ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2013-1619
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Eighth District
	:	Court of Appeals,
MATTHEW MOLE,	:	Cuyahoga County Ohio
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. CA 98900

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

Mathew Mole, a police officer, had sex with a 14-year-old boy. He was convicted of sexual battery under to R.C. 2907.03(A)(13), a statute that prohibits peace officers from having sex with minors. On appeal, the Eighth District held that the statute facially violates the Equal Protection Clause.

The Attorney General joins this case as *amicus curiae* because the Eighth District's holding undermines principles of judicial restraint and dramatically elevates the scrutiny applied to acts of the General Assembly under rational-basis review. Unless reversed, the Eighth District's holding will upend the traditional framework that courts apply to facial equal protection challenges under rational-basis scrutiny.

Facial challenges run contrary to principles of judicial restraint. They require courts to anticipate questions before it is necessary to decide them and formulate rules that are broader than the facts to which those rules are to be applied. Facial challenges should therefore rarely succeed. The Eighth District's decision threatens not only to make successful facial challenges common, but to redefine them in a way that threatens volumes of the Revised Code. That is because the Eighth District inverted the limiting principle built into facial challenges that preserves a law unless it cannot be constitutionally applied in *any* circumstance. The Eighth District instead wielded the extreme remedy of the facial challenge to invalidate a law because it could not be constitutionally applied in *every* circumstance.

Rational-basis scrutiny also plays a limited role in judicial review of statutes. That is because review under that standard asks only whether a statute is rationally related to a valid State interest. Here, too, the Eighth District turned a well-established doctrine into an invasive tool of judicial review by demanding a relationship between legislative means and ends that is incompatible with the rational-basis doctrine.

R.C. 2907.03(A)(13) survives a facial challenge under rational-basis scrutiny properly applied. The General Assembly's aims in passing the law included protecting children from predation by peace officers and guarding the reputation and integrity of peace officers by holding them to a higher standard than the general public. The prohibition in R.C. 2907.03(A)(13) rationally advances those interests by criminalizing sex between a peace officer and a minor.

The Court should reverse and reiterate the limited scope of facial challenges and the low bar for passing rational-basis review.

STATEMENT OF AMICUS INTEREST

As the chief law officer of Ohio, R.C. 109.02, the Attorney General has a substantial interest in judicial restraint as a limit that reserves for the General Assembly the role of determining public policy in Ohio. The Attorney General also has a keen interest in laws that protect the most vulnerable in society, including children. The decision below strikes from the Revised Code a law that protects children, and does so with logic that endangers the General Assembly's ability to pass laws on an almost limitless range of topics. The Attorney General urges the Court to reverse the decision below and reinstate the conviction.

STATEMENT OF THE CASE AND FACTS

Mole, a Waite Hill police officer, met a 14-year-old-boy through a Smartphone dating app. Tr. 88, 169. The boy told Mole he was 18, Tr. 91, 181, and Mole did not tell the boy he was a police officer. The boy invited Mole over to his mother's house in the middle of the night. Tr. 93, 175. Mole and the boy had sex. Tr. 109-116. The boy's mother discovered Mole and the boy and called the police. Tr. 118-120.

Mole was arrested and charged with Unlawful Sexual Conduct with a Minor in violation of R.C. 2907.04(A), Tr. 6, and Sexual Battery in violation of R.C. 2907.03(A)(13). Tr. 7. The sexual-conduct-with-a-minor charge was tried to a jury, but resulted in a mistrial. Tr. 476-477.

The State did not retry Mole on that offense. The sexual-battery charge was tried to the bench, Tr. 12, which found Mole guilty and sentenced him to two years in prison and classified him as a Tier III sex offender. Tr. 477, 483, 525.

Mole appealed raising a facial equal-protection challenge to R.C. 2907.03(A)(13). The Eighth District reversed on that basis in a fractured decision. *State v. Mole*, No. CA 98900, 2013-Ohio-3131 (8th Dist.) ("App. Op."). Judge Jones had two problems with R.C. 2907.03(A)(13). First, he faulted the statute for over inclusiveness. He opined that R.C. 2907.03(A)(13), which covers all "peace officers" instead of only "police officers," was too broad in that not all peace officers should be held to a higher standard. App. Op. ¶¶ 18-19. Second, he reasoned that R.C. 2907.03(A)(13) was not rationally related to its legitimate state interest. Judge Jones identified what he believed to be the statute's animating state interest as the desire to "deter sexual conduct in a variety of situations where the offender takes unconscionable advantage of the victim." App. Op. ¶ 31 (internal citations omitted). He acknowledged that the State might have "a legitimate interest in protecting minors from those who use their profession to pursue an inappropriate sexual relationship," but reasoned that division (A)(13) contains no such occupational connection or relationship. App. Op. ¶¶ 33, 34 (internal citations omitted). Thus, in his view, R.C. 2907.03(A)(13) does not rationally advance a state interest because a peace officer convicted under the statute did not necessarily use his position as a peace officer to induce the sexual conduct. App. Op. ¶¶ 34-35.

