In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2020-0544
	:	Case No. 2020-0625
Appellant,	:	
	:	On Appeal from the
v.	:	Butler County
	:	Court of Appeals,
MIQUAN D. HUBBARD,	:	Twelfth Appellate District
	:	
Appellee.	:	Court of Appeals Case No. CA2019-05-086

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

VICTORIA BADER (0093505)
Assistant Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(t) 614-466-5394
(f) 614-752-5167
victoria.bader@opd.ohio.gov

Counsel for Appellant
Miquan D. Hubbard

MICHAEL GREER (0084352)
Assistant Prosecuting Attorney
315 High Street, 11th Floor
Hamilton, Ohio 45011
(t) 513-887-3474
(f) 513-887-3748
Greerjm@butlercountyohio.org

Counsel for Appellee
State of Ohio

DAVE YOST (0056290)
Attorney General of Ohio

BENJAMIN M. FLOWERS * (0095284)
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor General
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

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INTRODUCTION

This case presents the same question as *State v. Jarvis*, Case No. 2020-0549: Does Sierah's Law—which requires certain violent offenders to register with the State after leaving prison—violate the Retroactivity Clause, Art. II, §28, in its application to individuals who committed their offenses *before* the law's effective date and who were confined in jail, awaiting sentencing, when the law went into effect?

The answer is "no." The Attorney General explained why in an *amicus* brief he filed in *Jarvis*. Rather than fully repeating the same arguments he made in that *amicus* brief, this brief makes an abbreviated version of those arguments and addresses a few novel contrary arguments raised by the appellant here, Miquan Hubbard.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in protecting Ohio's Constitution against misconstruction. Furthermore, the Attorney General is interested in respecting the democratic will of the people as reflected in the acts of their elected representatives. For these reasons, the Attorney General is filing this *amicus* brief supporting Sierah's Law's constitutionality.

STATEMENT OF THE CASE AND FACTS

1. In 2018, Ohio passed Sierah's Law, 2018 Sub. S.B. No. 231, named in honor of Sierah Joughin—a woman killed in Fulton County by a man with a lengthy history of violent crimes. Sierah's Law created the Violent Offender Database. The law applies to criminals convicted of aggravated murder, murder, voluntary manslaughter, kidnapping, or second-degree felony abduction. R.C. 2903.41(A)(1); R.C. 2903.42(A)(1). Sierah's Law presumptively requires these felons to register with the Database if they were either: (1) convicted after the law's effective date, *id*.; or (2) "confined in a jail … state correctional institution, or other institution" on the law's "effective date." R.C. 2903.41(A)(2). Felons placed in the Database must complete an intake form prepared by the Attorney General's Office within ten days of their release. R.C. 2903.43(A), (C)(1). The form requires violent felons to provide: their full name and their aliases; the addresses of their residences, places of employment, and any schools they are attending; their social security and driver's license numbers; their offenses; notes on any scars, tattoos, or other identifying marks; and the license plate number, vehicle identification number, and description of each of their vehicles. R.C. 2903.43(C)(2). They must also be photographed and have a set of fingerprints and palmprints taken. R.C. 2903.43(C)(3). The form *does not* require felons to provide DNA samples, online aliases or screennames, racial identifications, or height and weight.

A felon subject to reporting obligations must report once annually to the sheriff's office where he resides, at any time during a ten-day period pegged to the date of initial registration. R.C. 2903.43(D)(1). Covered felons need to register with just one county sheriff. When reporting in person, felons must either verify that the information they provided has not changed or else update it. *Id.* And the State photographs them once more. *Id.* Felons must update their information before the annual in-person meeting only if they change addresses; if they move, they have three business days to contact their old county sheriff about the move. R.C. 2903.43(E). Felons are not charged any fee, nor does the Database include separate procedures for singling out homeless offenders.

Reckless failure to comply with registration duties is only a fifth-degree felony. R.C. 2903.43(I). And these duties last for just ten years from the time of initial enrollment. The requirements cannot be extended unless the State moves for an extension and the court determines that the felon either committed another crime or failed to comply with his Database-related duties. R.C. 2903.43(D)(2). Furthermore, all offenders have the right to file a motion for a hearing to evaluate their registration duties. The law also permits registrants who were not the "principal offender in the commission of the offense that classifies the person a violent offender" to seek relief from the law's registration requirements. R.C. 2903.42(A)(4).

