Commonwealth of Kentucky
Supreme Court
No. 2007-SC-000347-CL

COMMONWEALTH OF KENTUCKY — **APPELLANT**

v.

Appeal from Kenton District Court
Hon. Martin J. Sheehan, Judge
Indictment No. 07-M-604

MICHAEL BAKER — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been this 11th day of January, 2008, mailed via U.S. Mail to Honorable Martin J. Sheehan, Judge, Kenton District Court, 500 Justice Center, 230 Madison Avenue, Covington, Kentucky 41011, sent via electronic mail to Hon. Christopher S. Nordloh, Assistant Kenton County Attorney, 28 West Fifth Street, Covington, Kentucky 41011, by regular mail to Hon. Bradley Fox, Fox & Scott, P. L. L. C., 517 Madison Avenue, Covington, Ky. 41011, Attorney for Appellee.

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INTRODUCTION

Appellee, Michael Baker, a registered sex offender , was charged on February 2, 2007, with a misdemeanor for being in violation of KRS 17.545 which prohibits registered sex offenders from residing within 1,000 feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. Appellee filed a motion to dismiss the charge asserting that KRS 17.545 violated numerous constitutional provisions. The trial court granted appellant's motion solely on the basis that KRS 17.545 constituted an *ex post facto* punishment barred by both the United States Constitution and the Kentucky Constitution. The Commonwealth moved this Court for certification of the law pursuant to CR 76.37 which was granted by this Court's order on August 23, 2007.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. Procedural History

The facts of this case are undisputed. On March 31, 1994, appellee entered a plea of guilty to a charge of third degree rape in the Kenton Circuit Court, case number 94-CR-00427 (TR, 2). As a result of his conviction, appellee was required to register as a sex offender for a period of ten years pursuant to KRS 17.520 (TR, 1). Appellant's period of registration was to expire on March 27, 2010 (Id.).

On February 2, 2007, appellee resided at 440 Merravay Drive in Elsmere, Kenton County, Kentucky (Id.). On that date, he was arrested and charged with being in violation of KRS 17.545 because his residence was located within 1,000 feet of East Covered Bridge Park (Id.). Appellee subsequently moved the trial court to dismiss the charge on the basis that KRS 17.545 violated the following constitutional protections: 1) The Equal Protection Clause of the 14th Amendment to the United States Constitution; 2) Substantive Due Process as set forth in the 5th Amendment to the United States Constitution; 3) The *Ex Post Facto* Clause in Article 1, Section 10 of the United States Constitution and Section 19(1) of the Kentucky Constitution; and 4) The Inalienable Property Rights Provision as set forth in Section 1(5) of the Kentucky Constitution (TR, 23).

On April 20, 2007, the trial court entered its opinion and order on appellee's motion to dismiss (TR, 20-61). The trial court granted appellee's motion to dismiss on the basis that KRS 17.545 constituted an *ex post facto* punishment as applied to appellee whose triggering sex offender conviction pre-dated the effective date of the statute (TR, 52). The Commonwealth moved this Court for certification of the law pursuant to CR

76.37, and this Court granted the Commonwealth's motion on August 23, 2007.

II. Legislative History of KRS 17.545

The General Assembly first enacted a law placing residency restrictions on registered sex offenders during the 2000 Regular Session as part of Senate Bill 263. Codified as KRS 17.495, and effective April 11, 2000, the original restriction provided as follows:

> No registrant, as defined in KRS 17.500, who is placed on probation, parole, or other form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility. The measurement shall be taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence.

In 2004, the General Assembly amended KRS 17.495 and exempted youthful offenders from the residency restrictions.

During the 2006 Regular Session of the General Assembly, House Bill 3 was enacted which repealed KRS 17.495, amended the statute, and reenacted it as a new section of KRS 17.500 to KRS 17.580. The current form of the statute, KRS 17.545, effective July 12, 2006, reads as follows:

> (1) No registrant, as defined in KRS 17.500, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. The measurement shall be taken in a straight line from the nearest property line of the school to the nearest property line of the registrant's place of residence.
>
> (2) For purposes of this section:
>
> (a) The registrant shall have the duty to ascertain whether any property listed in subsection (1) of this section is within one thousand feet of the

registrant's residence.

