IN THE SUPREME COURT OF OHIO

Francis M. Hyle,	:	**Case No. 2006-2187**
Green Township Law Director	:	
	:	
Plaintiff-Appellee,	:	
-vs-	:	
	:	**On Appeal from the**
Gerry R. Porter, Jr.	:	**Hamilton County Court of Appeals,**
	:	**First Appellate District**
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT GERRY R. PORTER, JR.

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I. The State's Argument—That R.C. 2950.031 Terminates Mr. Porter's Property Rights Only Prospectively—Is a Fiction.

The State claims that "applying the law to all owner-occupiers, even if they lived in their homes before the law's enactment, is not even a matter of retroactive application at all, but is purely prospective application." (Attorney General's Br. at 7). The State is mistaken. As the State acknowledges, this "Court has used the term 'retroactive' to describe a law that is 'made to affect acts or facts occurring, or rights accruing before it came into force.'" *Id. quoting Bielat v. Bielat* (2000), 87 Ohio St. 3d 350, 353, 2000-Ohio-451, 721 N.E.2d 28, 32-33.

Mr. Porter's right to occupy his home vested when he purchased it in 1995. R.C. 2950.031 was passed in 2003. The State seeks to use R.C. 2950.031 to reach back and cut off rights vested years before the statute was passed. This use of the statute "affects . . . rights accruing before [the statute] came into force." *Id.* R.C. 2950.031 is a retroactive law in its most basic form.

II. The Legislature Did Not Intend to Retroactively Cut Off Vested Property Rights of Homeowners Like Mr. Porter.

The State argues that Section 8 of Senate Bill 5—which expressly exempts renters who signed a lease agreement before July 31, 2003 from the reach of R.C. 2950.031—is evidence that the General Assembly, as Appellee puts it, "intend[ed] that R.C. 2950.031 apply retrospectively in all other regards." (Appellee's Br. at 11); *see* Attorney General's Amicus Br. at 9. This attempt to spin the renters' exemption to the State's advantage fails for two reasons.

First, the likely reason why there is no express exemption for such homeowners is that the legislature did not think it necessary to state the obvious: later-passed legislation should not gut the pre-existing right of homeowners to enjoy and live in their properties. As discussed at length in Mr. Porter's opening brief, and as this Court has emphasized, "Ohio has always

considered the right of property to be a fundamental right." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶38, 832 N.E.2d 1115, 1129. These rights are so fundamental that the Ohio Constitution describes them as "inalienable," Sec. 1, Art. I, and broadly protects Ohioans from retroactive laws that impair these rights, Sec. 28, Art. II. The General Assembly is presumed to draft laws in conformity with the heightened protection afforded property rights. R.C. 1.47. Viewed in this light, the General Assembly's statement in Section 8 of Senate Bill 5—that the residency restriction would apply to rental agreements entered into *after* the restriction went into effect—is simply evidence that the legislature assumed that homeowner rights that vested *before* the restriction's effective date would be left undisturbed.

Second, the renters' exemption, at a minimum, leaves the issue of the General Assembly's intent unclear. In that case, this Court must still find that R.C. 2950.031 does not apply retroactively. Without a "clear statement" of legislative intent to retroactively divest homeowners like Mr. Porter of their right to live in their homes, R.C. 1.48 commands this Court presume a prospective-only application. *See State v. LaSalle* (2002), 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶14. Appellee and the Attorney General turn R.C. 1.48 on its head, asking this Court to *presume* the legislature intended to retroactively terminate homeowners' rights based on what is, at best, unclear language. However, as this Court recognized long ago, an inference does not constitute a clear statement of legislative intent to apply a statute retroactively. *State ex rel. Andrews v. Zangerle* (1920), 101 Ohio St. 235, 244, 128 N.E. 165, 168 ("mere implication . . . is obviously insufficient").

III. Mr. Porter Has Never Argued That He Has an Unrestricted Right to Live Wherever He Wants.

Referring to "the plethora of zoning laws pertaining to residential property," Appellee argues that a property owner's right to use and enjoy his property does not "include the

unrestricted right to live there." (Appellee's Br. at 14). Likewise, the Attorney General, mischaracterizing Mr. Porter's argument, contends: "The right to live where one chooses is not, contrary to Porter's insistence, an violable [*sic*] aspect of the right to own property." (Attorney General's Br. at 12). In so arguing, both Appellee and the Attorney General build up and then knock down a straw man.

