notably, the *Williams* Court did not use the two-part analysis that is applicable under federal law, including the very high “clearest proof” standard. The *Williams* majority actually eschewed addressing the issue under the United States Constitution. As a result, the “punitive” conclusion in *Williams* has no value in terms of federal law.

In its central concern about the AWA, the *Williams* Court focused on the AWA scheme’s categorical use of prior convictions as a basis for regulation, repeatedly citing the “automatic” nature of the Tier classification based on the nature of the conviction. *Williams*, ¶¶ 16, 17, 19. But *Smith v. Doe* expressly recognized that such categorical use does not make a scheme “punitive.” *Smith v. Doe* directly undercuts a central feature of the *Williams* analysis, again showing that *Williams* does not support a finding that the AWA scheme is “punishment” under federal-law standards.

In a related point, the *Williams* Court complained that sex offenders do not receive a hearing to determine what Tier they are assigned to because the Tier classification is “automatic.” *Williams*, ¶ 16. But, again, as *Smith v. Doe* recognized, the legislature could choose to regulate on the basis of the conviction itself without case-specific analysis of the

offender's dangerousness. Categorical regulation does not make the resulting classification "punishment."

In addition, the United States Supreme Court has recognized that federal due process does not require that a classification include an assessment of dangerousness. It upheld a Connecticut law when the registration requirement was "based on the fact of a previous conviction, not the fact of current dangerousness." *Conn. Dept. of Public Safety*, 538 U.S. at 3. The Court held that "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Id.* at 3. This confirms that the absence of a "hearing" does not make the registration requirement "punitive."

The *Williams* Court's reference to the "hearing" held under Megan's Law was inapposite anyway. Megan's Law was mostly categorical, tying the level of registration as a sexually oriented offender, aggravated sexually oriented offender, and habitual sex offender to the nature or number of convictions. As to the sexually oriented offender classification, even this Court recognized that the judge's role was to "rubber stamp" the classification as a ministerial matter and that due process did not entitle the defendant to any hearing to contest the classification. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502. To be sure, under Megan's Law, there was a hearing to determine whether the sex offender was a sexual predator because of a likelihood to reoffend. But the AWA could constitutionally do away with any need to prove dangerousness without being "punitive" as a matter of federal law.

The *Williams* Court also complained about the fact that registration under the AWA scheme was more than de minimis. *Williams*, ¶¶ 13, 15. But, again, measures as harsh as deportation, disqualification from employment, and involuntary commitment are deemed

non-punitive under the federal standard. The inconvenience of biannual trips to the sheriff's office does not make the AWA Tier II classification "punishment."

The *Williams* Court also contended that it was suggestive of "punitive" intent that the General Assembly created criminal penalties for offenders who violate the registration requirements. *Williams*, ¶ 11. But this Court even before *Williams* had recognized that the criminal penalty for failing to register is for the *new* offense of failing to register, not for the prior sex offense that provides the basis for registration. "[A]ny such punishment flows from a failure to register, a new violation of the statute, not from a past sex offense. In other words, the punishment is not applied retroactively for an act that was committed previously, but for a violation of law committed subsequent to the enactment of the law." *Cook*, 83 Ohio St.3d at 421. Even after *Williams*, this Court has reaffirmed this analysis and expanded on it. *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341, ¶¶ 22-28. As a result, the penalty attaching to a future failure-to-register offense should play no role in determining whether the registration scheme is "punitive" as to the prior sex offense. This Court's suggestion to the contrary in *Williams* was mistaken.

The *Williams* Court also contended that it was suggestive of "punitive" intent that the General Assembly placed the procedures for registration in the criminal code. *Williams*, ¶ 11. But, as recognized in *Smith v. Doe*, placing regulations in the criminal code is far from dispositive. "The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith*, 538 U.S. at 94. Putting the procedures in the criminal code actually helped ensure that offenders would receive notification of their registration duties, which is consistent with the non-punitive purposes

behind the scheme. *Smith*, 538 U.S. at 95-96 (regulatory scheme helps ensure compliance in providing notice; “Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.”).

In the end, the *Williams* analysis does not jibe with the federal-law analysis of *Smith v. Doe* in several respects. Nor does it jibe with the outcome in *Smith v. Doe*, in which the offenders’ categorical lifetime, quarterly public registration requirements were upheld as non-punitive measures.

This Court should reject defendant’s federal-law challenge because the AWA scheme does not impose “punishment” on the sex offense under federal-law standards.

F.