(b) If a new facility opens, the registrant shall be presumed to know and, within ninety (90) days, shall comply with this section.

(3) Any registrant who violates subsection (1) of this section shall be guilty of:

(a) A Class A misdemeanor for a first offense; and
(b) A Class D felony for the second and each subsequent offense.

(4) Any registrant residing within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility on July 12, 2006, shall move and comply with this section within ninety (90) days of July 12, 2006, and thereafter, shall be subject to the penalties set forth under subsection (3) of this section.

(5) This section shall not apply to a youthful offender probated or paroled during his or her minority or while enrolled in an elementary or secondary education program.

In finding that KRS 17.545 was an unconstitutional *ex post facto* punishment as applied to appellee, the trial court found that the General Assembly "clearly expressed its intent to enact a punitive scheme," and, further found that the statute was punitive in its effect even if its intent was not clear (TR, 37). After finding the statute unconstitutional as an *ex post facto* law, the trial court declined to address the remaining challenges asserted by appellee against the constitutionality of the statute.

ARGUMENT

KRS 17.545 WAS INTENDED TO BE AN EXTENSION OF THE EXISTING REGULATORY SCHEME REGARDING SEXUAL OFFENDERS AND IS NOT PUNITIVE

It is undisputed that the United States Constitution and the Kentucky Constitution prohibit the enactment of a law that increases punishment for criminal acts committed prior to the laws enactment. U.S. Const., Article 1, Section 10 and Section 19(1) of the Kentucky Constitution. The United States Supreme Court has previously held that statutes and acts, even those applied retroactively, requiring sex offenders to register do not violate the *ex post facto* clause of the U.S. Constitution. Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140 (2003). In that case, the U.S. Supreme Court set out the framework by which to evaluate whether or not a law violates the *ex post facto* clause.

The Smith Court established a two-step process to determine if a statute violates the *ex post facto* clause. First, the court must ascertain whether the legislature intended the statute to establish a civil, nonpunitive, regulatory scheme or to impose punishment. 538 U.S. at 92; See also, Kansas v. Hendricks, 521 U.S. 346, 361, 117 S.Ct. 2071, 138 L.Ed.2d 501 (1997). If the intention was to impose punishment, that ends the inquiry. 538 U.S. at 85. If, however, the legislature intended to create a regulatory scheme, the second step of the process requires the court to examine whether the purpose or effect of the statute is so punitive as to negate the legislature's intent. 538 U.S. at 92. In performing the second step of the analysis, the court must look at five factors as guideposts. These five factors are whether the regulatory scheme: 1) has been regarded in our history and traditions as a punishment; 2) imposes an affirmative disability or restraint;

3) promotes the traditional aims of punishment; 4) has a rational connection to a nonpunitive purpose; and 5) is excessive with respect to that purpose. 538 U.S. at 97.

This Court has found that Kentucky's sex offender registration scheme, KRS 17.500 *et seq.*, is not an *ex post facto* law under either the United States or the Kentucky Constitutions. Hyatt v. Commonwealth, 72 S.W.3d 566, 573 (Ky. 2002). Rather, this Court found the registration and notification system to be a proper regulatory and nonpunitive remedial measure. Id. at 572. The registration and notification statutes were "directly related to the nonpunitive goals of protecting the safety of the public." Id.. In enacting the residence restriction statute at issue in this case, the General Assembly included the statute in that regulatory and nonpunitive scheme.

Numerous jurisdictions have considered whether sex offender residency restriction statutes similar to KRS 17.545 constitute *ex post facto* violations. Doe v. Miller, 405 F.3d 700 (8th Cir. 2005)(applying Iowa law); People v. Leroy, 828 N.E.2d 769 (Ill. App. 2005); Lee v. State, 895 So.2d (Ala.Crim.App. 2004); Thompson v. State, 603 S.E.2d 233 (Ga. 2004); Denson v. State, 600 S.E.2d 645 (Ga.App. 2004); State v. Seering, 701 N.W.2d 655 (Iowa 2005). All of the jurisdictions have found that the statutes were intended to be nonpunitive regulatory schemes, and that the schemes were not so punitive in their purpose or effect as to negate that intention.

