IN THE SUPREME COURT OF OHIO
2022

In re D.R.	Case No. 21-934
(State of Ohio, Appellant)	On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals No. C-190594

REPLY BRIEF
OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION
IN SUPPORT OF APPELLANT STATE OF OHIO

Steven L. Taylor 0043876
Legal Research and Staff Counsel
Ohio Prosecuting Attorneys Association
196 East State Street, Suite 200
Columbus, Ohio 43215
Phone: 614-221-1266
Fax: 614-221-0753
E-mail: taylor@ohiopa.org
Counsel for Amicus Curiae Ohio
Prosecuting Attorneys Assn.

Joseph T. Deters 0012084
Hamilton County Prosecuting Attorney
Paula E. Adams 0069036
(Counsel of Record)
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 513-946-3228
Fax: 513-946-3021
E-mail: paula.adams@hcpros.org
Counsel for State of Ohio

Raymond T. Faller 0013328
Hamilton County Public Defender
Jessica Moss 0085437
(Counsel of Record)
Assistant Public Defender
125 East Court Street, Ninth Floor
Cincinnati, Ohio 45202
Phone: 513-946-8252
Fax: 513-946-8242
E-mail: jmoss@hamiltoncountypd.org
Counsel for Appellee D.R.

Other Counsel
on Certificate of Service

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

Amicus Proposition of Law: Pursuant to its legislative authority, the General Assembly can control if and when juvenile sex offenders can seek an early termination of their registration duties. There is no constitutional imperative to create early-termination opportunities whenever the sex offender or court might desire, and procedural due process would not require the creation of such opportunities.

Amicus curiae Ohio Prosecuting Attorneys Association (OPAA) stands by its merit brief and offers the following reply.

A.

The defense is seeking a form of judicial legislation. The defense repeatedly concedes the undisputed point that the statutory scheme provides no discretion for juvenile courts at the end-of-disposition stage for juvenile offenders already classified as Tier I offenders and who were ages 16 or 17 at the time of the sex offense. The defense repeatedly concedes that the statutory scheme prohibits judicial discretion at that stage to terminate the Tier I registration duty for such offenders. (D.R. Brief, at 1, 4, 5, 6, 7, 24, 26, 27, 28 – "automatic"; "stripped of its ability to exercise discretion"; "continued as required"; "mandates continued classification"; "inability * * * to have their classification terminated"; "leaves no room for the juvenile court"; "foregone conclusion"; "must continue"; "removed all discretion") The defense proposition of law itself concedes that the statute imposes "[a]utomatic continued classification at the end of disposition * * *." (Id. at 5)

Even so, and despite the clear lack of discretion, the defense nevertheless ascribes to the "juvenile system" a purpose to always allow juvenile courts to exercise discretion in all decisionmaking based on an overriding consideration of "rehabilitation". (Id. at 1,

12, 32, 34 – "rehabilitative purpose of the juvenile system"; "right to rehabilitation within the juvenile system"; "system based on 'individualized assessment'"; "very purpose of the juvenile system")

These things cannot both be true. Given the plain statutory text disallowing discretion in this instance, the "system" in which the statute is included does not require universal discretion on an individualized basis. By denying discretion in this instance, the "system" necessarily declines to create a mandatory, across-the-board form of discretion. The General Assembly has made a choice not to allow discretion in this instance, and that legislative text defeats the claim that the "system" always requires that a juvenile court be afforded discretion. To impose a mandatory requirement of discretion under the guise of what the "system" requires would be to impose such a requirement by judicial fiat, purporting to find some policy rationale expressed in the "system" when that "system" negates any reading of the statutory scheme as mandating universal, across-the-board juvenile-court discretion.

Even as contemplated by the defense, however, one suspects that any supposed "system" of discretion would not be limitless or endless. There would be some cases in which it would be claimed that the exercise of discretion constituted an "abuse of discretion", and so, even in this fictional "system" of universal discretion, "discretion" would not be limitless. All of which would beg the question of why the judiciary would have the prerogative to enforce limits against the abuse of the juvenile-court's discretion while the General Assembly as the body having the legislative prerogatives in this area would be denied the prerogative to recognize a brief three-year waiting period before the juvenile sex offender is eligible for the early-termination mechanism that the General

Assembly itself created.

