In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2022-0603
	:	
Appellee,	:	On Appeal from the
	:	Lucas County
v.	:	Court of Appeals,
	:	Sixth Appellate District
TYREE K. DANIEL,	:	
	:	Court of Appeals
Appellant.	:	Case No. L-21-1104

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

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INTRODUCTION

Ohio requires people convicted of arson-related crimes to register with county sheriffs for life. The registry is available to law enforcement, but is not published on the internet as a public record. An exception to the lifetime registration requirement allows a judge to reduce the length of that registration duty if the prosecutor and the investigator recommend doing so. All that gives rise to the following question: Does Ohio's arson-registry law, by allowing judges to impose less-than-lifetime registration requirements *only if* the prosecutor and investigator recommend doing so, violate the separation of powers? The answer to that question is "no." That is what the Sixth District held. This Court should affirm its judgment.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement 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, and here, R.C. 2909.15(D)(2)(b) is constitutional under a correct understanding of the Ohio Constitution.

STATEMENT OF THE CASE AND FACTS

1. This case began when someone set fire to a building in Toledo. *State v. Daniel*, 2022-Ohio-1348 ¶2 ("Op."). Authorities soon learned that Daniel (along with others) set

the fire. *See* Jan. 16, 2020 Plea Tr. at 3–4. The State indicted Daniel on two counts of aggravated arson in violation of R.C. 2909.03(A)(1), (B)(1) and (B)(2)—felonies of the first and second degrees. Op. ¶3. Daniel pleaded guilty to an amended count of arson in violation of R.C. 2909.03(B)(1) and (D)(1), (2)—a fourth-degree felony—in exchange for dismissal of the remaining aggravated-arson charge. *Id.* at ¶4.

Under R.C. 2909.15 (the "Arson Registry Law"), offenders convicted of an arson-related offense must register annually with local law enforcement for life. *See also* R.C. 2909.13(B)(1)–(2). The Arson Registry Law provides a limited exception to the lifetime-registration requirement. That exception appears in what this brief calls the "Registry Reduction Statute." R.C. 2909.15(D)(2)(b). It says: upon the request of the prosecutor and the investigating law enforcement agency, the trial court may reduce the registration period to a specified term of no less than ten years. *Id*.

The prosecutor and investigator in this case did not request a shorter sentence, meaning Daniel faced a lifetime registration requirement. At sentencing, Daniel objected to this. He contended that the Registry Reduction Statute, by forbidding judges from imposing a shorter registration requirement without a motion from the prosecutor and investigator, violated the Ohio Constitution's separation of powers. The trial court rejected his argument. Op. ¶5. It sentenced Daniel to three years of community control with 60 days of incarceration at the Corrections Center of Northwest Ohio, a multi-

county jail facility. *Id.* at ¶¶5–6. And it imposed the statutorily required lifetime registration requirement.

2. Daniel appealed his registration obligation to the Sixth District Court of Appeals. *Id.* at ¶7. The Sixth District affirmed. *Id.* at ¶31. The court concluded that the registration requirement is not part of the criminal sentence, but simply a collateral consequence of the defendant's sentence for an arson-related crime. *Id.* at ¶19. Because the statutory obligation to register as an arson offender is remedial and not punitive, the court determined that the requirement is not "punishment" and does not implicate the judicial power to sentence an offender. *Id.*

The Sixth District alternatively concluded that, even if R.C. 2909.15(D)(2)(b) did involve the judicial sentencing power, the statute did not impermissibly intrude on that judicial function. *Id.* at ¶22. The prosecutor's recommendation does not control the trial court's discretion in deciding whether or not to assign a defendant a shorter registration period. *Id.* Instead, the court reasoned, the Registry Reduction Statute grants trial courts a measure of discretion that they would not otherwise have, triggered by the executive branch's recommendation for a shorter registration period. *Id*. This, it determined, was consistent with the separation of powers. *Id.*

3. The Court of Appeals *sua sponte* certified its decision as conflicting with *State v. Dingus*, 2017-Ohio-2619 (4th Dist.), on the following question: "Does R.C. 2909.15(D)(2)(b) unconstitutionally violate the doctrine of separation of powers?" Op.

