

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2020-0544
	:	2020-0625
Plaintiff-Appellee,	:	
	:	
v.	:	On Appeal from the Decision of the
	:	Butler County Court of Appeals
	:	Twelfth Appellate District,
MIQUAN HUBBARD,	:	No. CA 2019-05-086
	:	
Defendant-Appellant.	:	

MERIT BRIEF OF *AMICI CURIAE*
OHIO JUSTICE AND POLICY CENTER, ADVOCATING OPPORTUNITIES,
OHIO DOMESTIC VIOLENCE NETWORK, AND
OHIO ASSOCIATION OF REENTRY COALITIONS
IN SUPPORT OF DEFENDANT-APPELLANT MARQUIN HUBBARD

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I. INTRODUCTION

Protecting the public from violent crime is a compelling state interest for Ohio and is also a core interest of each amici. In hopes of promoting this goal, Ohio passed Sierah’s Law (S.B. 231). Effective on March 20, 2019, the law created a new public database that purported to catalogue the worst-of-the-worst, most dangerous, violent offenders in Ohio’s communities. R.C. 2903.41-.44.

Under this new statutory scheme, people must register in a Violent Offender Database (VOD) for at least 10 years, and potentially for life, based on enumerated convictions: aggravated murder, murder, voluntary manslaughter, kidnapping, or abduction. In many cases, registration occurs regardless of rehabilitation, years of law-abiding life, and completion of lengthy incarceration. Ultimately, Ohioans who fall into the VOD scheme are required to accept the significant burdens and duties of this registry—or else face felony charges and indefinitely-extended registration.

By the explicit language of the law, registration duties apply retroactively to people whose triggering-offense occurred prior to the effective date of Sierah’s Law. This includes people like Mr. Maquan Hubbard, who committed the offense prior to March 20, 2019, but whose sentencing occurred after that date. It also includes a much larger group: people who, on the law’s effective date, were already convicted, sentenced, and incarcerated for any of the triggering offenses—who had served years, sometimes decades, before Sierah’s Law was even introduced.

Among them are clients of the *amici*, including “Jannette,” “Alice,” and “Molly,” who are represented by the Ohio Justice & Policy Center.¹ While these women’s cases are not directly before this Court, their stories allow a better illustration of the full scope of VOD retroactivity.

Molly, a victim of domestic violence, stabbed her ex-boyfriend in 2004, as he was physically and sexually abusing her. She called the police, but the ex-boyfriend died from the wounds. After

¹ For privacy reasons, the names of these clients have been changed. If further information or identification is needed by this Court, *amicus* Ohio Justice & Policy Center can offer separate documentation and would ask to do so under seal.

Molly spent 15 years in prison for murder, former Ohio Governor John Kasich commuted Molly's sentence and set her free from prison in July 2019. Clemency was granted because evidence of Molly's battered woman's syndrome and the extent of the abuse—especially on the night of the offense—was not presented at trial.

In April 2020, Ohio Governor Mike DeWine granted clemency for Alice, who was released from prison after six years of incarceration. A survivor of horrendous child-sex-trafficking, Alice had been arrested at age 15 in connection with the murder of her trafficker. Alice completed educational, vocational, and therapy programs while incarcerated, and even founded a program to help other sex-trafficking survivors in prison.

Jannette was as a drug-addicted teenager, who was convicted of complicity to murder and complicity to kidnapping in 1994. She had gotten involved with older drug dealers and users, and as a result of her offenses, spent the next 25 years of her life in prison. She had no prior criminal convictions. During incarceration, Janette turned her life around, and completed numerous educational, socio-emotional, behavioral, and professional-licensing programs. When she was released by the Parole Board in 2020, she showed the lowest-possible risk assessment score (0 points) for criminal behavior and was at the lowest prison security level.

Upon release, each woman was subjected to a new punishment, the Violent Offender Database, under a law that did not exist at the time of her offense, her sentencing, or many years of her incarceration. The prison system informed each woman about her duty to register within two days before her scheduled release.

As of May 1, 2020, the Ohio Attorney General's Office reports that there are 804 people in the VOD, including "374 people still incarcerated and 309 who have actively registered their home address and vehicle information after being released from prison." Office of Ohio Attorney General, *Violent Offender Registry Reaches One-Year Mark* (May 1, 2020), <https://www.ohioattorneygeneral.gov/Media/Newsletters/Criminal-Justice-Update/Spring->

2020/Violent-Offender-Registry-reaches-one-year-mark (accessed Sept. 1, 2020). This report was made less than a year after Sierah’s Law went into effect. It is unlikely that, during this time period, many people would be impacted by registration duties through *prospective* application of the law: having committed a triggering offense, getting convicted and sentenced, and having completed incarceration for these high-level offenses. Likely, every person experiencing registration obligations is doing so based on *retroactive* application of the law.

This case is about every person similarly-situated to Mr. Hubbard, Molly, Alice, and Janette—and it is about the ultimate ineffectiveness of the burdensome VOD scheme. Indeed, Ohio’s VOD scheme adds punishment, does not protect Ohio’s communities from violent crime, and should never be applied retroactively.