B.

Instead of the issue being whether the "system" imposes discretion when it clearly does not do so, the issue is a matter of constitutional law and, in particular, whether "procedural due process" compels that there be mandatory discretion at the end-of-disposition stage. The First District expressly relied on "procedural due process" as the basis for this conclusion. But "procedural due process" affords no basis for relief, and "substantive due process" equally fails (even if that claim would be addressed here).

State law does not create any cognizable due process interest in being allowed to seek early termination of the Tier I duty at the end-of-disposition stage. Again, the defense concedes the point: the statutory scheme made this juvenile ineligible for early termination as a matter of state law. There was no state-law interest at stake at that time and no "procedural due process" justification for affording D.R. a hearing at a time when, as a matter of state law, he could not receive early termination.

Even though the juvenile was ineligible, the statute afforded him a hearing in order to make a record of his progress so far. But, as the OPAA noted in is merit brief, the statutory creation of the opportunity to be heard does not create a cognizable due process interest. "The State may choose to require procedures * * * but in making that choice the State does not create an independent substantive right." *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (existence of "a careful procedural structure" does not create protected liberty interest). Procedures provided at the end-of-disposition stage would be matters of state law that are not compelled by procedural due process. Procedural due process is not an end in itself.

Nor would "procedural due process" require the creation of an act-of-grace early-termination mechanism that is not dependent on any substantive predicate that would require that the court grant early termination. As stated in the earlier OPAA brief, "due process" is simply not implicated by such act-of-grace provisions and would not compel the creation of any such provision. The defense and its amicus do not explain how the statute creates any substantive predicate requiring early termination; in fact, the statute would merely afford "act of grace" discretion requiring no particular factual predicate mandating the granting of early termination. "The mere expectation of receiving a state afforded process does not itself create an independent liberty interest protected by the Due Process Clause." *Doyle v. The Oklahoma Bar Assn*., 998 F.2d 1559, 1570 (10th Cir. 1993). "Procedural due process" is wholly inapposite here.

C.

D.R. argues that he has a reputational interest that warrants procedural due process protection. But a reputation interest alone does not rise to the level of being a cognizable due process interest. "A favorable reputation is not a protected liberty interest." *State v. Williams*, 88 Ohio St.3d 513, 527 (2000), citing *Paul v. Davis*, 424 U.S. 693, 711-712 (1976). "[M]ere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 6-7 (2003).

While injury to reputation alone is insufficient to support a due process claim, it can support a due process claim under a "stigma-plus" test if government has made a false statement about the person that was sufficiently derogatory of the person's reputation *and* the person as a result experienced some governmentally-imposed change

in legal status that significantly and materially altered his status under state law. *Hinkle v. Beckham Cty. Bd. of Cty. Commrs.*, 962 F.3d 1204, 1229-31 (10th Cir. 2020). But only governmentally-imposed burdens or alterations in legal status would qualify as a "plus" factor; "[w]hen a specified harm is predicated on voluntary third-party behavior, it cannot serve as a 'plus' factor." *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 11 (1st Cir. 2011).

In this case, D.R.'s reliance on a reputational interest goes nowhere. The juvenile had *already* been adjudicated a delinquent child for having committed a sex offense, and, as the defense continues to concede, he did more than engage in just gross sexual imposition against the 12-year-old victim. (D.R. Brief, at 1-2 – conceding oral sex) There was nothing left to dispute regarding D.R. being a sex offender, which had already been established through earlier proceedings in which D.R. had received ample due process. "Even assuming for the sake of argument that a convicted sex offender has a liberty interest in being free from registration as such, it is settled that conviction or similar adjudication of a sex offense supplies sufficient due process for the imposition of sex offender conditions, including registration." *Does v. Abbott*, 945 F.3d 307, 312 (5th Cir. 2019).