Mr. Porter has never argued that the right to choose where one lives is an inviolable aspect of the right to own property. For instance, Mr. Porter has never argued that he has the right to buy commercially zoned property in downtown Cincinnati, build a residence upon it, and live there. Nor does he argue in this appeal that he has the right to move to *any other* home located within 1000 feet of school premises. He contends only that he has the right to continue to live in *his home*, a home in a residentially zoned neighborhood that he purchased in 1995, eight years before R.C. 2950.031 became law.

Fair Housing Advocates, Inc. v. City of Richmond Heights (6th Cir. 2000), 209 F.3d 626, a case Appellee cites as an example of the "plethora of zoning laws" that restrict property rights, is inapposite. There, the issue was whether certain zoning ordinances restricting dwelling occupancy illegally discriminated against families of four in violation of the Fair Housing Act; the Court upheld the ordinances. *Id*, at 638. Significantly, the case did not involve the issue of whether a family of four could retroactively be forced to move from their home pursuant to such an ordinance. Thus, *Fair Housing Advocates* sheds no light on the issue this Court has to decide.

Nor is *Clark v. Greene County Combined Health District*, 108 Ohio St.3d 427, 2006-Ohio-1326, 844 N.E.2d 330, apposite. *Clark* held that a homeowner could be required to connect his household sewer to a sanitary sewerage system when such a system becomes available. *Clark*, ¶18. The case, however, did not involve retroactive application of a law.

Moreover, there is a fundamental difference between requiring a property owner to connect his household sewer to a sewerage system and retroactively divesting a homeowner of his fundamental right to live in his home.

IV. It Is Irrelevant That R.C. 2950.031 Does Not Totally Divest Mr. Porter of His Property Rights; The Law Impairs a Substantive Right.

Appellee contends that R.C. 2950.031 survives constitutional scrutiny because the State's conduct would not constitute "total divestiture of Porter's property rights.'" (Appellee's Br. at 13, *quoting Hyle v. Porter*, 1st Dist. No. C-050768, 2006-Ohio-5454, ¶24.) Appellee's analysis, like the First District's, is a dangerous and unwarranted departure from this Court's Section 28, Article II precedent.

The question before this Court is *not* whether Mr. Porter has been *totally* divested of his vested property rights, but whether those rights have been retroactively *impaired. State v. Cook* (1998), 83 Ohio St.3d 404, 410, 700 N.E.2d 570, 577. According to Black's Law Dictionary, to "impair" is "to weaken, to make worse, to lessen, diminish or relax, or otherwise affect in an injurious manner." *Id.* at 752 (6th ed. 1990). Mr. Porter's property rights have certainly been impaired. The State has forced him to leave his home and has forbidden him from ever residing there again.

Other than *Hyle*, Appellee cites no law in support of the total-divestiture rule he urges the Court to adopt. There is no such precedent. The total divestiture rule espoused by the State (and the First District) is in direct conflict with this Court's precedent. In *OSAI v. A & D Furniture Co.* (1981), 68 Ohio St.2d 99, 428 N.E.2d 857, this Court held that the treble damages provision of the Consumer Sales Practices Act, which limited punitive damages, could not be applied retroactively without violating Section 28, Article II of the Ohio Constitution because the damages cap "affect[ed] a substantive right." *Id.*, at 68 Ohio St.2d at 100, 428 N.E.2d at 856.

Under Appellee's (and the First District's) logic, however, *OSAI* was wrongly decided. The damages cap did not totally divest the plaintiffs of their right to punitive damages. The cap merely limited those damages. *OSAI* confirms what Black's Law Dictionary (and common sense) already tell us: To impair rights does not mean to completely eliminate them. And R.C. 2950.031 has impaired Mr. Porter's property rights.

V. When Mr. Porter Purchased His Home, He Had More than a Mere Expectation that He Would Be Able To Reside There.

The State mistakenly cites *Bielat v. Bielat*, 87 Ohio St.3d 350, 721 N.E.2d 28 for the proposition that Mr. Porter had only "an expectation of property." (Attorney General's Br. at 8); *see also, id.* at 8 (referring to Mr. Porter's "investment-backed expectation" to reside in the home he purchased). *Beilat* is inapposite. Mr. Porter's right to live in his own home is not so readily belittled under Ohio law.