II. INTERESTS OF *AMICUS CURIAE*

Ohio Justice and Policy Center

The Ohio Justice and Policy Center (“OJPC”) is nonprofit public-interest law firm, whose mission is to create fair, intelligent, redemptive criminal justice systems. OJPC works to reduce the size of the prison population, as well as to ensure safe, productive, healthy community integration for people with criminal records. OJPC offers targeted assistance for survivors of domestic violence and human trafficking—who have criminal records related to their victimization. OJPC’s services include a combination of direct legal assistance, community education, and policy advocacy to ensure that survivors can reclaim their lives. This case is of particular concern to OJPC, because it impacts OJPC clients, and it represents ineffective criminal justice policy statewide.

Advocating Opportunity

Advocating Opportunity, Inc. (“AO”) is a nonprofit law firm which provides holistic legal services and advocacy for human trafficking victims, both minors and adults. AO is dedicated to ensuring that the constitutional, statutory, and unalienable rights of human trafficking victims, and all

crime victims, are upheld throughout the criminal justice process. Through its offices in Toledo and Columbus, Ohio, AO works to uphold the rights of human trafficking victims across the state of Ohio; to raise awareness in Ohio about the need for proper and effective criminal justice responses; and to advocate for human trafficking victims.

Ohio Domestic Violence Network

The Ohio Domestic Violence Network (“ODVN”) is Ohio’s comprehensive domestic violence resource. ODVN provides direct legal services, training, technical assistance, and advocacy to over 15,000 survivors, their families, and allies. ODVN provides training opportunities for judges, attorneys, children services agencies, advocates, and other community service providers. Each year, ODVN provides direct legal support and representation to about 500 survivors, the vast majority of whom are women who are victims of abuse, including sexual violence, in connections with protective orders, family law, and other civil legal needs, in an effort to keep survivors and their children safe from domestic and sexual violence. ODVN also advocates for domestic violence survivors who are charged with crimes.

Ohio Association of Local Reentry Coalitions

The Ohio Association of Local Reentry Coalitions is a statewide non-profit reentry advocacy group. The association advocates for individuals returning to the community from prison and works to assist local coalitions develop re-entry programs that ensure public safety as well as success for those returning to the community. The work being done by reentry advocates around the state helps to ensure that returning citizens successfully transition back into their community and lead law-abiding lives. The association also monitors proposed legislation that will have an impact on people returning to communities from incarceration and advocates for legislation that will ensure success once released from prison. The work being done by the association and its members around the state helps to make Ohio safe and a great place to call home.

III. STATEMENT OF CASE AND FACTS

A complete discussion of the pertinent underlying facts is included in Mr. Hubbard’s merits brief.

IV. ARGUMENT

Proposition of Law: Under Section 28, Article II of the Ohio Constitution, Sierah’s Law cannot be retroactively applied to people whose offense occurred prior the law’s effective date.

Amici write to ensure that the Court understands the impacts of Sierah’s Law—not only on Mr. Hubbard, but also on the many people who, long after their conviction and sentencing, are subject to the VOD scheme. This Court should find that retroactive application of the VOD scheme is unconstitutional, in light of the five arguments herein. First, in this case, relevant legal analysis hinges on the depth and breadth of potential VOD impacts. Second, impacts of Ohio’s VOD scheme follow a national trend of increasingly punitive registries. Third, Ohio’s VOD scheme creates many new burdens and obligations. Fourth, Ohio’s VOD scheme is ultimately so punitive and problematic that it does not protect the public and should never be applied retroactively. Lastly, when the VOD scheme is applied retroactively to incarcerated people, individuals often cannot exercise their right to file a motion challenging their registration duties.

A. The legal analysis in this case hinges on the significant depth and breadth of the VOD scheme.

Under Section 28, Article II of the Ohio Constitution, the “general assembly shall have no power to pass retroactive laws.” This Court developed a two-part test to determine whether a statute is unconstitutionally retroactive. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 8 (citing *Hyle v. Porter*, 117 Ohio St.3d 165, 2008- Ohio-542, 882 N.E.2d 899, ¶ 7–9). First, courts must consider “whether the General Assembly expressly made the statute retroactive.” *Id.*; see also R.C. 1.48 (stating “A statute is presumed to be prospective in its operation unless expressly made

retrospective.”). Sierah’s Law, in R.C. 2903.42(A), expressly states that it should apply retroactively to two groups of people: (1) those whose offense occurred before the law went into effect, but whose conviction occurred “on or after the effective date of this section”; and (2) those who, “on the effective date of” the law, have already “been convicted of or pleaded guilty to” a triggering offense and who are presently “confined in a jail, workhouse, state correctional institution, or other institution, serving a prison term, term of imprisonment, or other term of confinement for the offense.” This second subsection explicitly includes people who have been incarcerated for decades before the VOD scheme came into effect. R.C. 2903.41(A)(2). Thus, the first part of the retroactivity test is satisfied.