Equally so, there was nothing false in his original classification as a sex offender subject to registration, and, as a result, there could be no reputational harm from the existence of a classification truthfully taking into account his undoubted status as a sex offender. "[W]e have found sufficient stigma only where a state actor has made concrete, *false* assertions of *wrongdoing on the part of the plaintiff*. When a sex offender is required to register or is assigned a risk level, there is no false assertion of fact, and

thus there is no stigma." *Does*, 945 F.3d at 313 (internal quotation marks and citation omitted; emphasis sic).

Nor can D.R. point to any significant and material alteration in his legal status as a result of the juvenile court's inability to grant early termination at the end-of-disposition stage. D.R. was already subject to registration at that point, and he was the party seeking an alteration in the status quo. Because nothing was changing as to his registration status under state law, and because nothing could change, there was simply no stigma-plus reputational interest at stake that would create any "procedural due process" imperative to afford D.R. the opportunity to be heard at that time.

The early termination sought by the juvenile would not have disputed that he is a sex offender. Instead, it would have sought early termination for other reasons, none of which would have denied the basic premise that he stood adjudicated as a sex offender. Although this juvenile was statutorily ineligible at the end-of-disposition stage for early termination, it still remains true that only "juvenile offender registrants" can invoke the early-termination mechanism, and, by definition, such registrants have been adjudicated for having committed a sexually oriented offense or child-victim oriented offense on which registration was based. R.C. 2152.84(A)(1).

As for the defense's hyperbole about D.R. being "branded" as a sex offender, that status was the result of D.R. having committed at least gross sexual imposition (and worse), having admitted to that conduct, and having been adjudicated accordingly. There is no constitutional requirement that the General Assembly indulge a legal fiction that D.R. is not a sex offender and did not commit a sexually oriented offense.

Considering truthful information about the offender is not a "harm" to a person's reputational interests. The question of statutory ineligibility for early termination presents a question of law that has no effect on the factual question of whether D.R. is a sex offender, as he undoubtedly is, and as had already been determined under the statutory scheme.

D.R.'s citation to *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), is inapposite. In that case, the statute allowed the police chief to prohibit the sale of alcohol to persons who by excessive drinking had demonstrated specific traits, such as becoming "dangerous to the peace" of the community. The Court held that the person should be afforded the opportunity to be heard before the state-law decisionmaker would decide whether that factual predicate existed and before the person's legal status was altered to her detriment. "Procedural due process" in such instances affords the person the chance to dispute the material fact(s) at issue before such alteration. But instead of disputing whether he is a sex offender and whether he was 16 or 17 at the time of the offenses, both of which were facts already established in earlier proceedings, D.R. seeks to impose a mandatory-eligibility requirement on the statutory scheme to afford him an opportunity to be heard at a time when no interest is at stake under the statutory scheme and the court is required as a matter of law to continue the Tier I classification. This is, again, not a matter of "procedural due process" that would allow the person to dispute a fact of consequence to the outcome. Instead, it is an argument grounded in theories of equal protection and substantive due process, contending that this juvenile should have the same statutory eligibility as would 14-year-old and 15-year-old offenders.

D.

D.R. also errs in contending that the statute creates an "irrebuttable presumption" that is violative of procedural due process. According to the defense, the statute amounts to an irrebuttable presumption because it makes him ineligible for early termination at the end-of-disposition stage, thereby "presuming" he has not been rehabilitated. But "[s]o-called 'irrebuttable presumptions' are invalid only if the fact presumed is an essential constitutional or statutory predicate to government action." *Granzow v. Bur. of Support*, 54 Ohio St.3d 35, 37 (1990). D.R. is challenging the validity of a legislative classification, not any "presumption" of any particular fact that is constitutionally or statutorily necessary to allow the duty to register to continue.