Bielat involved the 1993 Uniform Transfer-On-Death Security Act (UTODSA). The statute was passed before the death of the plaintiff's husband in 1996, but after he designated his sister as the beneficiary of his IRA. Under UTODSA, the decedent's sister benefited from the IRA proceeds despite a violation of the Statute of Wills. The widowed plaintiff argued that UTODSA retroactively impaired her right to inherit her husband's IRA proceeds. This Court reasoned that the wife's "mere expectation" to receive her husband's IRA as part of his estate was not a vested property right. *Id.* at 87 Ohio St.3d at 357-58; 721 N.E.2d at 36. The plaintiff had no vested rights at the time the UTODSA became law because her husband had not yet died.

In sharp contrast to Mrs. Bielat's "mere expectation" of receiving the proceeds of her husband's IRA, Mr. Porter has a fundamental property interest in continuing to reside in the home he purchased eight years before R.C. 2950.031 became law. On July 31, 2003, R.C. 2950.031's effective date, Mr. Porter's property interest was not hypothetical, imagined or

expected; it was concrete, definite, and vested. The Attorney General's reliance on *Bielat* is fundamentally misplaced.

VI. The Court Should Not Create a Sex-Offender Exception to Its Well-Established Retroactivity Analysis.

Citing *Porter v. City of Oberlin* (1965), 1 Ohio St.2d 143, 205 N.E.2d 363, Appellee argues, "[e]ven if Porter does have a 'vested right' to reside in the property he owns, it does not mean that his right thwarts the reasonable exercise of the police power for the public good." (Appellee's Br. at 15). *Porter v. City of Oberlin*, however, does not support such a sweeping police-power exception to Section 28, Article II, or to this state's established tradition of protecting property rights.

The issue in *Porter v. City of Oberlin* was whether a fair housing ordinance prohibiting owners and real estate brokers from discriminating against prospective buyers and renters because of race, creed or color unconstitutionally interfered with the plaintiff's property rights. This Court began its analysis by stating, "unless the Oberlin fair housing ordinance conflicts with...some limit on legislative power set forth in the Constitution of Ohio or the Constitution of the United States, its validity must be sustained." *Id.*, 101 Ohio St. 2d at 146, 205 N.E.2d at 366. The Court noted that "[t]he Oberlin fair housing ordinance does not interfere with any rights to acquire or possess property [protected by Section 1, Article I of the Ohio Constitution]. On the contrary, its obvious purpose is to support such rights by preventing interference therewith on the grounds of race, creed or color." *Id.*, 101 Ohio St. 2d at 149, 205 N.E.2d at 367. The Court then held that the ordinance was justified as a valid exercise of the police power. *Id.*, 101 Ohio St. 2d at 149, 205 N.E.2d at 367.

The plaintiff in *Porter v. City of Oberlin* never had the right to discriminate in the sale or rental of property based on race, creed, or color; thus, the City of Oberlin's ordinance interfered

with nothing. Gerry Porter, on the other hand, has a vested, protected right to live in (i.e., possess and enjoy) the home he owns. Because the police power at issue in *Porter v. City of Oberlin* did not divest the plaintiff of any protected substantive right, that case does not support what Appellee, under the authority of R.C. 2950.031, has done here: retroactively abolish Gerry Porter's vested right to live in his home.

The State urges the Court to overlook the retroactive (and therefore, unconstitutional) impairment of Mr. Porter's vested property rights because he committed a sex offense against a minor. This argument, if accepted by the Court, jeopardizes the rights of all Ohio's homeowners to quietly enjoy their properties. If this Court rules that it is constitutional for Mr. Porter to be evicted from his home, then what about Mr. Dover (defendant in the companion case, *Nasal v. Dover*) who pled guilty to attempting to inappropriately touch a teenaged girl as she helped him down from the bleachers in a crowded gymnasium and who lives in his home of with his elderly wife of 40 years? *Nasal v. Dover*, 169 Ohio App.3d 262, 2006-Ohio-5584, 862 N.E.2d 571, at ¶4. Or a woman living within a buffer zone, who has been convicted of sexual battery for having consensual sex with a male prisoner? Or a homeowner who, as a high school senior, had consensual sex with an underage freshman girl, and was convicted of unlawful sexual conduct with a minor? Even if they committed their offenses and purchased their homes before the law's effective date and regardless of the minimal (if any) danger they pose to children, all of these people would be forced to move. The state would strip them all of the fundamental right to dwell in their own homes.

Accepting the state's argument here would also allow the General Assembly to enact laws prohibiting drug offenders, or drunk drivers, or some other class that later becomes the target of public hysteria, from residing near schools or any other place where children are likely

to congregate. If this Court creates a sex-offender police-power exception to the protection normally given homeowners, what meaningful principle could stop the General Assembly from cutting off the property rights of other unpopular homeowners? If Ohio's formidable constitutional protections favoring property rights and heavily restricting retroactive laws are to retain their meaning, they must be upheld even for the unpopular.