Second, this Court must determine whether the statute affects a substantial right or if it is purely remedial. *Williams* at ¶8-9. In *Williams*, this Court has explained the differences between substantive and remedial laws: “a statute is substantive if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right.” *Williams* at ¶9. “Remedial laws, however, are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *Id.*

The depth and breadth of impacts created by the VOD scheme are punitive enough to satisfy the second prong of the retroactivity test, distinguishing them from permissibly retroactive collateral sanctions. This distinction is important to understand. Without doubt, after a felony conviction, a person can face ongoing legal hurdles against which there is no “expectation of finality.” *See State v. Cook*, 83 Ohio St.3d 404, 414, 1998-Ohio-291, 700 N.E.2d 570 (1998). New benefits like a Victim’s Fund may, for example, exclude some felons from eligibility, or limitations on a particular professional license may emerge. In the context of registries, this Court has found that “de minimus procedural requirements,” which were comparable to the inconvenience of obtaining a driver’s license, did not violate the prohibition against retroactive laws. *Cook* at 412-418. The existence of some retroactive collateral sanctions or some permissible registries does not, and cannot, mean that a person with a

felony *never* has finality in *any* way under the law. The Fifth District, finding the VOD scheme unconstitutionally retroactive, illustrates this conclusion by with a poignant hypothetical:

Take for example a situation in which an offender committed a fifth degree felony offense and pled guilty to that offense. Now suppose that, prior to sentencing, a statute was enacted elevating the offense to a felony of the second degree. No one would seriously contend that because the offender had "no reasonable expectation of finality in his felony conviction" he could be given the increased punishment set forth in the newly enacted statute. Clearly, sentencing the offender under the new statute for a felony of the second degree would violate the *Ex Post Facto* Clauses of the United States and Ohio Constitutions because it increases the punishment for a past crime. *See, Dorsey v. United States*, 567 U.S. 260, 275-87, 132 S.Ct. 2321, 2332-38, 183 L.Ed.2d 250 (2012) (*citing* *Calder v. Bull*, 3 Dall. 386, 390-391, 1 L.Ed. 648 (1798); *Collins v. Youngblood*, 497 U.S. 37, 41-44, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990))(Ex Post Facto Clause prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties). In this example, the new statute could not be applied retroactively because it is clearly punitive, and would impose new or additional burdens, duties, obligations, or liabilities to a past transaction.

State v. Jarvis, 5th Dist. Muskingum No. CT-2019-0029, 2020-Ohio-1127, ¶ 27.

As the Fifth District correctly concluded, the VOD imposes burdens, duties, obligations, liabilities, and loss of rights that are exactly the sort of punitive impacts that may not be added retroactively to a conviction.

B. Ohio's VOD scheme follows a national trend of increasing the number and punitive nature of registries.

Registries, in one form or another, were first used in the United States in the 1930s to regulate, track, shame, or punish people convicted of various offenses. *See, e.g., Platt, Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U.Rev.L. & Soc. Change 727 (2013); Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (2009). Criticized as ineffective, these laws were soon widely repealed or eliminated through litigation. *Id.* In the mid-1990s, however, registries made a comeback around the nation, initially focusing on sex offenders. *Id.* Litigation and public criticism pointed out that, as the registries rapidly expanded, the laws became more punitive and no longer served public safety. *See e.g. Williams* at ¶ 10-21. The resurgence of registries was fueled by fear and panic over criminality of "demonic perpetrators," as

well as a “public taste for punitiveness, which remains with us today.” Logan, *Knowledge as Power* at Chapter 4.

In the last 15 years, legislators have embraced these largely-punitive measures, not only by making sex offender registries harsher, but also by adding new types of registries based on other convictions. Registries have emerged for child abuse,² elder abuse,³ and animal abuse.⁴ Proposals have cropped up for hate-crime registries,⁵ as well as for a wide array of other convictions. The new registries, of course, have varied—and, admittedly, a few were completely unavailable for public inspection or required individualized risk assessment before registration. But, as legal scholarship points out, the national trend has been clear: “legislatures across the country are introducing legislation on a state, city, and county level” that make existing registries “increasingly harsh,” “broader and more severe.” Platt, 37 N.Y.U.Rev.L. & Soc. Change at 740.

Ohio, too, followed the trend of snowballing registries. Ohio was among several states that created arson registries,⁶ and it then created a Violent Offender Database. A bill to register purchasers of prostitution is currently pending in the General Assembly, with the explicit purpose to shame, punish, and deter people convicted of purchasing prostitution. H.B. 431; Ludlow, *Shame As Deterrence: Bill Would Create Online Registry Of Ohio ‘Johns’*, Columbus Dispatch (Nov. 6, 2019), <https://www.dispatch.com/news/20191106/shame-as-deterrence-bill-would-create-online-registry-of-ohio-johns>.

² See e.g., CONN. GEN. STAT. ANN. § 17a-101k (West 2011); IOWA CODE ANN. § 235A.14 (West 2012); VT. STAT. ANN. tit. 33, § 4916 (West 2012).

³ See, e.g., ARK. CODE ANN. § 12-12-1716 (West 2009); UTAH CODE ANN. § 62A-3-311.1 (West 2008).

⁴ See e.g., SUFFOLK, N.Y., CODE §§ 299-25 to 299-33 (2010); Nowicki, *On the Lamb: Toward a National Animal Abuser Registry*, 17 Animal L. 197 (2010).