The claim of "irrebuttable presumption" in this instance is nothing more than a substantive due process challenge to a legislative classification. "[O]ur 'irrebuttable presumption' cases must ultimately be analyzed as calling into question not the adequacy of procedures but – like our cases involving classifications framed in other terms – the adequacy of the 'fit' between the classification and the policy that the classification serves." *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989) (lead opinion); *Weinberger v. Salfi*, 422 U.S. 749, 772-73 (1975). "If the classification in operation and effect is rationally related to legitimate state objectives, it is not subject to attack on due process grounds merely by labeling the rule followed an irrebuttable presumption." *Darks v. Cincinnati*, 745 F.2d 1040, 1044 (6th Cir. 1984). The legislative classification is "in effect a rule of substantive law rather than an irrebuttable presumption." Id. As held in *Conn. Dept. of Pub. Safety v. Doe*, "States are not barred by principles of '*procedural* due process' from drawing such classifications. Such claims 'must ultimately be

analyzed' in terms of substantive, not procedural, due process." *Doe*, 538 U.S. at 8 (citation omitted; emphasis in quoted case).

E.

At bottom, the defense seeks to superimpose a legal requirement that the juvenile be eligible for early termination at any time he deems appropriate. For various reasons discussed in the OPAA merit brief, there are various rational grounds for the General Assembly to think that older juvenile sex offenders should wait an additional three years before becoming eligible for early termination of the minimal Tier I duty. The defense disagrees with that legislative judgment, but the General Assembly only needed a rational basis to make this judgment, and several exist. As discussed in the OPAA merit brief, the General Assembly rationally distinguishes between younger and older juvenile sex offenders, and an equal protection challenge fails.

The defense arguments would likewise fail as a matter of substantive due process. There is no substantive-due-process right to an early termination of a minimal Tier I registration duty. Substantive due process would accord special protection only to those fundamental rights and liberties that are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, ¶ 16. Substantive-due-process claims require a careful description of the asserted fundamental liberty interest, and courts are cautioned against using "due process" to define new fundamental liberty interests without having concrete examples of such interests being deeply rooted in our legal tradition. Id. As this Court has recognized, juvenile courts are purely creatures of statute and were created long after the

"due process" constitutional provisions were promulgated. Due process "cannot have created a substantive right to a specific juvenile-court proceeding." Id. ¶ 17.

Calling sex-offender registration "punitive" does not mean that it rises to the level of a "fundamental" interest. Although juveniles claim that sex-offender registration is punitive, it is not punitive in this context of determining whether to allow early termination of a 10-year registration duty. In any event, the United States Supreme Court has expressly declined to adopt "this sort of truncated analysis" that would equate any form of "punishment" as a "fundamental" liberty interest. *Chapman v. United States*, 500 U.S. 453, 465 (1991). The Court stated, as follows:

> Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. * * * But a person who has been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, * * * and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause * * *.

Chapman, 500 U.S. at 465 (citations omitted). In accordance with *Chapman*, the mere fact that a statute imposes imprisonment will not justify strict judicial scrutiny. See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (no strict scrutiny for criminal statute banning assisted suicide).

In the present case, the "punishment" falls far short of imprisonment, and the duty to register for ten years and to verify address on an annual basis amounts to a de minimis requirement. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶ 15; *State v. Cook*, 83 Ohio St.3d 404, 412 (1998). No "fundamental" deprivation of any deeply-rooted liberty

interest is involved. The same approach applies to sanctions imposed in juvenile court. See *In re Raheem L.*, 2013-Ohio-2423, 993 N.E.2d 455, ¶¶ 10-11 (1st Dist.) ("no fundamental right" implicated in juvenile sex-offender registration).

In the absence of a fundamental liberty interest being at stake, the challenger is left to contend that the statutory scheme is not "rationally related to legitimate governmental interests." *Glucksberg*, 521 U.S. at 722, 728; *State v. Thompkins*, 75 Ohio St.3d 558 (1996); *Adkins v. McFaul*, 76 Ohio St.3d 350, 351 (1996). A substantially equivalent test for substantive due process is found in Ohio case law: "[A]n exercise of the police power * * * will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary." *Benjamin v. Columbus*, 167 Ohio St. 103 (1957), paragraph five of the syllabus.

The "rational basis" standard of review is the paradigm of judicial restraint. See *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993).

> Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

Benjamin, paragraph six of the syllabus; *DeMoise v. Dowell*, 10 Ohio St.3d 92, 96-97 (1984).