A. KRS 17.545 was not intended by the General Assembly to be punitive.

The trial court distinguished KRS 17.545 from the residency restriction statutes considered in the above cited cases, and found that the Kentucky General Assembly clearly expressed its intent to create a punitive scheme based on the language in the title of House Bill 3, the fact that the legislature analyzed the financial costs to the corrections and

parole systems, and because the enforcement of KRS 17.545 is through criminal penalties (TR, 15-18). However, a review of the sex offender residency restriction statutes considered by other jurisdictions shows they are not readily distinguishable from KRS 17.545.

In Miller and Seering, *supra*, the courts were considering Iowa Code section 692A.2A contained in "Subtitle 1. Crime Control and Criminal Acts." The statute prohibits "a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor" from residing "within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility." The statute, as enacted by the Iowa General Assembly, was titled "An act prohibiting a registered sex offender from residing near a school or child care facility, and providing a penalty." Pursuant to subsection 3 of the statute, a person who violates the statute commits an aggravated misdemeanor.

In Leroy, *supra*, the court was considering section 11-9-4(b-5) of the Criminal Code of 1961 which makes it unlawful for a child sex offender to reside within five hundred feet of a "playground, child care institution, day care center, part day child care facility, or a facility providing programs or services exclusively directed toward persons under 18 years of age." As noted, the Illinois residency restriction statute is contained in the Criminal Code under "Article 11. Sex Offenses." As enacted by the Illinois General Assembly, the statute was titled "Crimes-Child Sex Offenses-Playground or Facility." A violation of section 11-9-4(b-5) is a Class 4 felony. 720 ILCS 5/11-9.4(e).

Likewise, in Lee, *supra*, the Alabama Criminal Court of Appeals addressed a

challenge to that state's sex offender residency restriction statute codified at section 15-20-26(a), Ala.Code 1975 which provides that "no adult sex offender shall establish a residence or any other living accommodation or accept employment within 2,000 feet of the property on which any school or child care facility is located." The statute is contained in "Title 15. Criminal Procedure." of the Code of Alabama. Pursuant to subsection (h) of the statute, a person who violates the statute is guilty of a Class C felony.

Finally, OCGA section 42-1-13 which restricts a person required to register as a sex offender from residing "within 1,000 feet of any child care facility, school, or area where minors congregate" was challenged as a *ex post facto* law in Thompson and Denson, *supra*. As with the other statutes, a violation of Georgia's sex offender residency restriction is enforced by criminal sanctions. Pursuant to subsection (d), a violator "shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years."

Clearly, the trial court was wrong when it stated that "[u]nlike the statutes under review in Miller, Lee, Mann, Leroy, or Seering, the Kentucky General Assembly has clearly expressed its intent to create a punitive scheme" (TR, 37) based on the General Assembly's use of terms such as "offenses" and "punishment: in the title of House Bill 3, analysis of the financial costs to corrections and parole as part of House Bill 3 and adoption of criminal sanctions to enforce KRS 17.545. All of the statutes under review in the cited cases use criminal sanctions as the means to enforce violations of the residency restrictions (felonies in all but Iowa). All of the statutes use terms such as "crimes," "offenses," "penalties," etc. in their titles or are enacted as part of a criminal code. The statutes are not "clearly distinguishable" from KRS 17.545. Rather, they are nearly

identical to the statute before the Court in this matter.

The Commonwealth maintains that the General Assembly did not intend KRS 17.545 to be punitive. The statute was added as part of KRS 17.500 *et seq.* together with the existing sex offender registration system that this Court has declared to have a purpose "of protecting the safety of the public." Hyatt, *supra*, at 572. Likewise, the fact that the General Assembly requested a financial analysis of the costs to corrections and parole in conjunction with consideration of House Bill 3 does not lead to the conclusion that the General Assembly intended KRS 17.545 to be a punitive statute. House Bill 3 did not solely repeal KRS 17.495 and create KRS 17.545. Rather, House Bill 3 amended and created many statutes in addition to KRS 17.495. For example, KRS 17.500 was amended to add additional offenses that require registration, KRS 17.520 was amended to change the registration period from ten to twenty years for all registrants other than lifetime registrants. The Departments of Corrections and Probation and Parole are the departments most involved with registered sex offenders. As such, it seems prudent of the legislature to study the costs those departments might incur as a result of the changes and additions enacted through House Bill 3.