Once a county sheriff has collected the offender's form, prints, and photograph, the sheriff must forward them to the Bureau of Criminal Investigation (BCI) for inclusion in a statewide online database operated according to procedures established by the Attorney General. R.C. 2903.43(F)(1). The Database is open only to federal, state, and local law-enforcement officers—it is *not* a public record, and *not* available to the public. R.C. 2903.43(F)(2). While the county-level records maintained by sheriffs are public records, felons included in the Database may move to suppress some or all of these records from public view if they fear for their safety. R.C. 2903.43(F)(3). To take advantage of this option, a registrant must file a motion with his county court of common pleas. The motion "shall expressly state the reasons for which the violent offender … fears for the offender's safety, shall identify each county in which the offender has enrolled or re-enrolled, and shall provide materials in support of the motion." R.C. 2903.43(F)(3)(c). The court may either rule on the motion without a hearing, or else hold a hearing to determine if "the offender's fears for the offender's safety are valid and [whether] the interests of justice and the offender's safety require that the motion be granted." *Id*. If the motion is granted, all of the "statements, information, photographs, fingerprints, or materials provided by the offender" that are in the "possession of a county sheriff are not public records." *Id.*

2. Miquan Hubbard, the appellant here, pleaded "guilty to murder in violation of R.C. 2903.02(B) and an amended firearm specification." *State v. Hubbard*, 12th Dist.

Butler No. CA2019-05-086, 2020-Ohio-856 ("App.Op."), ¶3. On December 19, 2018—before Hubbard pleaded guilty, and about three months after he committed his crimes—Governor Kasich signed Sierah's Law, 2018 Sub.S.B. No. 231. Hubbard pleaded guilty on March 7, 2019, just before the law's March 20, 2019 effective date. *Id.* ¶¶3, 4. The State incarcerated Hubbard while he awaited sentencing. Thus, Sierah's Law, by its terms, applies to Hubbard: he was convicted of a covered offense and "confined in a jail … state correctional institution, or other institution" on the law's "effective date." R.C. 2903.41(A)(2).

Hubbard filed a motion "object[ing] to application of Sierah's Law," claiming that its application to him violated the Retroactivity Clause of the Ohio Constitution. App.Op., ¶5; *see also* Ohio Const., Art. II, §28. The trial court rejected this argument. App.Op. ¶5-6. So did the Twelfth District, which held that Sierah's Law is constitutional in its application to felons who, like Hubbard, committed their crimes before the law's effective date. *See* App.Op. ¶37. Because this ruling contradicted a decision of the Fifth District, *State v. Jarvis*, 5th Dist. Muskingum App. No. CT 2019-0029, 2020-Ohio-1127, the Twelfth District certified a conflict. *See* Case No. 2020-0625, Conflict Order, issued May 14, 2020. The Fifth District likewise certified a conflict in *Jarvis.* See Case No. 2020-549, Conflict Order, issued April 17, 2020. This Court agreed that there is a conflict and set both cases for merits briefing. *See* July 1, 2020 Case Announcements, 2020-Ohio-3473.

ARGUMENT

<u>*Amicus* Attorney General's Proposition of Law:</u>

> *Sierah's Law, R.C. 2903.41*, et seq., *is constitutional in its application to violent offenders who committed their crimes before the law's effective date*.

Sierah's Law applies to felons who had already been convicted, and who were "confined in a jail … state correctional institution, or other institution," on the law's "effective date." R.C. 2903.41(A)(2). This case asks whether applying the law to such felons violates the "Retroactivity Clause" of Section 28, Article II of the Ohio Constitution. It does not. Sierah's Law may be validly applied to felons, such as Hubbard, who committed their crimes before the law's effective date. The Court should therefore affirm the Twelfth District.

A. Sierah's Law is not unconstitutionally retroactive.

The Retroactivity Clause forbids the General Assembly from passing "retroactive laws." Ohio Const., Art. II, sec. 28. As a matter of original meaning and this Court's precedent, a criminal law is "retroactive" when it *punishes* already-completed conduct. *See* Noah Webster, *American Dictionary of the English Language* (1828); *cf. Pratte v. Stewart*, 125 Ohio St. 3d 473, 2010-Ohio-1860, ¶37; *State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583, ¶34; *Miller v. Hixson*, 64 Ohio St. 39, 51 (1901). A law is punitive—and thus cannot be applied retroactively—if it "impairs or takes away vested rights, affects an accrued substantive right," or "imposes new or additional burdens, duties, obligations, or liabil-

ities as to a past transaction." *Pratte*, 125 Ohio St. 3d 473, ¶37 (citation omitted). Sierah's Law does not do that, and is therefore not impermissibly retroactive.

First, neither violent offenders nor anyone else have a "vested" or "accrued" right not to register with the State. Thus, Sierah's Law could not possibly impair, take away, or affect such rights.