Under rational-basis review, courts are poorly situated to second-guess the lines drawn by the legislature. Rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," nor does it "authorize 'the judiciary

[to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Heller v. Doe*, 509 U.S. 312, 319 (1993). "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Am. Assoc. of Univ. Professors v. Central State University*, 87 Ohio St.3d 55, 58 (1999), quoting *Beach Communications*, 508 U.S. at 315. "[A] state has no obligation whatsoever 'to produce evidence to sustain the rationality of a statutory classification.'" Id. at 58, quoting *Heller*, 509 U.S. at 320. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Univ. Professors*, 87 Ohio St.3d at 58, quoting *Heller*, 509 U.S. at 321.

A legislature is allowed to focus on what it perceives to be the greatest danger. *Beach Communications*, 508 U.S. at 316. "[T]he fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." Id. at 315-16, quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

Perfection and mathematical nicety are not required in drawing classifications. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). A law is not unconstitutional because it makes rough accommodations in light of practical considerations. Id.

Given the rational bases that support this law against equal protection challenge, the same rational bases support the law against substantive due process challenge. There is no fundamental unfairness in the General Assembly rationally concluding that older juvenile

offenders should undergo registration for three years longer while still allowing the court to eventually grant an early termination if warranted after that waiting period.

Ironically, the briefing of the defense and its amicus *supports* the rational bases underlying the law. Even under the statistics cited, the danger of recidivism continues. For example, the defense amicus cites studies indicating that various percentages of juvenile sex offenders reoffend at rates of "4.92%" and "2.75%", and, while the amicus claims that 95% to 97% do not reoffend, the plain import of this statistic is that 3% to 5% nevertheless *do* reoffend. (State P.D. Brief, at 6) The defense itself had acknowledged a report in its appellate brief below as indicating that, even after receiving treatment, supervision and support, juvenile sex-offender recidivism rates would be "at 4%-10%". (Defense Appellate Brief, p. 22)

Given the phenomenon of underreporting of sex offenses, one can have a healthy skepticism of "studies" and how they compute recidivism rates by sex offenders, especially if there is an overreliance on the self-serving statements of the sex offenders themselves. Nevertheless, even recidivism rates as low as 3% to 10% create ample reason for the General Assembly to be concerned about juvenile-sex-offender recidivism and for that body to reject a pollyannaish approach to the problem.

Even in this case, the positive reports on D.R.'s progress included an indication that D.R. poses an *average* risk of reoffense and at least a "low risk". (Tr. 6-7-19 p. 7-8 – "On the Static-99, which is an instrument they generally use for adults, page 12, puts [D.R.] at an average risk * * *"; "Dr. Dryer opines that my client is at low risk") The defense repeatedly concedes the existence of a "low risk" of reoffense by D.R. (D.R. Brief, at 3, 4, 22, 28, 29, 33) "Low risk" is not "*no* risk."

The defense and its amicus wrongly assume that only proof of a likelihood to reoffend will provide a justification for a registration requirement. Registration is constitutionally allowed under a rational-basis standard that would allow the General Assembly to be concerned about moderate and low risks even when they involve smaller percentages.

The defense's amicus provides other reasons to be concerned about allowing termination of the registration duty too soon. According to the defense amicus, juvenile offenders represent a "diverse group" having various reasons for their sexual acts, including being seriously mentally ill and engaging in a pattern of violating the rights of others. (State P.D. Brief, at 8-9) "Often, they are impulsive and exhibit poor judgment." (Id. 9) Moreover, "'[t]heir brains are not as developed and they are more impulsive in nature.'" (Id. 9) They also have a lesser understanding of norms and consequences. (Id. 9) As the amicus argues, this is a "critical period of identity formation and brain development", and such offenders at this age are still "figur[ing] out who they are" because their character is not yet fixed. (Id. 15, 16, 17)

Given the impulsive nature of juvenile offenders and their still-ongoing brain development and character development, it is easily rational for the General Assembly to adopt a waiting period to see if these impulsive offenders will adhere to the tenets of their short-lived treatment or will fall back in the coming months. This can be especially true in cases like the present case, in which the end-of-disposition stage was occurring just ten months after the original disposition, and all of the juvenile's apparent progress had occurred under the strictures of court-ordered treatment and supervision. While there were positive indications *so far*, the juvenile lacked any track record as to how things would

proceed in the coming months when he would not have treatment and supervision actively guiding him.