In assessing claims of cruel and unusual punishment under Article I, Section 9, of the Ohio Constitution, this Court has indicated that Section 9 “sets forth the same restriction” as the Eighth Amendment. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 12. The provisions are identical, and this Court has recognized that an Ohio constitutional provision generally will be deemed to be coextensive with its identical federal counterpart. “[W]hen provisions of the Ohio Constitution and United States Constitution are essentially identical, we should harmonize our interpretations of the provisions, unless there are persuasive reasons to do otherwise.” *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 47. “[W]here the provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio’s Constitution are coextensive with those provided by the United States Constitution.” *State v. Robinette*, 80 Ohio St.3d 234, 238, 685 N.E.2d 762 (1997).

Significantly, the issue of double jeopardy can also involve questions of what is “punishment,” and this Court has held that “[t]he protections afforded by the two Double Jeopardy Clauses are coextensive.” *State v. Martello*, 97 Ohio St.3d 398, 2002–Ohio–6661, 780 N.E.2d 250, ¶ 7. In *Martello*, this Court employed the federal two-part test in determining whether “punishment” for the same offense had occurred.

Defendant provides no persuasive reason for deviating from the federal two-part test in assessing whether the AWA scheme is “punishment” for purposes of Ohio’s cruel-and-unusual-punishment provision. The same federal test applies to Ohio’s double jeopardy provision. It should also apply to the “cruel and unusual” provision.

The “punitive” conclusion in *Williams* should not control. *Williams* was addressing the prohibition against retroactive laws, a provision unique to the Ohio Constitution with its own standards and requirements. The Court characterized the issue before it as “narrow,” see *Williams*, ¶ 6, and therefore was not purporting to decide the “punishment” issue for all other purposes. Finding the scheme to be “punitive” under the standards for assessing retroactive-law challenges does not dictate whether the scheme is “punishment” under the double jeopardy or cruel and unusual provisions. This is especially true because *Williams* expressly declined to take up the issue of the federal test for “punishment.”

If anything, there are persuasive reasons for adhering to the federal test. As even the *Williams* Court acknowledged, “The General Assembly has the authority, indeed the obligation, to protect the public from sex offenders.” *Williams*, ¶ 21. The federal standard gives the General Assembly the appropriate latitude to regulate the serious problem of sex-offender recidivism. There is nothing about this problem that would suggest that this Court should carve out a special dispensation for convicted adult sex offenders exempting them

from the federal standard, especially when their crimes target minor victims. The non-punitive regulatory justifications for AWA are at their zenith in cases of sex offenders targeting minors.

Defendant relies on the decision in *C.P.*, which contended that the cruel-and-unusual-punishment provision in Section 9 “provides unique protection” that is “independent of the protection provided by the Eighth Amendment.” *C.P.*, ¶ 59. The *C.P.* Court also quoted language from *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), indicating that “state courts are unrestricted in according greater civil liberties and protections to individuals and groups.”

While it is undoubtedly true that the Ohio Constitution is a document of independent force, this Court has held that, absent persuasive reasons for deviation, an Ohio constitutional provision will be deemed coextensive with an identical federal counterpart. There is no persuasive reason for deviation here in favor of convicted sex offenders. As a matter of Ohio law, this Court will treat the provisions as the same. Indeed, the Ohio provision is not really “unique,” since this Court has recognized that the Ohio provision contains the “same restriction” as the federal provision. *Hairston*, *supra*.

It can also be conceded that, as a matter of federalism, Ohio is not bound by the federal standard and could decide to adopt a different standard under state law. *Smith v. Doe* is only binding under the federal constitution, not under the state constitution. If this Court deviated from *Smith v. Doe* for purposes of the Ohio Constitution, the United States Supreme Court could do nothing to overturn such a ruling on a matter of state law. *Wainwright v. Goode*, 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 488, 96 S.Ct.

2308, 49 L.Ed.2d 1 (1976); *Howard v. Kentucky*, 200 U.S. 164, 173, 26 S.Ct. 189, 50 L.Ed. 421 (1906). Even so, it is still the Ohio standard at this point not to deviate absent persuasive reason for doing so, and defendant has not satisfied the “persuasive reason” test.

In addition, *Arnold* is incorrect in contending that “state courts are unrestricted” in this regard. As a matter of judicial restraint, the beyond-reasonable-doubt standard for proving constitutional violations weighs heavily against any Ohio court adopting expansive and broad “interpretations” of Ohio constitutional provisions. “[T]he General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions.” *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas*, 9 Ohio St.2d 159, 162, 224 N.E.2d 906 (1967). Unless the Ohio Constitution clearly and specifically prohibits the legislative action, the law must be upheld.