Finally, the fact that criminal sanctions are used to enforce the requirements of KRS 17.545 does not lead to the conclusion that the legislature clearly intended KRS 17.545 to be punitive. As noted, this Court found the statute requiring sex offenders to register to be nonpunitive and not an *ex post facto* criminal law even though the enforcement of violations for failing to register was through criminal sanctions. As with the statute requiring registration, the residency restrictions contained in KRS 17.545 is part of a nonpunitive, civil regulatory scheme with the goal of protecting the safety of the

public. The statute does not amount to a separate punishment based on past crimes.

B. KRS 17.545 is not so punitive in either purpose or effect as to negate the Legislature's nonpunitive intent.

As stated above, even when the Legislature intended to create a civil, nonpunitive regulatory scheme, the second prong of the Smith analysis requires a court to examine whether the statute is so punitive in effect as to negate the Legislature's intent.

> In analyzing the effects of the Act we must refer to the seven factors noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), as a useful framework. These factors, which migrated into our *ex post facto* case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses. See id., at 168-169, and nn. 22-28, 83 S.Ct. 554. Because the Mendoza-Martinez factors are designed to apply in various constitutional contexts, we have said they are "neither exhaustive nor dispositive," United States v. Ward, 448 U.S. [242,] at 249; [United States v. One Assortment of] 89 Firearms, [465 U.S. 345,] at 365, n. 7, but are 'useful guideposts,' Hudson [v. United States], 522 U.S. [93], at 99 [1997]. The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Smith, 583 U.S. at 97, 123 S.Ct. 1140. "It is important to note, however, that 'these factors must be considered in relation to the statute on its face,' [Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963)], and 'only the clearest of proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,[United States v. Ward, 448 U.S. 242, 249 (1980)]. Lee, *supra*, at 1043 (*quoting* Hudson v. United States, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450

(1997)). See also Miller, *supra*, at 719; Leroy, *supra,* at 780; Seering, *supra*, at 667.

1. KRS 17.545 is not punishment and the sexual offender regulatory scheme has historically not been deemed punishment.

Traditionally regulation of sexual offenders has not been found to be akin to punishment. See Cutshall v. Sundquist, 193 F.3d 466, 474 (6th Cir. 1999), Hyatt, *supra.* "Registration and Notification Statutes across the nation have consistently been held to be remedial measures, not punitive, and therefore do not amount to punishment or increased punishment." Hyatt, *supra*, at 571. Likewise, residency restriction statutes have also been consistently held to not to amount to punishment across the nation. The appellee is expected to argue that KRS 17.545 is the equivalent of banishment which has been regarded historically as a punishment. See Smith, 538 U.S. at 98.

"Banishment has been defined as 'punishment inflicted on criminals by compelling them to quit a city, place , or country for a specified period of time, or for life.'" Miller, 405 F.3d at 719 (*quoting* United States v. Ju Toy, 198 U.S. 253, 269-70, 25 S.Ct. 644, 49 L.Ed.2d 1040 (1905)(Brewer, J., dissenting)). In Smith, the U.S. Supreme Court explained that, historically, banished offenders could not "return to their original community," and the banishment "expelled [the offender] from the community." Smith, 538 U.S. at 98.

In considering Iowa's residency restriction statute in Miller, the majority opinion held that "[u]nlike banishment, [section] 692A.2A restricts only where offenders may reside. It does not 'expel' the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence." 405 F.3d

at 719. The majority further noted, as found by the United States District Court for the Southern District of Iowa "that residency restrictions for sex offenders 'are relatively new and somewhat unique,' [Doe v. Miller,] 298 F.Supp.2d [844], at 849 n. 4 [2004], and as with sex offender registration laws, which also were of 'fairly recent origin,' Smith v. Doe, 538 U.S. at 97, 123 S.Ct. 1140 (internal citation omitted), this novelty 'suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." 405 F.3d at 720.

KRS 17.545 is akin to section 692A.2A of the Iowa code considered by the Eighth Circuit Court of Appeals in Miller. Although the statute restricts where a sex offender may reside, it does not banish offenders from their communities and offenders are free to engage in most community activities. The statute does not restrict offenders from employment opportunities located within the restricted areas, it merely restricts them from residing therein. As stated by the Iowa Supreme Court, "[t]he statute is far removed from the traditional concept of banishment." Seering, 701 N.W.2d at 667-68.