⁵ Shackford, *The Idea of a Hate Crimes Offender Registry Is Absurd: Let’s Not Come Up with New Reasons to Continue Punishing Ex-Cons After the Fact*, Reason (Jan. 10, 2017), <https://reason.com/2017/01/10/the-idea-of-a-hate-crimes-offender-regis/>.

⁶ In Ohio, the arson database is in R.C. 2909.15. For other states, see e.g., CAL. CODE REGS. tit. 15, § 3653 (2009); LA. REV. STAT. ANN. § 15:562.3 (2010).

Thus, the VOD did not emerge in a vacuum. It emerged as registries, all over the nation, were becoming more prolific and cumbersome—based on a fundamental misconception that they would reduce crime and protect communities. The VOD, as described in the next section, follows this trend of punitive, ineffective, and costly registries.

C. Ohio’s VOD scheme affects substantive rights and retroactively imposes new or additional burdens, duties, obligations, and liabilities.

The impacts of the VOD scheme, detailed below, are unreasonable and long-lasting. Registration duties start at a *minimum* of 10 years under R.C. 2903.42, but can last for a person’s life. Under R.C. 2903.43(D)(2), the 10-year enrollment period may be extended indefinitely “if the prosecutor files a motion with the court” requesting the extension. If a court finds “that the offender has violated a *term or condition* of a sanction imposed under the offender’s sentence or that the offender has been convicted of or pleaded guilty to another *felony or any misdemeanor offense of violence* during the ten-year enrollment period, the court *shall* issue an order that ... the offender’s VOD duties shall continue indefinitely”. R.C. 2903.43(D)(2) (emphasis added). Thus, after even a single non-criminal violation of a person’s sentencing requirements, a prosecutor’s motion for indefinite registration duties must be granted. Moreover, if a person is convicted of even a low-degree misdemeanor classified as violent (e.g. fourth-degree-misdemeanor menacing) or any felony—at any time in the initial 10-years or the extended-enrollment—that person cannot complete a motion to be removed from the registry. R.C. 2903.44(B)(3), (F)(3). The person’s registration duties will last for life, regardless of their rehabilitation or mitigating circumstances.⁷ *Id.*

⁷ A motion to be removed from the registry must include “A statement asserting that the offender has not been convicted of or pleaded guilty to any other felony or any misdemeanor offense of violence during the offender’s ten-year enrollment period or extended enrollment period.” R.C. 2903.44(B)(3). Additionally, a motion to be removed from the registry can *never* be granted so long as the prosecutor objects. R.C. 2903.44(F)(3). Absent a way to overcome R.C. 2903.44(B)(3) and (F)(3), Sierah’s law appears to make that person’s registration duties last for life.

1. Extensive obligations to notify the sheriff about personal details

The registration duties in the VOD scheme are not a mere inconvenience. Like the sex offender registration scheme in *Williams*, the VOD is not comparable to renewing a driver's license every four years. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, ¶ 14, 16. Every year, a person on the VOD registry must provide to their local sheriff a long list of personal details: their name and any nicknames/aliases; home address; employer name; employer address; school name; school address; driver's license number and, if applicable, commercial driver's license number; for each vehicle that they operate or own, the vehicle identification number and vehicle description; social security number; description of all scars, tattoos, or distinguishing marks; fingerprints; and palm prints. R.C. 2903.43(C)(2). They must allow the sheriff to take a photograph of them. *Id.*

A person on the registry must also notify the sheriff within three business days of any change of home, work, or school addresses. R.C. 2903.43(E). For people who are retroactively impacted by the VOD, work- and home-address changes will happen more often than for the general public, making the notification requirement particularly burdensome. This is because formerly incarcerated people with violent felony records struggle to find stable, full-time employment for many years after release, and thus will be more likely than the general public to piece together part-time or seasonal jobs. *See, e.g.,* Decker et al., *Criminal Stigma, Race, Gender and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment* (Jan. 2014), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf> (finding that past incarceration significantly reduces employment opportunities, and “[m]ore than one-third of employers reported that they would never hire an individual who had been released from prison for a violent crime”). Such individuals are also more likely to face housing barriers and will thus be more likely released to halfway houses and family-members' homes before finding their own homes. *See, e.g.,* Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 Ind.L.J. 421 (2018), available at <https://www.repository.law.indiana.edu/ilj/vol93/iss2/4>.

Taken as a whole, the numerous, constant, and intrusive obligations in the VOD scheme—identifying employers, changes in where a person takes classes, birthmarks, and the VIN of a car borrowed from a sibling—are far from the obligations facing any regular citizen.

2. Threat of felony penalties and lifetime registration

Failure to comply with these duties and obligations results in a fifth-degree felony. R.C. 2903.43(I)(2). The behavior that triggers this felony—not registering—is not a crime outside of the VOD scheme and would not impact other citizens. Susceptibility to, and threat of, this new felony charge, imposes a significant new liability: a new criminal record, and potential for fines, incarceration, and community control. Moreover, based on that felony alone (regardless of the person’s circumstances, rehabilitation, or mitigation), a court *must* grant a prosecutor’s request to extend registration duties indefinitely. R.C. 2903.43(D)(2). People, who were convicted of a felony during the enrollment period, cannot be removed from the registry under R.C. 2903.44(B)(3) and (F)(3).