“In determining whether an act of the Legislature is or is not in conflict with the Constitution, it is a settled rule, that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the General Assembly, and *whatever limitation is placed upon the exercise of that plenary grant of power must be found in clear prohibition by the Constitution*. The legislative power will generally be deemed ample to authorize the enactment of a law, unless the legislative discretion has been qualified or restricted by the Constitution in reference to the subject matter in question. If the constitutionality of the law is involved in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception.”

*Jackman*, 9 Ohio St.2d at 162, quoting *State, ex rel., v. Jones, Auditor*, 51 Ohio St. 492, 503, 504, 37 N.E. 945 (1894) (emphasis in *Jackman*).

In *State ex rel. Dickman, v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59

(1955), this Court emphasized over and over that the constitutional violation must be clearly established.

- A legislative act is *presumed in law to be within the constitutional power* of the body making it, whether that body be a municipal or a state legislative body.
- That presumption of validity of such legislative enactment cannot be overcome unless it appear that there is a *clear conflict* between the legislation in question and some particular provision or provisions of the Constitution.
- The question, whether a law be void for its repugnancy to the Constitution, is, at all times, *a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.* The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels *a clear and strong conviction of their incompatibility* with each other.
- *Every possible presumption* is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.
- To repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation \* \* \* [they will] never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, *beyond reasonable doubt.*
- But while the right and duty of interference in a proper case, are thus undeniably clear, the principles by which a court should be guided, in such an inquiry, are equally

clear, both upon principle and authority \* \* \* and *it is only when manifest assumption of authority, and clear incompatibility between the Constitution and the law appear, that the judicial power can refuse to execute it.* Such interference can never be permitted in a doubtful case.

- If under any possible state of facts the sections [of the law] would be constitutional, this court is bound to presume that such facts exist.
- Any doubt as to the constitutionality of a statute will be resolved in favor of its validity.
- Every reasonable presumption will be made in favor of the validity of a statute.

*Dickman*, 164 Ohio St. at 147-49 (emphasis added; quoting several cases).

The General Assembly had the plenary police power to adopt the AWA. Its decision to adopt that regulatory scheme cannot be overturned unless there is a “clear incompatibility” between the AWA scheme and the cruel and unusual provision. Defendant has not shown such clear incompatibility beyond a reasonable doubt, and asking for broad and expansive interpretations merely confirms that the Ohio constitutional provision itself does not create such clear incompatibility.

Finally, the citation to *Arnold* misses an important point about federalism. If there is going to be a deviation from the federal standard, there would be no requirement that the Ohio provision afford greater protection than the federal standard. This Court could rule as a matter of state law that the Ohio provision affords *less* protection, and that interpretation would be unreviewable in the federal courts. Federalism “does not necessarily mean that state constitutional guarantees always are more stringent than decisions of the Supreme Court under their federal counterparts. A state’s view of its

own guarantee may indeed be less stringent, in which case the state remains bound to whatever is the contemporary federal rule.” *State v. Kennedy*, 295 Ore. 260, 270-71, 666 P.2d 1316, 1323 (1983).

For example, in *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Court recognized that the States may eliminate the exclusionary rule for a violation of state law even though federal law provided an exclusionary rule for federal search-and-seizure constitutional violations.

Federalism is not a one-way ratchet toward creating ever broadening interpretations of state constitutional law in favor of convicted sex offenders.

Defendant’s constitutional challenges should be rejected.

### CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O’Brien supports the constitutionality of the Adam Walsh Act and urges that this Court affirm the judgment of the Second District Court of Appeals.

Respectfully submitted,

RON O’BRIEN 0017245  
Franklin County Prosecuting Attorney



STEVEN L. TAYLOR 0043876

(Counsel of Record)

Chief Counsel, Appellate Division  
Counsel for Amicus Curiae Franklin County  
Prosecutor Ron O’Brien

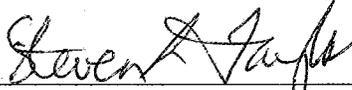
**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 30<sup>th</sup> day of Sept., 2014, to the following known counsel involved in the case:

Ryan A. Saunders  
Assistant Prosecuting Attorney  
50 East Columbia Street, Suite 449  
Springfield, Ohio 45502

Katherine R. Ross-Kinzie  
Assistant State Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215

Paula E. Adams  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202

  
\_\_\_\_\_  
STEVEN L. TAYLOR 0043876