2. KRS 17.545 is not primarily concerned with traditional aims of punishment, even though those might be accomplished.

The second factor to consider under the second prong of the Smith analysis is whether the statute in question promotes the traditional aims of punishment - deterrence and retribution. 538 U.S. at 102. In considering the Iowa residency restriction statute under this factor, the Miller majority stated "[t]he primary purpose of the law is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense. The Iowa statute is designed to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit

a new crime." 405 F.3d at 720. In Leroy, the Illinois Appellate Court noted that the Illinois residency restriction statute might have some deterrent effect, "[h]owever, even an obvious deterrent purpose does not necessarily make a law punitive." 828 N.E.2d at 781 (*citing* Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 780, 114 S.Ct. 1937, 1946, 128 L.Ed.2d 767, 779 (1994)).

In considering KRS 17.545 it would be wrong to not admit that there is inherent in the law elements of punishment. However, the statute does not seek to punish one for being a sex offender. Rather, the statute seeks to reduce the likelihood that a known sex offender may re-offend, especially against a child. Restricting residency might take away elements of temptation and opportunity, and, thereby, reduce the risk that a sex offender may re-offend. "The nature of some governmental restrictions, especially those designed to protect the health and safety of children, may necessarily have some effects related to the goals of punishment. These effects, however, are secondary and largely 'consistent with the regulatory objective.'" Seering, 701 N.W.2d at 668 (*quoting* Smith, 538 U.S. at 102). The U.S. Supreme Court has stated "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' ... would severely undermine the Government's ability to engage in effective regulation." Smith, 538 U.S. at 102 (*quoting* Hudson, 522 U.S. at 105).

Appellee might also argue that sex offenders would still be able to congregate in places where there are children even thought they are prohibited from residing in that area. However, "[t]he question here is not whether the legislature had made the best choice possible to address the problem it seeks to remedy" but are the legislature's actions reasonable in promoting the goal of protecting the health and safety of the public and to

keep sex offenders from re-offending. Smith, 538 U.S. at 87.

3. Although KRS 17.545 imposes some degree of disability or restraint on sex offenders such is not sufficient to render the statute punitive.

The third factor to consider under the Smith analysis is whether KRS 17.545 imposes an affirmative disability or restraint. In analyzing this factor, the Court must consider how the effects of the statute are felt by those subject to it. Leroy, 828 N.E.2d at 781 (*citing* Smith, 538 U.S. at 99-100). Clearly, KRS 17.545 imposes some degree of disability or restraint on sex offenders in that it restricts them from living within 1,000 feet of a school, day care center, publicly owned playground or preschool. However, it does not otherwise restrict the movements of registered sex offenders. As the U.S. Supreme Court has noted, restricting the freedom of those deemed dangerous "is a legitimate nonpunitive governmental objective and has been historically so regarded." Kansas v. Hendricks, 521 U.S. 346, 363, 117 S.Ct. 2072, 2083, 138 L.Ed.2d 501, 516 (1997).

In Miller, the majority opinion, noting that the Iowa residency restriction statute imposed an element of disability or restraint, pointed out that the residency restriction was "certainly less disabling, however, than the civil confinement scheme at issue in Hendricks, which permitted complete confinement of the affected persons." 405 F.3d at 721. The degree of disability or restraint must be considered in light of the countervailing nonpunitive purpose of the statute. Id.. The U.S. Supreme Court emphasized in Hendricks that imposing an affirmative restraint "does not inexorably lead to the conclusion that the government has imposed punishment." 521 U.S. at 363. Thus, merely because KRS 17.545 imposes some degree of disability or restraint upon the persons affected by the statute such is not a basis solely for determining that the statute is

punitive in its effect. As stated in Leroy, "we are not convinced that the presence of this factor alone is sufficient to create a punitive effect from [the statute's] nonpunitive purpose." 828 N.E.2d at 781.