Second, the law does not impose "new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Id*. Instead of punishing past conduct, the law imposes future obligations (ongoing obligations to register) and punishes those who fail to comply. Laws of this nature—in other words, laws that change the collateral consequences of a crime—are retroactively punitive only if one could reasonably expect at the time of the crime to be free from the effects of such legislation. *State v. Cook*, 83 Ohio St. 3d 404, 412 (1998) (quoting *State ex rel. Matz v. Brown*, 37 Ohio St. 3d 279, 281 (1988)). For example, because it is reasonably to be expected that future regulation might bar those with criminal histories from working in some fields, a law that bars anyone convicted of certain crimes from working at a school does not constitute retroactive "punitive" legislation. *Doe v. Ronan*, 127 Ohio St. 3d 188, 2010-Ohio-5072, ¶¶27-28. Along the same lines, criminals have no reasonable expectation that they will be forever free of future registration obligations like those at issue here.

It is true that felons can reasonably expect not to be subjected to legislation that imposes additional *punishments* for already-completed acts. And it is also true that reg-

istration obligations *can* become so onerous as to constitute punishment. *See State v. Williams*, 129 Ohio St. 3d 344, 2011-Ohio-3374. But while the line between punitive and non-punitive registration obligations is far from bright, Sierah's Law falls quite clearly on the non-punitive side of the line. That follows from this Court's case law.

Consider, for example, this Court's decision in *State v. Cook*, 83 Ohio St. 3d 404, 412 (1998). There, the Court upheld a now-repealed version of the State's sex-offender registry that required offenders to "register with their county sheriff and provide a current home address, the name and address of the offender's employer, a photograph, and any other information required by" BCI. *Cook*, 83 Ohio St. 3d at 408. "In addition, sexual predators" had to "provide the license plate number of each motor vehicle owned by the offender or registered in the offender's name." *Id*. Offenders all had to verify their home addresses either annually or every ninety days, depending on the severity of the offense. *Id*. And they had to do so for either ten years, twenty years, or life, again depending on the severity of the offense. *Id*. The Court determined that these obligations were non-punitive, since the scheme imposed "*de minim[i]s* administrative requirement[s]" akin to renewing a driver's license. *Id.* at 418.

The Court reached the same conclusion with respect to an amended version of the sex-offender registry that changed the law in three ways. First, the amended law removed the ability of those deemed "predators" to seek removal of the classification. *Ferguson*, 120 Ohio St. 3d 7, ¶8. Second, whereas the old law required offenders to reg-

ister with the sheriff *only* in the county where they lived, the amended law required them to register every ninety days with the sheriffs in the counties where they lived, worked, and attended school. *Id*. ¶9. Finally, the amended law established that "any statements, information, photographs, and fingerprints required to be provided by the offender are public records and are included in the Internet database of sex offenders maintained by the Attorney General's office." *Id*. ¶10. In upholding this law, the Court stressed that "Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment." *Id*. ¶39. Moreover, "a statutory scheme that serves a regulatory purpose is not punishment even though it may bear harshly upon one affected." *Id*. (internal quotation marks omitted). Those principles required upholding the law: while the registration obligations imposed inconveniences, even fairly onerous ones, the statute, on its face, was "not born of a desire to punish." *Id*. ¶36.

Only once has this Court held that a law imposing registration duties crossed the line from non-punitive into punitive. The case is *Williams*, 129 Ohio St. 3d 344, which addressed an amended version of the sex-offender law that imposed still more registration and reporting requirements and imposed them for a much longer period of time. The amended law made more offenders subject to registration requirements "without regard to the circumstances of [the] crime or [the offender's] likelihood to reoffend," *id*. ¶17; it more than doubled the registration period (from ten years to twenty-five) for at least some offenders, *id*. ¶19; and it ensured that "all the registration requirements

appl[ied] without regard to the future dangerousness of the sex offender," *id*. ¶20. These changes took an already-onerous-yet-non-punitive scheme, *Ferguson*, 120 Ohio St. 3d 7, ¶39, and made it punitive, *Williams*, 129 Ohio St. 3d 344, ¶20. Combined with the already-onerous administrative requirements, the imposition of these additional requirements evinced, on their face, a desire to *punish* sex offenders for crimes they had already committed and not merely a desire to protect the public.

The registration obligations at issue here fall on the non-punitive side of the line. Indeed, the obligations here are *less* onerous than the ones upheld in *Cook* and *Ferguson*. Violent offenders must update their registration only once per year, not every ninety days, unless they move. *Compare* R.C. 2903.43(D)(1), (E) *with Ferguson*, 120 Ohio St. 3d 7, ¶9. Violent offenders must register for just ten years, not twenty-five years and not for life, and the time can be extended only upon a motion by the prosecutor. *Compare* R.C. 2903.42(A)(1), R.C. 2903.43(D)(2) *with Cook*, 83 Ohio St. 3d at 408. Violent offenders must register with just one sheriff—the sheriff in the county where they live—not three. *Compare* R.C. 2903.42(C) *with Ferguson*, 120 Ohio St. 3d 7, ¶9. The information provided to the State in connection with the violent-offender registry is not a public record and is not posted on a publicly accessible, state-run website. *Compare* R.C. 2903.43(F)(2) *with Ferguson*, 120 Ohio St. 3d 7, ¶10. While interested parties may obtain files retained by the sheriffs through public-records requests, offenders can seek to suppress that information. R.C. 2903.43(F)(3). Finally, while having committed a violent offense no doubt

carries a (justifiable) stigma, common experience teaches that the stigma is not close to as serious as the stigma that comes with having to announce one's sex-offender status to the world.