3. Public access to registry records, impacting registrants’ privacy, safety, employment, housing, and healthy community relationships

Unlike Ohio’s arson registry, but like Ohio’s sex offender registry, the VOD is a public registry—meaning it is open to public inspection. R.C. 2909.15 (stating that arson registry is not public record); *State v. Caldwell*, 1st Dist. Hamilton No. C-130812, 2014-Ohio-3566, 18 N.E.3d 467, ¶ 11; *Williams* at ¶ 14 (explaining a burden of the sex offender registry: “any statements, information, photographs, or fingerprints that an offender is required to provide are public record”). Other than certain personal identification numbers, all of the detailed, personal information in the registry is visible to the public. In fact, “any statements, information, photographs, fingerprints, or materials that are provided pursuant to this section by a violent offender or qualifying out-of-state violent offender who has VOD duties imposed under section 2903.42 or 2903.421 of the Revised Code and that are in the possession of a county sheriff *are public records open to public inspection* under section 149.43 of the Revised Code.” R.C. 2903.43 (F)(3) (emphasis added). Ohio Representative Niraj Antani, one of

the co-sponsors for Sierah’s Law, explained that the public nature of the VOD registry is intentional: “Just as the public has a right to know to know on the status of sex offenders, citizens should know about offenders with an extremely violent past.” Garbe, *Gov. Kasich Signs Bill To Set Up Ohio Violent Offender Registry*, Dayton Daily News (Dec. 19, 2018), <https://www.daytondailynews.com/news/state--regional/ohio-may-set-violent-offender-registry/hY22HQjocwhuotFBKFJdzL/>; see also *House Passes Bills On Violent Offender Database, Sexual Assault Kit Testing*, 87 Ohio Report No. 235, Gongwer News Service (Dec. 5, 2018) (Rep. Derek Merrin states about Sierah’s Law: “Information is power and Ohioans have the right to know if violent offenders are living in their midst.”)

It is a matter of time until a public or private entity will make VOD content easily accessible and, likely, searchable online. This is because Sierah’s law has no provisions making VOD records accessible only by a particular group or for a particular purpose—in contrast with Ohio’s arson registry, which is only accessible by law enforcement. R.C. 2909.15. This distinction further underscores the punitiveness of the VOD scheme. See *Williams* at ¶14 (comparing Ohio’s newest sex offender registry laws to the laws in *Cook*, and noting that *Cook* “considered it significant that the information provided to sheriffs by sex offenders could be disseminated to only a restricted group of people.”)(citing *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570 (1998)).

Indeed, the Ohio Attorney General’s Office has already indicated plans to bring the VOD online for ease of public access. In a media interview, Ohio Attorney General David Yost stated that he is “having his team review Sierah’s Law in an effort to make most information public and accessible online. ‘People that commit murder. I’d kind of like to know if there’s a murderer living next door and I think most people in Ohio would,’ Yost said.”⁸ Enright, *How Changes To Ohio’s New Violent*

⁸ This statement was made a month after the VOD went live, and was arguably a change from initial expectations. Before the database was active, the Ohio Attorney General’s Office spokespersons had stated that the Office did not plan to post central searchable website of violent offenders. Ed Balint, *Violent*

Offender Registry Could Make The Database More Public, WHIO TV7 (Apr. 30, 2019), <https://www.whio.com/news/local/how-changes-ohio-new-violent-offender-registry-could-make-the-database-more-public/qyWTl0IDZGAyBp18YZcHjM/>.

Sheriffs have also expressed their desire to facilitate easier, broader access for the public online. For example, Stark County Sheriff George Maier told media that “violent offender registrants and their residences will be listed on the sheriff’s department website.” Balint, *Violent Offender Registry Begins in Stark County, Across State*, Canton Rep (Mar. 31, 2019), <https://www.cantonrep.com/news/20190331/violent-offender-registry-begins-in-stark-county-across-state>.

The VOD creates a risk to registrants’ safety because a person’s image, car description, and work, home, and school addresses are accessible to the public. If someone wishes to retaliate against a registrant, the registrant is very easy to find. Looking back to the women described in the introduction: on the VOD, Jannette and Alice can be located by the very people who created unhealthy, dangerous situations during their teenage years. They are at risk of further abuse and human trafficking, and can easily be targets for people who are involved in drug dealing and gang activity.

Ohio Revised Code 2903.43(F)(3)(c) contemplates that public access can create a threat to registrants’ safety, but the law stops short of creating meaningful protection. At the court’s discretion, upon a motion from the registrant, a court “may” remove some information from public view, if “the offenders fears for the offender’s safety are valid and that the interests of justice and the offender’s safety require that the motion be granted.” R.C. 2903.43(F)(3)(c). Even so, a court is not required grant the motion or even to hold a hearing.