Judge Stewart agreed with the result, but offered her own rationale. She expressed no concern that the statute criminalized the behavior of "peace officers" instead of just "police officers," but she agreed that the statute does not rationally advance a state interest because it does not require the peace officer to have used his power or influence to induce sexual conduct.

App. Op. ¶¶ 43-44. She found the statute over inclusive because it did not intend to criminalize behavior such as Mole's where the minor did not know the offender was peace officer, App. Op. ¶ 46, but also under inclusive because under the text of the statute, a peace officer under 20 would not violate the statute if he was not more than two years older than the minor. App. Op. ¶ 47. Thus, she noted that the statute "in some circumstances criminalizes conduct that it did not intend to prevent, and yet in other circumstances allows conduct that it intended to criminalize." App. Op. ¶ 48.

Judge Celebreeze dissented, arguing that R.C. 2907.03(A)(13) effectuates more than one valid state interest. App. Op. ¶ 51. Not only does it seek to protect children, but it also seeks to prevent peace officers from bringing disrepute to their ranks by engaging in sexual relations with children. App. Op. ¶ 52. "[Peace officers] maintain a sphere of influence over their communities broadly and . . . must instill in the public the belief that these officers are deserving of the power and authority granted to them." App. Op. ¶ 53. This second interest, Judge Celebreeze said, is advanced by a statute that does not rely on whether or not there is an occupational connection between the peace officer and the victim. App. Op. ¶ 55.

The State appealed, and this Court accepted review to decide whether R.C. 2907.03(A)(13) on its face violates equal-protection guarantees.

ARGUMENT

***Amicus Curiae* Ohio Attorney General's Proposition of Law No. I :**

Facial constitutional challenges are disfavored.

Striking down a statute on a facial challenge is an "exceptional remedy." *Carey v. Wolnitzek,* 614 F.3d 189, 201 (6th Cir. 2010). A facial challenge requires a court to conclude "that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). These challenges seek to remove a law from the books, to

"leave nothing standing." *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (Sutton, J.). Facial challenges also "run contrary to the fundamental principle of judicial restraint." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450 (2008). They force the Court to "anticipate a question of constitutional law in advance of the necessity of deciding it" and to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (internal quotations omitted); *Washington State Grange*, 552 U.S. at 450. They raise the risk of "premature interpretation of statutes on the basis of barebones records." *Sabri v. United States*, 541 U.S. 600, 609 (2004) (internal quotation marks and brackets omitted). The breadth of the remedy and the loosening of judicial restraint involved in facial constitutional litigation means courts "disfavor[]" facial challenges. *Washington State Grange*, 552 U.S. at 450. Court do and should prefer as-applied challenges, which are the "basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (internal quotation marks omitted).

The Eighth District's analysis shows why facial challenges should be disfavored. Judge Jones took issue that R.C. 2907.03(A)(13) reaches all "peace officers" instead of only "police officers." App. Op. ¶ 19. He cataloged the different officers included as "peace officers" and questioned whether the State has a valid interest in a law prohibiting sexual conduct between a minor and all types of peace officers. App. Op. ¶ 19. That turns a facial challenge on its head. Instead of asking whether the statute is "incapable of *any* valid application," *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, n.5 (1982) (internal quotation marks omitted) (emphasis added), Judge Jones asked whether the statute has any *invalid*

applications. That is a question reserved for an as-applied challenge by a litigant presenting the particular facts that make the law (potentially) unconstitutional as *that litigant*.