4. KRS 17.545 has a rational connection to a legitimate nonpunitive purpose - public safety.

As noted above, this Court has previously considered Kentucky's sex offender registration statutes and has found that they are directly related to the nonpunitive purpose of protecting the safety of the public. Hyatt, 72 S.W.3d at 572. The residency restriction contained in KRS 17.545 was added by the General Assembly to the sexual offender registration scheme and still has the goal of public safety at heart. In other jurisdictions, courts have consistently applied the same rationale to residency restriction statutes, and found that, if the registration statutes were sound and nonpunitive, it would follow that the added requirement regarding residency would likewise be found to be nonpunitive in nature. Weems v. Little Rock Police Department, 453 F.3d 1010, 1017 (8th Cir. 2006); Miller, 405 F.3d at 719, Thompson v. State, 603 S.E.2d 233 (Ga. 2004); Lee, 895 So.2d at 1043; Leroy, 701 N.E.2d at 668.

"The requirement of a 'rational connection' is not demanding: A 'statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.'" Miller, 405 F.3d at 721 (*quoting* Smith, 538 U.S. at 103). KRS 17.545 is rationally connected to the nonpunitive purpose of protecting the public from known sex offenders and to reduce the opportunity and temptations for sex offenders to reoffend. "The risk of recidivism posed by sex offenders is 'frightening and high.'" Smith, 538 U.S. at 103 (*citing* McKune v. Lile, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002)).

"The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." Id.. In this case, the General Assembly made a reasonable determination that conviction of a sex offense should entail regulatory restriction of the offender from residing within 1,000 feet of a school, day care center, publicly owned playground, or preschool. Such determination is rationally connected to the nonpunitive purpose of protecting the public from potential recidivism of the offender, and is not punitive.

5. The residency restriction in KRS 17.545 is not excessive with respect to its purpose.

The final factor to consider under the second prong of the Smith analysis is whether the statute is excessive in relation to its regulatory purpose. Again, "'[t]he excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy,' but rather an inquiry into 'whether the regulatory means chosen are reasonable in light of the nonpunitive objective.'" Miller, 405 F.3d at 722 (*quoting* Smith, 538 U.S. at 105). As noted, KRS 17.545 prohibits registered sex offenders from residing within 1,000 feet of a school, publicly owned playground, day care center, or preschool. The statute does not in any other way restrict the movement or activity of registered sex offenders.

KRS 17.545's 1,000 foot restriction appears to fall in the middle of the restriction areas considered by courts in other jurisdictions. While it is not the least restrictive (500 foot restriction under Illinois law), it is also not the most restrictive (2,000 foot restriction under Iowa and Alabama law). As the Iowa Supreme Court stated,

> While it is not easy to fully assess this factor, we are mindful that the relative gauge we use to test excessiveness includes

> the protection of children. In that light, we think it is more difficult to conclude that the restrictions are excessive considering the special needs of children in this particular aspect of our society and the imprecise nature of protecting children from the risk that convicted sex offenders might reoffend.

Seering, 701 N.W.2d at 668.

In the case at bar, KRS 17.545 is not excessive with respect to its purpose of promoting public safety. The statute imposes a minimal restriction on where registered sex offenders my reside, but does not otherwise infringe upon their movements or activities.

Applying the five-factors of the Smith analysis, it is clear that they weigh in favor of finding that KRS 17.545 is not so punitive in its effect as to negate the nonpunitive purpose the General Assembly intended for the law. As such, the statute is a proper civil, nonpunitive regulatory scheme and not an *ex post facto* criminal punishment.

CONCLUSION

Based upon the foregoing, the Commonwealth requests that this Court certify the KRS 17.545 is a civil nonpunitive regulatory scheme and not an *ex post facto* criminal punishment.

Respectfully Submitted,

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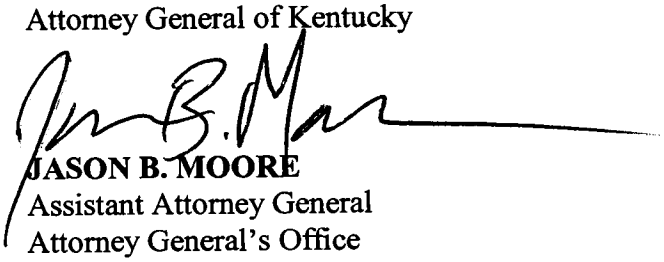

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