Lastly, stigmatization, ostracism and harassment of registrants is not just possible but likely, in light of research into the effects of publicly accessible sex-offender registries. This research, detailed

Offender Registry Begins in Stark County, Across State, Canton Rep (Mar. 31, 2019), <https://www.cantonrep.com/news/20190331/violent-offender-registry-begins-in-stark-county-across-state>.

further in Section D-1 of this brief, shows impacts on employment, housing, and community relationships. One example is illustrated in the Table below. It is hard to gauge the full scope of these impacts under the VOD scheme because the law is so new and, under current leadership, some sheriffs' offices are smartly and appropriately using caution in providing registrants' information to the public. But good, smart sheriffs are not the same as good, smart laws. To be clear: the law allows public access not just for employers, landlords, or neighbors, but also for anyone else, and thus makes harm to registrants more than a mere possibility.

NEGATIVE EXPERIENCES RESULTING FROM REGISTRATION, ABOVE AND BELOW MEDIAN SAMPLE TIME ON REGISTRY		
Experience	32 Months or Less Time on Registry (Percent)	More than 32 Months on Registry (Percent)
Loss of job	38.9	45.0
Denial of promotion at work	--	20.0
Loss/Denial of place to live	27.8	35.0
Treated rudely in a public place	22.2	40.0
Asked to leave a business	--	5.0
Lost a friend who found out about registration	27.8	50.0
Harassed in person	22.2	45.0
Assaulted	5.6	15.0
Received harassing/threatening telephone calls	5.6	15.0
Received harassing/threatening mail	5.6	25.0

Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 Fed. Probation 30, Table 3 (2004).

4. Financial costs of registration

County sheriffs have already started instituting registration fees that people must pay annually.⁹ In the experience of *amicus* Ohio Justice & Policy Center, at least one client has been asked to pay a \$100 registration fee when she enrolled in the VOD. A newspaper article, based on interviews with several sheriff's offices, reported that VOD registrants must pay "an initial enrollment \$50 fee and a

⁹ Since the registry is new and some counties have no registered offenders, the cost structures are still being created. Undoubtedly, like court fees, implementation will vary widely across counties over time.

yearly \$25 renewal fee,” although it is not clear which county was reportedly imposing these fees.¹⁰ Enright, *How Changes to Ohio’s New Violent Offender Registry Could Make The Database More Public*, WHIO TV7 (Apr 30, 2019).

D. Because Ohio’s VOD scheme is based on misconceptions about offending, it does not protect the public and is excessive for any remedial purpose.

The General Assembly did not expressly provide a remedial purpose for the VOD scheme anywhere in the law; however, if one argued that such a purpose exists, Ohio’s VOD scheme aims to increase public safety. The Ohio Attorney General’s Office has made this argument: “The database identifies people convicted of aggravated murder, murder, voluntary manslaughter, kidnapping and/or abduction in the hope of preventing them from committing another violent crime.” Office of Ohio Attorney General, *Violent Offender Registry Reaches One-Year Mark* (May 1, 2020). Sierah’s Law is based on the assumption that people with enumerated convictions are a homogenous group, who must be regulated identically by a registry. The law also assumes that, for these enumerated convictions, “principal offenders” are all uniformly dangerous and a high risk to the community. However, as described next, these misconceptions are not supported by empirical research and scholarship, and ultimately, the VOD scheme undermines public safety.

1. Violent and homicide offenses have low recidivism rates

Research shows that “released violent offenders, especially homicide offenders who are older at release, have lower overall recidivism rates relative to other released offenders.” Prescott et al., *Understanding Violent-Crime Recidivism*, 95 Notre Dame L.Rev. 1643 (2020) (reporting extensive data analysis of recidivism rates for those convicted of violent crimes). In fact, “almost every study finds repeat-homicide recidivism rates at or below 1%.” *Id.* This empirical data demonstrates that the

¹⁰ The article erroneously states that Sierah’s Law requires this payment, but in reality, payments are set at a local level.

popular misconception that people who have committed violent offenses are irredeemably dangerous is erroneous.

2. Registries create reentry barriers and thus, can increase recidivism

There is no evidence that putting people on a violent-offender registry decreases their already-low recidivism rate or increases public safety. According to Professor Wayne Logan, an expert on criminal-offender registries at the Florida State University College of Law, registries do not have the effect society hopes for. As Professor Logan notes:

Although premised on empirical certitudes of recidivism, and the expectations that they assist police, deter recidivism, and empower communities with information to self-protect, it remains unclear whether registration and notification actually work as intended. What is known is that modern registries, like their historic forebears, are rife with errors, undercutting their knowledge-based premise. Moreover, there is growing reason to believe that the laws, especially relating to notification, actually might make communities less safe and contribute to recidivism.

Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (2009)

While there is little research about the effectiveness of violent-crime registries specifically, multiple studies on sex-offender registries show that publicly accessible registration requirements create no statistically significant reduction in recidivism. In Iowa, for example, there was no statistically significant difference in the recidivism rate of people subject to the registry (3%) from the recidivism rate of those who were not required to register. Adkins et al., Iowa Dep't of Human Rights, *The Iowa Sex Offender Registry and Recidivism* (2000). Likewise, research on New York State's sex-offender registration and notification laws reveals no evidence that those laws have reduced sexual offending by rapists, child molesters, sexual recidivists, or first-time sex offenders. Sandler et al., *Does A Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychol., Pub. Pol'y & L. 284–302 (2008). A study of three sex-offender datasets, likewise, found that “results from all three data sets do not support the hypothesis that sex offender registries are effective tools for increasing public safety.” Agan, *Sex Offender Registries: Fear Without*

Function?, 54 J.L. & Econ. 207, 229 (2011). Rather, “[t]he results show that an offender who should have had to register appears to behave no differently, or possibly worse, than one who did not have to register.” *Id.*

Instead of protecting communities, the VOD scheme may have the unintended consequence of *increasing* recidivism because public registries hamper reentry efforts. While an offender is “required to enroll onto a registry that is, in theory, supposed to keep communities safe, . . . research shows that, in reality, those registries act as one more shackle around the hands of those trying to re-enter society—heightening risk factors that criminologists say only increase the chances that an ex-offender will turn to criminal activity again.” Felton, *Public Crime Registries Rarely Work, So Why Do They Continue to Grow?*, Pacific Standard (June 14, 2017), <https://psmag.com/news/public-crime-registries-rarely-work-so-why-do-they-continue-to-grow>. Whereas stability and support increase the ease and likelihood of successful reentry for former offenders, with a corresponding reduction in recidivism, public policies making it more difficult for former offenders to succeed will undermine public safety. *See, e.g.*, Petersilia, *When Prisoners Come Home: Parole And Prisoner Reentry*, Oxford Univ. Press (2003).

There is a significant body of research on the reasons that sex-offender registries, in fact, increase recidivism, and this research should guide our thinking about other public registries like the VOD. Sex-offender research suggests that giving registration information to the public “encourag[es] recidivism among registered offenders, perhaps because of the social and financial costs associated with the public release of their criminal history and personal information.” Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 192 (2011). Registries destabilize people and their families by creating far-reaching barriers to employment, housing, community relationships, and successful community reintegration. *See, e.g.*, Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 Fed. Probation 30, 32 (2004) (finding that public registry registrants report “having lost a job, losing or being denied a place

to live, being treated rudely in public, losing friends, and being personally harassed as a result of public knowledge of one's offenses."); Frenzel et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 Just. Pol'y J. 1, 4 (2014). Publication of an offender's identity, home address, place of work, and other identifying information also creates stressors—such as shame, isolation, anxiety, and depression—that can trigger recidivism. Levenson & Cotter, *The Effects of Megan's Law on Sex Offender Reintegration*, 21 J.Contemp.Crim.Just.49, 51–52 (2005); Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J.Contemp.Crim.Just. 67 (2005); Human Rights Watch, *No Easy Answers, Sex Offender Laws in the U.S.*, vol. 19, no. 4(G), 62 (Sept. 2007).

Since Ohio's VOD scheme includes names of employers who hire "violent offenders," it may ultimately to lead to lost or denied jobs, hindering community integration. Access to employment is an important factor in reducing the likelihood of reoffending for all offenders. *See e.g.*, ABA Justice Kennedy Comm'n, *Reports with Recommendations to the ABA House Of Delegates* (2004) ("The most important predictive factor as to whether an offender will become a recidivist appears to be employment. Those who find work are less likely to re-offend. Those who cannot find work are more likely to engage in criminal acts. To the extent that legal and attitudinal barriers to employing people with convictions can be removed, the chances of employment increase and the likelihood of recidivism decreases."). Barriers to financial stability increase recidivism, while gainful employment for offenders decreases recidivism. *See e.g.*, Gendreau et al., *A Meta-Analysis of the Predictors of Adult Crime Recidivism: What Works*, 34 *Criminology* 575-607 (1996).

3. Registries lower the deterrence effect of incarceration

Registries further undermine public safety because they reduce the deterrence of prison incarceration. According to Professor J.J. Prescott, an economist and criminal-justice researcher at the University of Michigan law: "The deterrence of prison is reduced by the use of public registries, because they have the effect of destroying the value of being out of prison by turning people into

pariahs. . . . Prison as a threat only works if you have something to lose.” Felton, *Public Crime Registries Rarely Work, So Why Do They Continue to Grow?*.

4. Inability to distinguish truly dangerous people reduces safety

Perhaps most importantly, the overbroad VOD scheme does not distinguish between people who are dangerous and those who are not. Everyone with the enumerated convictions is presumed required to register.

There is no individualized analysis at all for someone who was the “principal offender”¹¹ in a crime. See R.C. 2903.42(A)(2),(4). No amount of mitigating circumstances, rehabilitation, or demonstrated crime-free lifestyle changes such a person’s requirement to register in a database that purports to show the community’s most-dangerous, violent offenders. Even if someone leaves prison as the lowest security level, with zero criminal-behavior indicated on the Ohio’s Risk Assessment System reentry tests, there is no relief if they were the principal offender. They will be automatically clumped with, and labeled as, “the worst-of-the-worst”—offenders who currently pose a threat of violence to the public. As with Ohio’s current sex-offender-registration scheme, whether a person has VOD registration duties depends entirely on the underlying offense, without any individualized consideration of whether the person is presently dangerous. R.C. 2903.41(A); *Williams* at ¶17, 20.