Judge Jones's inversion of how facial challenges operate also led him astray when pondering the relationship between the State's interest and the how the statute achieves them. He notes that all other divisions of R.C. 2907.03(A) require that the offender have a certain relationship to the victim. In his view the peace-officer provision stands "alone" in that it does not require an "occupational connection" such that the offender's status contributed to the crime. App. Op. ¶ 31. In other words, Judge Jones was not able to imagine instances in the other subsections of the statute where the victim would not know the occupation of the offender. That approach again flips the facial-challenge question upside down. The question is whether the statute is valid in no set of circumstances, not whether it is invalid in any circumstances. *Salerno*, 481 U.S. at 745; *Oliver v. Cleveland Indians Baseball Co. Ltd. P'ship*, 123 Ohio St. 3d 278, 2009-Ohio-5030 ¶ 13; *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶ 26. If a law operates unconstitutionally only in some circumstances, the law is not facially invalid. *Arbino*, 2007-Ohio-6948 ¶ 26.

And Judge Jones's assumptions about other parts of the statute are wrong on their own terms as well. Many of the other divisions of R.C. 2907.03 criminalize sex with a minor even when the victim does not know the offender's occupation. For example, in division (A)(7), the offender must be either a teacher, administrator, coach, or other person in authority employed by or serving in a school and the victim is enrolled or attends that school. There is no requirement that the victim know that the offender was employed by the school and it is not difficult to imagine instances in a large school where a victim might not have this knowledge. Similarly, (A)(11) requires the victim to be confined to a detention facility and the offender simply be an

employee of that detention facility. Again, it is easy to imagine, given the variety of employees in a detention facility and the potential size of the detention facility, that a victim might not know that the offender is an employee of the detention facility. This same logic holds true for divisions (A)(8) and (A)(12), dealing with teachers, administrators, coaches or other persons employed by an institution of higher education and clerics. Judge Jones's approach it not faithful to the established methods of deciding facial constitutional questions, and therefore reached a result that must be reversed.

Judge Stewart's opinion similarly reaches the wrong result because it starts from a mistaken framework. Her opinion faulted R.C. 2907.03(A)(13) because in some "circumstances [it] allows conduct that it intended to criminalize." App. Op. ¶ 48. Judge Stewart ruled that the statute is constitutionally defective because it does not criminalize sex between a peace officer under the age of 20 and a victim less than two years younger. App. Op. ¶ 47. Here, Mole was over 30 and the victim was 14. App. Op. ¶ 3. Whether or not it was appropriate for the legislature to determine they did not want to criminalize sex between an officer who was under the age of 20 and a minor who was less than two years younger than the officer is not a facial constitutional flaw. The statute is underinclusive because the General Assembly decided to draw a line, much as it has in other criminal statutes prohibiting sex with minors. *See* R.C. 2907.04(A) (unlawful sexual conduct with a minor defined at 16, not 18); R.C. 2907.04(B) (offense classification varies according to age differential between defendant and minor). These kinds of classifications are consistent with the Equal Protection Clause because legislation "does not violate" that guarantee even when it makes "imperfect" distinctions. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Those distinctions can include classifications that a judge may regard as too broad or to narrow. "A law can be underinclusive or overinclusive without running afoul of

the Equal Protection Clause." *New York Transit Authority v. Beazer*, 440 U.S. 568, 592 n.38 (1979). The Eighth District's contrary reasoning is incorrect and must be reversed.

And the Eighth District's constitutional rule sprung from treating a facial challenge as a mandate to explore how the statute may operate in cases other than Mole's. But the facts of this case made that unnecessary, not just improper. Mole was a police officer, not merely a peace officer. He was over 30, and his victim 14, at the time of the crime. The exploration of whether the statute would be constitutional as applied to a Department of Taxation investigator, or whether it is appropriately applied when the age differential between the officer and the victim is less than two years are questions for another case. They should arise (if ever) in a case where the litigants have a "personal stake in the outcome of the controversy." *Clifton v. Blanchester*, 131 Ohio St. 3d 287, 2012-Ohio-780 ¶ 15 (internal quotation marks omitted) (discussing standing, but the sentiment is equally valid in avoiding overreliance on facial challenges).

Mole's facial attack should have been squarely and decisively rejected below. The statute has obviously legitimate applications when police officers use their influence to coerce sex with minors. And it is applicable to all sexual encounters between peace officers and minors so long as the officer is 20 or older. Even if there are circumstances where the statute is invalid *as applied*, those circumstances are not appropriately considered in a facial equal-protection attack under rational-basis review.

The lower court's error as to the proper facial-challenge framework requires reversal.

***Amicus Curiae* Ohio Attorney General's Proposition of Law No. II:**

R.C. 2907.03(A)(13) is facially constitutional.