The defense's claim of a punitive purpose underlying the statutory scheme would mean that registration could be justified on a rational basis as a punitive sanction owing to the seriousness of sex offending. The purposes of juvenile dispositions include "protect[ing] the public interest and safety" and "hold[ing] the offender accountable for the offender's actions". R.C. 2152.01(A).

It must be kept in mind as well that "due process" is not an endless reservoir to be used when other constitutional protections fail. For example, a court cannot extract isolated strands of thinking from the specific Eighth Amendment context of "cruel and unusual punishment" and then import them into generalized notions of "due process" in order to provide greater protections than the Eighth Amendment itself would provide. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); see, also, *Conn v. Gabbert*, 526 U.S. 286, 293 (1999); *Turner v. Rogers*, 564 U.S. 431, 452-54 (2011).

Judged in Eighth Amendment terms, any cruel-and-unusual-punishment challenge here would fail. While a mandatory lifetime Tier III registration for a juvenile implicates the standard for cruel and unusual punishment when there is no allowance for the removal of the duty for 25 years, see *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, D.R. does not face any lifetime registration duty, and the juvenile court had the

discretion to recognize a Tier level as low as Tier I at the initial disposition, and it did so here. At most, only a 10-year registration duty applies to this juvenile under Tier I, and even that time frame is not "automatic", as the court can terminate the 10-year duty as soon as three years after the end-of-disposition stage. Requiring just a three-year waiting period before seeking early termination of a minimal 10-year registration duty does not qualify as being "so greatly disproportionate to the offense as to shock the sense of justice of the community." *State v. Weitbrecht*, 86 Ohio St.3d 368, 371 (1999), quoting *State v. Chaffin*, 30 Ohio St.2d 13 (1972).

Courts also must keep in mind that "the Eighth Amendment does not mandate adoption of any one penological theory." *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (controlling plurality). Legislatures can accord "different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." Id.

As a result, the General Assembly is not required to adhere to a singular "rehabilitation" or "social welfare" approach toward all forms of juvenile crime at all times. It can adopt multiple penological and regulatory approaches, including the creation of a mandatory-bindover system for the most serious juvenile offenders, as approved in *Aalim*, and including the creation of a nuanced approach toward juvenile sex-offender registration that appropriately requires older juvenile sex offenders to wait just three years before being considered for early termination of their minimal Tier I registration duty.

It defies common sense to think that the minimal Tier I registration duty amounts to "cruel and unusual punishment" because it does not allow early termination as soon as ten months after disposition and because the juvenile sex offender must wait just three

more years before becoming eligible for early termination. Imposing a three-year waiting period is not greatly disproportionate to the offense of sexually abusing a 12-year-old victim, and it hardly shocks the sense of justice in the community that this minimal registration duty is mandatory for so short a time. Complaints about the mandatory nature of this three-year waiting period cannot succeed under the pertinent standard for judging disproportionate penalties, and such complaints therefore necessarily fail even when dressed up in "procedural due process" or "substantive due process" clothing.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court reverse the judgment of the First District Court of Appeals.

Respectfully submitted,

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876
Counsel for Amicus Curiae OPAA

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on March 7, 2022, to the following counsel of record: Paula E. Adams, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, paula.adams@hcpros.org, counsel for State of Ohio; Jessica Moss, Assistant Public Defender, 125 East Court Street, Ninth Floor, Cincinnati, Ohio 45202, jmoss@hamiltoncountypd.org; counsel for Appellee; Benjamin M. Flowers, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, benjamin.flowers@OhioAGO.gov, counsel for amicus curiae Ohio Attorney General Dave Yost; Lauren Hammersmith, Asst. State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, lauren.hammersmith@opd.ohio.gov, counsel for amicus curiae Office of the Ohio Public Defender.

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876