¶30. Daniel filed a notice of the certified conflict with this Court, and this Court accepted review of the question that divides the appellate districts. *See 07/27/2022 Case Announcements*, 2022-Ohio-2490.

ARGUMENT

Proposition of Law:

> *The General Assembly does not invade the judicial power when it makes the courts' power to enter a reduced sentence contingent on an executive actor's recommending a reduced sentence.*

I. The Registry Reduction Statute respects the Constitution's separation of powers.

The Ohio Constitution forbids the legislative and executive branches from exercising judicial power. Daniel contends that the Registry Reduction Statute violates this principle by empowering two executive-branch officials (an investigator and a prosecutor) to invade the judicial role. He is wrong. The Court should reject his argument and affirm the Sixth District.

A. The Registry Reduction Statute does not empower any branch to exercise the powers of another branch.

1. The Ohio Constitution vests the executive, legislative, and judicial powers in three separate branches. *City of S. Euclid v. Jemison*, 28 Ohio St. 3d 157, 159 (1986). From this, it follows that no branch may exercise powers vested in another. *See, e.g.*, *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424 ¶40; *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799 ¶125; *City of Toledo v. State*, 154 Ohio St. 3d 41, 2018-Ohio-2358 ¶25; *State ex rel. Dann v. Taft*, 109 Ohio St. 3d 364, 2006-Ohio-1825 ¶56; *State ex rel.*

Khumprakob v. Mahoning Cnty. Bd. of Elections, 153 Ohio St. 3d 581, 2018-Ohio-1602 ¶44 (Fischer, J., concurring in judgment).

The question here is whether, in passing the Registry Reduction Statute, the General Assembly intruded upon the judicial power that our Constitution vests exclusively in the courts. To answer that question, it is important to define the contours of the "judicial power," which is best done "in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution." *State v. Harmon*, 31 Ohio St. 250, 258 (1877).

The People have always vested the courts—and the courts alone—with the "judicial power." Ohio Const., Art. III, §1 (1803); Ohio Const., Art. IV, §1. The same phrase appears in the U.S. Constitution. *See* U.S. Const., Art. III, §1. As originally understood, and as understood today, the judicial power authorizes courts to resolve disputes and redress legal injuries pursuant to law. *See, e.g.*, *Wayman v. Southard*, 23 U.S. 1, 22 (1825) (Marshall, C.J.); *Merrill v. Sherburne*, 1 N.H. 199, 204 (1818); *cf.* John Locke, *Second Treatise of Civil Government,* §125 (ed. Thomas Hollis, 1764). Said differently, the judicial power is the power to resolve disputes in "the nature of a suit or action between parties." *De Camp v. Archibald*, 50 Ohio St. 618, 625 (1893). It is the power "to determine what is the law upon existing cases." *Merrill*, 1 N.H. at 204. Judicial power also involves the power "to decide and pronounce a judgment and carry it into effect." Samuel Miller, *Lecture on the Constitution of the United States*, 314 (1891).

The legislature thus invades the judicial power when it purports to *resolve* cases and controversies—in other words, when it seizes from the courts the power to adjudicate a case and pronounce a final judgment. For example, the Court has struck down, on separation-of-powers grounds, statutes that authorize "the reopening of final judgments." *Bodyke*, 2010-Ohio-2424 at ¶55. It has held that the legislature lacks the power to impose a "blanket proscription on stays or injunctions." *Norwood*, 2006-Ohio-3799 at ¶125; *see also State v. Hochhausler*, 76 Ohio St. 3d 455, 464 (1996), or to "confer[] appellate jurisdiction upon an administrative agent or agency from a decision rendered by an Ohio court," *City of S. Euclid*, 28 Ohio St. 3d at 162; *see also State ex rel. Shafer v. Otter*, 106 Ohio St. 415, 424 (1922). Also invalid are laws that impede the judiciary's ability to "determine guilt in a criminal matter." *State v. Sterling*, 113 Ohio St. 3d 255, 2007-Ohio-1790 ¶34; *see also State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 135 (2000). The common thread of these cases is that the General Assembly may not enact laws that interfere with, or permit executive inference with, the judiciary's exclusive power to adjudicate cases and issue final judgments.