The lower court's opinion suffers another flaw beyond the error of inverting the relevant question for a facial challenge. Although the court recognized that it must apply rational-basis scrutiny, it did so more in name than in spirit. Properly applied, R.C. 2907.03(A)(13) easily

survives rational-basis review. That can be seen in the particulars of this case and the consequences that the lower court's rationale would have for other statutes.

A. R.C. 2907.03(A)(13) is rationally related to the State interests in protecting children and upholding the integrity of peace officers.

The contours of rational-basis review are well-known but bear repeating in light of the lower court's holding. Where there is no suspect class or fundamental right at issue, a rational-basis test applies. *Conley v. Shearer*, 64 Ohio St. 3d 284, 289 (1992). The analysis begins with the presumption that statutes are constitutional. *State v. Peoples,* 102 Ohio St. 3d 460, 2004-Ohio-3923 ¶ 5; *Heller v. Doe,* 509 U.S. 312, 319 (1993). That presumption requires substantial deference to legislative judgments. *State v. Williams*, 88 Ohio St. 3d 513, 531 (2000); *Conley*, 64 Ohio St. 3d at 289. And it means that courts refrain from judging the "wisdom, fairness, or logic" of legislative choices. *Heller*, 509 U.S. at 319 (internal quotation marks omitted). Rather, courts must uphold a challenged statute "if at all possible." *Conley*, 64 Ohio St. 3d at 289.

Viewing a statute through this deferential lens, a court must first determine whether the statute is supported by some valid, or legitimate, government interest. *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908 ¶ 19; *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St. 3d 56, 2009-Ohio-1970 ¶ 15. Once the court has identified a valid government interest, it must then determine if the means by which the state has chosen to advance the valid government interest are rational. *Pickaway*, 2010-Ohio-4908 ¶ 19. Classifications will be invalidated only if they "bear no relation to the state's goal." *State v. Thompkins*, 75 Ohio St. 3d 558, 561 (1996).

The individual challenging the law bears the burden of proving that it is not rationally related to a valid state interest. *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505 ¶ 9. Rational-basis review does not require that the legislature articulate any particular

purpose for the classification in the statute. *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). As a consequence, the State "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller,* 509 U.S. at 320. The rational basis behind a law may be based on "speculation unsupported by evidence of empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Indeed, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* The burden rests entirely with the individual attacking the statute to "negative every conceivable basis before an equal protection challenge will be upheld." *Williams*, 88 Ohio St. 3d at 531; *Heller*, 509 U.S. at 320. The state carries no burden to show that some rational basis justifies the legislation. *Williams*, 88 Ohio St. 3d at 531.

R.C. 2907.03(A)(13) prohibits peace officers from engaging in sexual conduct with minors when the peace officer is more than two years older than the minor. The valid state interests behind R.C. 2907.03(A)(13) are twofold: first, to protect children from peace officer predation, and second, to hold peace officers to a higher standard than the general public and preserve the reputation and integrity of the position.

There is no question the State has a legitimate and valid interest in protecting children from sexual abuse. *See State ex rel. O'Brien v. Heimlich*, No. 08AP-521, 2009-Ohio-1550 ¶ 38 (10th Dist.). "The United States Supreme Court has recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." *State v. Snyder*, 155 Ohio App. 3d 453, 2003-Ohio-6399 ¶ 20 (3d Dist.) (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

Additionally, States unquestionably have an interest in maintaining the reputation and integrity of their police forces. *See Jones v. Franklin Cty. Sherriff*, 52 Ohio St. 3d 40, 43 (1990).

"[P]olice officers are held to a higher standard of conduct than the general public. Law enforcement officials carry upon their shoulders the cloak of authority of the state. For them to command the respect of the public, it is necessary then for these officers even when off duty to comport themselves in a manner that brings credit, not disrespect, upon their department." *Id.* (internal citations omitted); *see City of Warrensville Heights v. Jennings*, 58 Ohio St. 3d 206, 207 (1991); *Zaragoza v. Bennett-Haron*, 828 F. Supp. 2d 1195, 1210 (D. Nev. 2011).