This “one size fits all” approach to classifying people as “violent offenders” irrationally fails to account for individual risks and circumstances, and it can impede efforts to monitor people who are actually likely to commit future violent crimes. This system does not allow the public or law

¹¹ While the term “principal offender” is not defined by Sierah’s Law, this Court has confirmed that the “meaning of principal offender is that the person is the actor” or the actual “perpetrator of the crime.” *State v. Cooley*, 9th Dist. Summit C.A. No. 12943, 1987 Ohio App. LEXIS 10341, at *14 (Dec. 23, 1987). See also *State v. Penix*, 32 Ohio St.3d 369, 371, 513 N.E.2d 744, 746 (1987) (“principal offender” construed to mean the “actual killer.”); *State v. Getsy*, 84 Ohio St.3d 180, 197, 702 N.E.2d 866, 884 (1998) (principal offender is “one who personally performs every act constituting the offense”).

enforcement to readily identify the most dangerous individuals. It shifts the focus to identifying people who committed a homicide in the past, rather than people who are likely to commit one today.

To be clear, a non-principal offender can file a motion with the sentencing court, seeking to rebut the presumption of inclusion in the VOD. R.C. 2903.42(A). However, for practical and legal reasons described in the next section, people who have been incarcerated for many years—to whom the VOD scheme applies retroactively—rarely have any fair or meaningful opportunity to timely file this motion. Even if a motion is filed, the court can nevertheless require non-principal offenders to be part of the VOD. *See* R.C. 2903.42(A)(4)(a).

E. Incarcerated people, to whom the VOD scheme applies retroactively, often cannot exercise their “right to file a motion to rebut the presumption” of registration.

Today, people who commit a triggering offense are told before sentencing about the VOD scheme and its registration duties. R.C. 2903.42(A)(1)(a). The Attorney General has created a notice form that courts provide to qualifying people at sentencing, which people must sign to acknowledge their duties to enroll in the VOD. But, hundreds of incarcerated people, who were retroactively impacted by the VOD scheme, knew nothing about it. Some are in prison today, still unaware of the VOD; others are already released, having found out about the VOD far too late. As a result of procedural barriers and realities of incarceration, this group of people had, or will have, very limited ability to exercise their “right to file a motion to rebut the presumption” of registration—which must be filed before release. *See* 2903.42(A).

This issue is illustrated in the cases of Jannette, Alice, and Molly, described in the Introduction. These women fought for their freedom for many years, and were thrilled to learn their release date. Within two days of release, all three women were given their ‘release conversations’ and paperwork—in which the Ohio Department of Rehabilitation and Correction informed them about the Violent Offender Database for the first time. The women understood that they had a duty to enroll within 10 days of release.

Under 2903.42(A)(2)(b), an incarcerated person with a VOD-triggering offense may file a motion arguing that she is not a principal offender and requesting “that the court not require the offender to enroll in the violent offender database and not have all VOD duties with respect to that offense.” This motion must be filed with the sentencing court “prior to the time of the person’s release from confinement...” *Id.* If a person does not file this motion before release, she “shall be required to enroll in the violent offender database... and shall have all VOD duties with respect to that offense for ten years.” R.C. 2903.42(A)(3).

Janette and Alice, who were not principal offenders, were told about the VOD by the prison with days left to file this motion. This would put most inmates in an impossible situation. Even if an incarcerated person understands her right to file the motion, she would need to find, contact, and retain an attorney (if she could afford one)—or, alternatively, to independently research the requirements for creating and filing the motion, draft it, and submit it. An inmate would have to do this with the very-limited resources and options within a prison, with a schedule regulated by the institution and, largely, without internet access. Likely, people being released in 2019 or 2020 for a VOD-triggering offense closed their case many years ago and have no active, informed, accessible legal team. They have no real opportunity to file a motion before release. Luckily, Janette and Alice had active, pro bono counsel, *amicus* Ohio Justice & Policy Center, who is closely familiar with the VOD scheme; for this reason only, appropriate motions were timely filed.

One must wonder: among the community members on the VOD today, and among those who will reenter in the coming years, how many people were not so lucky? How many VOD registrants could have successfully argued against being on the registry—if they had a fair and meaningful opportunity? How many people, who are retroactively impacted by the VOD, could never use their “right to file a motion to rebut the presumption” of registration? This legal and policy issue is adjacent and related to the question of unconstitutional retroactivity. If this Court finds the VOD unconstitutionally retroactive, it resolves both issues at once.

V. CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court to hold that the retroactive application of the violent offender registry violates Article II, Section 28 of the Ohio Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 8th day of September, the undersigned counsel certifies that a copy of the foregoing Amicus Brief was served upon Michael Greer, Assistant Prosecuting Attorney with the Butler County Prosecutor's Office, by facsimile to (513) 887-3748 and electronic mail to Greerjm@butlercountyohio.org. On this same date, a copy of this amicus brief was also served on Victoria Bader by facsimile to (614) 752-5167 and electronic mail to victoria.bader@opd.ohio.gov.

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