B. Hubbard offers no good reasons to invalidate Ohio's violent-offender database.

Hubbard offers no sound reason to find Sierah's Law punitive and thus impermissibly retroactive, in its application to offenders who committed their crimes before the effective date of Sierah's Law.

Hubbard's brief attempts to portray this case as *Williams* 2.0. But as the above discussion shows, it is not—the law imposes obligations that are *less onerous* even than the ones this Court held non-punitive in *Cook* and *Ferguson*. Hubbard's brief hardly distinguishes those latter two cases. Indeed, he repeatedly relies on the *dissenting* opinion in *Ferguson*, *see* Hubbard Br.8, 12–13, and cites *Cook* just once, at the start of his analysis, *see* Hubbard Br.7.

Hubbard then goes through a litany of factors that he thinks show the punitive nature of Sierah's law. None does. For example, Hubbard notes that Sierah's law "was placed in the criminal code," just "[l]ike the sex-offender registration statutes" discussed in *Williams*. Hubbard Br.12. That is true. But it was also true of the statutes that this Court *upheld* as non-punitive in *Cook* and *Ferguson*. So this is a thin reed on which to hang an argument for a punitive label.

Hubbard next mistakenly insists that Sierah's Law, unlike the sex-offender registry laws, has no "express" legislative indication of a "remedial purpose." Hubbard Br.12. That is both irrelevant and wrong. It is irrelevant because, while this Court has pointed to such statements as evidence that onerous obligations are *non*-punitive, *see Ferguson*, 120 Ohio St. 3d 7, ¶28, it has never held that the absence of such a statement can transform non-onerous registration obligations into punitive laws. Nor would it make any sense to do so: the Retroactivity Clause prohibits only punitive laws, and laws cannot become punitive based on the presence or absence of a non-binding statement of purpose. Hubbard's argument is, in any event, wrong. While Sierah's Law contains no standalone statement of purpose, its express terms focus closely on offender risk and public safety. For example, if a convicted offender files a motion seeking to be spared of registration duties, the court must consider "whether the offender has" any prior convictions for violent offenses and "a propensity for violence," R.C. 2903.42(A)(4)(a)(i), the "results of a risk assessment," R.C. 2903.42(A)(4)(a)(ii), the "degree of culpability or involvement of the offender in the offense" triggering registration, R.C. 2903.42(A)(4)(a)(iii), and "[t]he public interest and safety," R.C. 2903.42(A)(4)(a)(iv). Those express provisions reflect a public-safety purpose, not a desire to punish. Any demand for a standalone statement of purpose misses the forest for the trees, and turns the Retroactivity Clause from a ban on retroactive, punitive laws into a guide for the composition of statutory language.

Hubbard concludes by identifying three more factors that, once again, do not distinguish this case from *Cook* or *Ferguson*. First, he notes registration duties here flow from a criminal conviction, and that failure to comply is itself a criminal offense. Hubbard Br.13–15. The same was true of the earlier sex-offender laws *upheld* by both *Cook* and *Ferguson*. Second, he notes that the "violent offender registry is public." Hubbard Br.15. That is false: the registry is *not* public. *See* R.C. 2903.43(F)(2). And while people can obtain some records by making public-records requests upon prosecutors' offices, the extra steps needed to obtain those records make the Violent Offender Database far less public than the upheld sex-offender registries, which were (and still are) available on the internet to everyone. *See Ferguson*, 120 Ohio St. 3d 7, ¶10. Finally, Hubbard insists that the obligations here add up to "new burdens" and "new obligations" based on past conduct. Hubbard Br.18. But the "burdens" and "obligations" are less burdensome than those upheld as non-punitive in *Cook* and *Ferguson*.

*

As explained above and in the Attorney General's *Jarvis* brief, Sierah's Law does not violate the Retroactivity Clause in its application to offenders like Hubbard. Nothing in Hubbard's brief justifies a different conclusion.

CONCLUSION

The Court should affirm the Twelfth District's judgment.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s Benjamin M. Flowers
BENJAMIN M. FLOWERS * (0095284)
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor General
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 26th day of October, 2020, by e-mail on the following counsel:

Michael Greer
Assistant Prosecuting Attorney
315 High Street, 11th Floor
Hamilton, Ohio 45011
Greerjm@butlercountyohio.org

Counsel for Appellee
State of Ohio

Victoria Bader
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
victoria.bader@opd.ohio.gov

Counsel for Appellant
Miquan Hubbard

/s Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General