"The public has special interests in . . . fostering a trust relationship between police officers and the community they serve." *Zaragoza*, 828 F. Supp. 2d at 1210; *see Foley v. Connelie*, 435 U.S. 291, 297 (1978) ("[T]he execution of the broad powers vested in [police officers] affects members of the public significantly and often in the most sensitive areas of daily life."). Police officers must "merit the trust and confidence of the mass of law-abiding citizens." *McCain v. Sheridan*, 160 Cal. App. 2d 174, 177 (1958) (internal citations omitted). "Whatever weakens that trust tends to destroy our system of law enforcement." *Id.*

Preserving trust in law enforcement means that the State can place restrictions on police officers that are not placed on the population as a whole. *See, e.g. Andrad v. City of Phoenix*, 692 F.2d 557, 559 (9th Cir. 1982); *cf. Kelly v. Johnson*, 425 U.S. 238, 249 (1976) (police need not "necessarily be treated for constitutional purposes the same as . . . a member of the general public"). In a variety of constitutional contexts, courts across the country "uniformly recognize[]" that the interest of preserving discipline and order within law enforcement and maintaining the "credibility and reputation of the force with the outside civilian populace" is "legitimate and compelling." *Mullen v. Port Auth. of New York & New Jersey*, 100 F. Supp. 2d 249, 258 (D.N.J. 1999). In *Mullen*, a port authority officer pleaded guilty to endangering a child. *Id.* at 252. He was terminated by the port authority for violating a rule prohibiting employees

from committing any act or neglecting any duty that "reflects unfavorably upon the good name or reputation of the Port Authority." *Id.* The former officer filed a complaint in court alleging that his termination was a violation of the constitution, among other things. *Id.* at 251. The court turned away a constitutional challenge to the termination, noting that "maintain[ing] [the] credibility and reputation of the force with the outside civilian populace . . . [is] legitimate and compelling." *Id.* at 258; *see Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1499 (9th Cir. 1987) (recognizing that department rule "protect[ed] the reputation of the Department and . . . ensure[d] discipline and high morale among members of the Department."); *McMullen v. Carson*, 568 F. Supp. 937, 944 (M.D. Fla. 1983) ("police departments have an important governmental interest in maintaining public confidence in the police force and public respect for its officers"); *Hetherington v. State Personnel Bd.*, 82 Cal. App. 3d 582, 590 (1978) (upholding a law that prevented ex-felons from being peace officers).

The State interests in officer reputation and trust, and the interest in protecting children each sustain R.C. 2907.03(A)(13) against a facial equal-protection challenge. *See Pickaway*, 2010-Ohio-4908 ¶¶ 23, 26 (statutes may have more than one objective). The Eighth District's holding was wrong to conclude otherwise, and it made distinct errors as to each State interest.

The Eighth District opinions striking the statute never mention the State's interest in maintaining confidence and trust in peace officers. Instead, the lower court mentions only the State's interest in preventing a peace officer from using his position of power to influence a minor to have sex. The Eighth District thus failed to hold Mole to his obligation to negative "every conceivable basis" for a law before he could prevail on his equal-protection challenge. *Williams*, 88 Ohio St. 3d at 531; *see Heller*, 509 U.S. at 320. That error is especially prominent because the dissent highlighted this State interest. App. Op. ¶¶ 52-53, 55.

The Eighth District did address the State interest in protecting children, but it held the law to a tailoring standard more akin to First Amendment analysis than rational-basis scrutiny. *See* App. Op. ¶ 44 (statute "irrationally criminalizes" sexual conduct between officer and minor "without regard to whether the offender's position as a peace officer was a motivating factor for either the offender or the victim"). The legislative concern about officers using their position to coerce sexual relationship with minors need not, as the Eighth District intimated, be an *element* of the offense. Legislation need not hit its mark with that precision when the standard is rational basis. The General Assembly may permissibly conclude that the harm it aimed to prevent—coercive sexual relationships between officers and minors—was best attacked by a statute that prohibited all such encounters because the risks of over inclusion were far smaller than the risks of under inclusion. Better to criminalize encounters even where officer's status played no role than to add that as an element and let otherwise guilty officers remain unpunished. That is a common legislative approach, *cf.* R.C. 4511.19(A)(1) (OVI defined as both operating while "under the influence" and having a specified blood-alcohol concentration), and represents permissible statutory line drawing under rational-basis scrutiny. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("distinctions may be made with substantially less than mathematical exactitude").