A sex-offender exception to this Court's well-established jurisprudence protecting vested rights from retroactive infringement would also be seriously counterproductive. There is no dispute that the protection of children from sexual abuse is a compelling government purpose. R.C. 2950.031 does not meaningfully further this goal, however. Amici Jacob Wetterling Foundation, the Association for the Treatment of Sexual Abusers, the Iowa County Attorneys Association, the Iowa Coalition Against Sexual Assault, and the Iowa State Sheriffs and Deputies Association all work hard to prevent children and other vulnerable populations from being sexually abused. None of these organizations is an apologist for sex offenders. Yet they uniformly urge that sex offender residency restrictions *increase* the risk of harm to children. These statutes destabilize offenders by forcing them to move, which can increase the risk of recidivism, and by forcing them "underground," where law enforcement is unable to monitor them. (Amicus Br. in Support of Mr. Porter at 6-9). At a minimum, there is no evidence, according to amici, to support the notion that residency restrictions actually protect children from harm. *Id.* at 10-11. These restrictions are driven by fear, not facts. *Id.* at 11-13.

Revised Code Section 2950.031 is an ineffective, fear-based law that jeopardizes the rights of all homeowners. This case is not the occasion for the Court to depart from the longstanding rule that a retroactive law is unconstitutional if it impairs vested, substantive rights.

VII. If This Court Reaches the Ex Post Facto Claim, It Should Hold That R.C. 2950.031 Violates the Ex Post Facto Clause.

Mr. Porter does not interpret the certified question as allowing for briefing on the Ex Post Facto issue he raised in the trial court and before the First District Court of Appeals. There was no conflict between the First and Second Districts on this question. Only the First District reached this question; the Second District ruled the issue moot because the case turned exclusively on Section 28, Article II of the Ohio Constitution. *Dover*, at ¶28. In framing the certified question, the Court did not ask the parties to brief the issue of whether the statute imposes punishment, which is only relevant to the Ex Post Facto question. The certified question—"Whether R.C. 2950.031 . . . can be applied to an offender who had bought his home and committed his offense before July 31, 2003"—is the issue upon which the First and Second Districts split in deciding whether the statute violates Section 28, Article II.

Notwithstanding the ACLU's briefing of the Ex Post Facto issue, Mr. Porter respectfully asks this Court not to decide that issue in this appeal. Not only is there no conflict on that issue in the appellate courts below, but Mr. Porter did not present expert testimony at trial regarding the ineffectiveness and potential counter-productivity of R.C. 2950.031. That evidence is relevant to determine whether the statute, on balance, is punitive. There are other cases in the appellate pipeline that will produce a more complete record upon which the Court can decide this very important question. *See, e.g., State ex rel. White v. Billings*, Clermont App. No. CA2006-09-072[1].

Additionally, on June 30, 2007, Governor Strickland signed Amended Substitute Senate Bill 10 ("S.B. 10") into law. The primary purpose of S.B. 10 is to change Ohio's sex offender

[1] Expert testimony relevant to the Ex Post Facto claims was presented at trial in the *Billings* case. The case has been argued and the parties are awaiting the Twelfth District's decision.

classification, notification and registration requirements to comply with the federal Adam Walsh Act. S.B. 10 includes an amendment to the previous sex offender residency restriction codified at R.C. 2950.031. The new residency restriction, which took effect on July 1, 2007, and which will be codified at R.C. 2950.034, prohibits sex offenders from living not only within 1000 feet of school premises but also within 1000 feet of preschool and child day-care premises. From a jurisprudential standpoint, it would make sense for the Court to refrain from deciding the Ex Post Facto question until a record can be developed showing the impact of the recent amendment on housing options for sex offenders living in Ohio.

That said, should the Court decide to address the Ex Post Facto issue, it should hold that R.C. 2950.031 imposes punishment and therefore cannot be applied retroactively. Below, Mr. Porter supplements the arguments made by the ACLU, and responds to some of the points made by the Attorney General in his amicus brief.

A. R.C. 2950.031 is analogous to punishment because it resembles a parole residency restriction.

Parole[2] is a form of punishment. "[P]arole is an established variation on imprisonment of convicted criminals. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey v. Brewer* (1972), 408 U.S. 471, 477, 92 S. Ct. 2593, 2598; *see also Stinson v. United States* (1993), 508 U.S. 36, 41, 113 S. Ct. 1913, 1917 (citing the federal Guidelines Manual promulgated pursuant to the Sentencing Reform Act of 1984 as providing direction as to the appropriate type of punishment to be imposed: probation, fine, or term of imprisonment). One standard condition is that the parole officer has authority to dictate where

[2] The term "parole" is used broadly here to refer to all forms of supervision assigned to defendants as a result of a criminal conviction, including probation, community control, post-release control or supervised release.

the parolee lives based on that parolee's specific risk factors for re-offense; also, the parolee must normally request permission of the officer before changing residences. *See Morrissey*, 408 U.S. at 478, 92 S. Ct. at 2598.

The residency restriction imposed by R.C. 2950.031 is analogous to parole in that it puts control over the sex offender's residence in the hands of law enforcement officials and the courts. *See State v. Seering* (Iowa 2005), 701 N.W.2d 655, 672 (Wiggins, J., concurring in part and dissenting in part) ("The [sex offender] residency restrictions of [Iowa's statute] are comparable to conditions of supervised release or parole"). However, Ohio's sex offender residency restriction law is more onerous than parole. Whereas parole conditions, such as where an offender might live, are typically based on a case-by-case determination of risk factors, § 2950.031 imposes a blanket restriction on *all* sex offenders living within 1000 feet of schools. The restriction applies

- regardless of whether the offender's prior offense involved a child or adult;
- regardless of whether the offender, in light of his risk factors, is likely to recidivate;
- regardless of whether the offender is classified as a sexual predator, habitual sex offender or a sexually oriented offender;
- regardless of whether the offender, in light of his risk factors, is likely to recidivate; and
- regardless of how long ago the sex offense was committed.

Smith v. Doe (2003), 538 U.S. 84, 123 S. Ct. 1140, is instructive on the issue of whether a residency restriction is a form of punishment. In that case, Doe, a sex offender, argued that retroactive application of Alaska's registration scheme constituted punishment in violation of the Ex Post Facto Clause. *Id.*, 538 U.S. at 91, 123 S. Ct. at 1146. In so arguing, Doe compared the registration scheme to parole, a form of punishment. In rejecting the analogy, the Supreme Court observed: sex offenders in Alaska "*are free to move where they wish and to live and work as*

other citizens, with no supervision." *Id.* 538 U.S. at 101, 123 S. Ct. at 1152 (emphasis added). Here, by contrast, Ohio sex offenders are plainly *not* free to move where they wish with no supervision. Thus, Ohio's residency restriction is far more like a parole residency restriction, a historical form of punishment, than the Alaska registration scheme at issue in *Smith v. Doe.*

B. R.C. 2950.031 promotes the traditional aims of punishment.

Retribution and deterrence are the two traditional aims of punishment. *See Smith v. Doe*, 538 U.S. at 102, 123 S. Ct. at 1152. The effect of § 2950.031 is to promote both of these goals.

The message imparted by R.C. 2950.031 is clear: commit a sex offense and face eviction from your home, and uncertainty about where you can live for the rest of your life. This lesson very plainly deters individuals from committing sex offenses.

The statute also furthers retributive purposes. It applies regardless of the type of offense committed, the offender's classification level, and his risk of re-offense. Imposing a blanket prohibition restricting sex offenders from living with 1000 feet of schools, regardless of their individual risk factors, smacks of retribution and community outrage, not reasonable, non-punitive regulation. As is made clear in the brief filed on behalf of amici Jacob Wetterling Foundation, et al., sex offender residency restrictions are fear-based laws that have no basis in the extensive body of scientific literature dealing with the nature of sexual offending. A fear-driven law that applies based solely on the fact of a conviction is purely retributive.

C. Revised Code Section 2950.031 imposes an affirmative disability or restraint.

There is no question that R.C. §2950.031 imposes a direct and affirmative disability or restraint on Mr. Porter: it forbids him, forever, from living in his home. Furthermore, it forbids him from moving to any new residence within 1000 feet of a school (and now pursuant to the recent amendment, from moving to a home within 1000 feet of preschools and daycares also).

The statute even requires him to move from any future residence should a school (or preschool or daycare) later move to within 1000 feet of the new home. *Mr. Porter can never put down solid roots or invest money into a property without fear of someday being evicted.* The punitive effect of this disability is accentuated by the fact that Mr. Porter lived in his home years before the restriction became effective. R.C. 2950.031 imposes a severe disability and restraint on Ohio sex offenders.

D. Revised Code Section 2950.031 is not sufficiently related to a non-punitive purpose to justify evicting Mr. Porter from his home.