When it comes to R.C. 2907.03(A)(13), legislative history shows that the concern about under inclusion led to the current text. Initially, the bill included language that would have tied the offense to times when the officer was performing official duties. *See* The Ohio Channel, Ohio Senate, Video Archive (12/16/2008) http://www.ohiochannel.org/medialibrary/media.aspx?fileId=117520. But the bill sponsor was concerned about prosecuting under that language, so it was dropped. *Id.* As enacted, division (A)(13) prohibits peace

officers, whether on or off duty, from engaging in sexual conduct with a minor. That decision trespasses no constitutionally protected ground.

B. The Eighth District's reasoning threatens other Ohio laws and prospectively narrows the General Assembly's available policy choices.

Accepting the reasoning of the court below threatens every Ohio law that makes a classification that is only rationally related to a legitimate state interest. The Revised Code is littered with statutes that make these kinds of classifications. For example, R.C. 2921.41 creates the felony of "theft in office" and creates a separate offense for public officials who commit theft offenses in certain circumstances. R.C. 2929.42 requires prosecutors to notify the appropriate licensing board when certain licensed health care professionals are convicted or plead guilty to certain criminal charges. R.C. 2929.43 requires that a peace officer who is convicted of a felony will be terminated from his employment as a peace officer. R.C. 2929.12 lists factors considered in felony sentencing, including whether the offender held a position of trust and the offense related to that position. R.C. 2929.192 provides that a person who serves in a position of honor, trust, or profit and commits certain offenses must forfeit benefits in the public retirement system or alternative retirement plan in which they are enrolled. All of these statutes distinguish: position of trust v. other; licensed v. not; public v. private. And all are threatened by the logic of the holding below.

Similarly, statutes that make classifications based on the status of the victim would also come under the microscope if the decision below stands. For example, numerous provisions of the Revised Code criminalize offenses specifically against the elderly and do not require that the offender know the victim's age. *See, e.g.*, R.C. 2913.49(I)(3), R.C. 2913.02(B)(3), R.C. 2913.04(F)(4) and (G)(4), R.C. 2913.43(B)(3). All of these statutes are rationally related to

legitimate state interests. But all could be endangered by a tailoring rule like the one employed by the lower court.

The lower court's rationale even threatens other parts of R.C. 2907.03(A). Divisions (A)(7), (A)(8), (A)(11), and (A)(12) do not require that the victim know the offender's occupation. Rather, they simply require that the offender hold a certain position and that the victim have some kind of relationship with the offender's employer. In division (A)(7), the offender must be either a teacher, administrator, coach, or other person in authority employed by or serving in a school and the victim is enrolled or attends that school. (A)(8) simply requires the offender be a teacher, administrator, coach or other person in authority employed by or serving an institution of higher education and the victim is enrolled or attends the institution. (A)(11) requires the victim be confined to a detention facility and the offender simply be an employee of that detention facility. (A)(12) requires that the offender be a cleric and the victim be a member of or attend the church or congregation served by the cleric. None of these divisions require that victim *know* the occupation of the offender. Should this Court leave the judgment below undisturbed, these divisions of R.C. 2907.03(A) would make the endangered statutes list.

The threat is not confined to existing statutes. It is not difficult to imagine other situations where the General Assembly might use precisely the same valid purpose and rational relationship that supports R.C. 2907.03(A) to support other potential laws. For example, the General Assembly might think it prudent to apply additional sanctions to a teacher who commits certain offenses. It does not matter whether the teacher's job played a role in the offense. *Cf. Doe v. Ronan*, 127 Ohio St. 3d 188, 2010-Ohio-5072 (administrative employee in a public school was terminated pursuant to a state statute and an Ohio Department of Education regulation after

a background check revealed he was convicted and served time for drug trafficking). What matters is how the public at large views the offense and the damage that the offense brings to the reputation and integrity of teachers as a whole.

Second guessing the General Assembly's choices in these kinds of judgments is not constitutionally required. Indeed, separation-of-powers principles suggest that it is constitutionally prohibited.

CONCLUSION

For all the foregoing reasons, the decision of the appeals court should be reversed.

Respectfully submitted,

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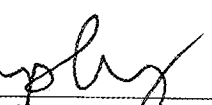

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I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant State of Ohio was served by U.S. mail this 24th day of March, 2014 upon the following counsel:

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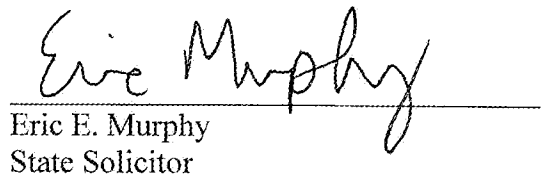

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