Contrary to the Attorney General's argument, R.C. 2950.031 does not meaningfully limit sex offenders' access to children. Although the statute prohibits sex offenders from living within 1000 feet of schools, it does not prevent offenders from living in apartment buildings full of children as Charles Mitchell, the Chairman of the Board of Green Township Trustees, acknowledged (T.p. 42), or near parks or anywhere else children live, play or congregate. Nor does the statute prohibit sex offenders from standing on or near school premises. Put simply, children live, and can be found almost everywhere throughout the community, not just near schools. Moreover, for the reasons touched upon previously, R.C. 2950.031 likely increases the risk of harm to the very children the statute is intended to protect.

Any nonpunitive purpose of Section 2950.031 is insufficient to outweigh the burden imposed upon Mr. Porter and others similarly-situated.

E. Section 2950.031 is excessive in relation to its alleged non-punitive purpose.

The residency restriction is excessive in relationship to its alleged non-punitive purpose. First, the statute is overbroad. It applies to sexually oriented offenders who do not pose a high risk of re-offense. Second, to the extent the statute's purpose is to prevent sex offenders from

assaulting children on school grounds, there are less restrictive ways of accomplishing that goal, such as prohibiting sex offender from coming onto school grounds unless specifically authorized to be there.

F. Should the Court reach the question, it should analyze the Ex Post Facto issue rigorously.

The Ex Post Facto Clause is essential to guarding individual rights. The Ex Post Facto Clause enjoys a sacred position in our constitutional history:

> Pronouncements attending the adoption of the Constitution make clear the Framers' near obsessive concern over the threat of retroactively-designed laws. . . . James Madison proclaimed that "ex post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation." Fellow-Federalist Alexander Hamilton considered the bar against ex post facto laws among the three "greatest securities to liberty and republicanism the Constitution contains."

Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1275-76 (1998), *citing The Federalist*, No. 44, at 282 (J. Madison), and No. 84, at 511 (A. Hamilton) (Clinton Rossiter ed., 1961). "The Ex Post Facto Clause was designed to guard against the Framers' fears of retroactive penal laws forged by 'hot-blooded' legislatures, laws that deprive Americans of notice that particular behavior is wrongful and/or serve to subject them to vindictive or arbitrary sanctions retroactive in their effect." Logan, at 1277.

Despite the centrality and importance of the Ex Post Facto Clause in our constitutional framework, most courts that have tested sex offender residency restrictions against the Clause have treated the issue cavalierly. Recently, however, a Kentucky trial judge thoroughly reviewed and criticized the disingenuous reasoning of numerous courts that have upheld laws similar to R.C. 2950.031. *See Kentucky v. Baker, et al.*, (Apr. 20, 2007, Kenton Dist. Ct., 4th Div.), Case No. 07-M-5879, at 18-33 (appended to ACLU Amicus Brief). Like amici Jacob Wetterling

Foundation, et al., the *Baker* court discusses how society's response to sex offenders is largely driven by fear:

> It should come as little surprise then, in the politically charged and passionate atmosphere surrounding [sex-offender residency restrictions], that negative findings on these [*Smith v. Doe* five] factors are afforded great weight by reviewing courts while affirmative findings are glossed over and discounted as significant in route to upholding the measure's constitutionality. It is often a process that can fairly be criticized as little more than judicial sleight-of-hand.

Id. at 19.

With the property rights of not just sex offenders, but all Ohio homeowners hanging in the balance, and with the voices of law enforcement (*amici* Iowa County Attorneys Association and Iowa Sheriffs & Deputies Association), the scientific community (*amicus* Association for the Treament of Sexual Abusers), and victims' advocates (*amici* Jacob Wetterling Foundation and the Iowa Coalition Against Sexual Assault) decrying this law as ineffective and potentially counter-productive, this Court should not follow the same path beaten by other courts that have upheld such laws without exacting review. This Court should perform the Ex Post Facto analysis of R.C. 2950.031 with the rigor appropriate to a right that is central to our Constitution.

Respectfully submitted,

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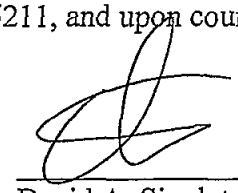
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served by regular mail upon Paula Adams and Joseph Deters, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, upon Robert P. Mecklenborg, Hyle and Mecklenborg, L.P.A., 3050 Harrison Avenue, Cincinnati, Ohio 45211, and upon counsel for amici, on July 21, 2007.



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