That said, the legislature does not invade the judicial power every time it announces a rule that affects the resolution of cases and controversies. To the contrary, the legislative power *entails* the crafting of the rules by which cases and controversies are to be resolved. Thus, the Court has upheld laws directing the award of attorney's fees, *City of Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318 ¶31, and setting forth

the factors courts "must consider" before classifying an offender as a sexual predator, *State v. Thompson*, 92 Ohio St. 3d 584, 588 (2001). The Court has also rebuffed the argument that a statutory limit on damages "seizes the judicial power to determine damages." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶107. Laws like these do not seize or block the judicial power; they instead announce rules for courts to follow in adjudicating concrete cases and controversies.

In sum, while the General Assembly may not reassign to another branch (including its own) the power to resolve cases and controversies, it may dictate the rules that govern the resolution of cases and controversies.

2. The Registry Reduction Statute does not deprive the courts of their judicial power, nor does it allow any other branch to exercise that power. To the contrary, the Statute sets forth a principle that guides courts in the resolution of criminal cases: it gives them discretion to impose a less-than-lifetime registration obligation *if and only if* the prosecutor and investigating agency so recommend. To see why this comports with the Constitution's division of powers, it helps to examine each branch's role under the statute.

The legislative power. The General Assembly does not administer the Registry Reduction Statute, but it did enact it. In doing so, it limited the judiciary's discretion to give convicted arsonists a less-than-lifetime registration term. That imposition of a limitation was entirely within its legislative power.

Deciding whether an accused is guilty of a crime involves judicial power. But deciding what consequences attach to the guilty verdict implicates legislative power. Examples abound in the Revised Code. The General Assembly has decided that offenders must serve mandatory prison time for using a firearm to commit a crime, R.C. 2929.14(B)(1)(a), for certain DUI offenses, R.C. 4511.19(G)(1)(b)(i) & (ii), and for certain drug offenses, *see, e.g.*, *State v. Ware*, 141 Ohio St. 3d 160, 2014-Ohio-5201 ¶13. Beyond prison time, the General Assembly has also mandated other consequences for criminal convictions. A felon serving a sentence is ineligible to vote. R.C. 2961.01(A). A person convicted of a higher level drug-possession felony must pay a mandatory fine. R.C. 2925.11(E)(1)(a). And a person convicted of certain sex crimes must register with the sheriff for life. R.C. 2950.07(B)(1). Ohio is hardly alone on this score. "Legislatures have frequently deprived courts of all discretion … [in] the sentencing function"; for example, leaving courts without any say over the "maximum and minimum limits" of a sentence. Note, *Distribution of Sentencing Power Between Legislature and Judiciary*, 59 Yale L.J. 164, 165 (1949). The U.S. Supreme Court, too, recognizes that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467 (1991).

These many legislative commands about the consequences for crime show that "the General Assembly has the plenary power to prescribe crimes and fix penalties"—something that "has long been recognized" in Ohio. *State v. Morris*, 55 Ohio St. 2d 101,

112 (1978). The General Assembly's plenary power over these consequences, of course, means that "the authority for a trial court to impose sentences derives from the statutes enacted by the General Assembly." *State v. Bates*, 118 Ohio St. 3d 174, 2008-Ohio-1983 ¶12; *see also State v. O'Mara*, 105 Ohio St. 94, syl. ¶1 (1922).

Because the legislative power in this area is plenary, any discretion a court has in imposing a sentence derives from the legislature's choice to give the courts such discretion. "[C]ourts are limited to imposing sentences that are *authorized* by statute, rather than only being limited to sentences that are not *prohibited* by statute." *State v. Anderson*, 143 Ohio St. 3d 173, 2015-Ohio-2089 ¶13 (quotation omitted). Indeed, because "the people of Ohio conferred the authority to legislate solely on the General Assembly"—including "the important and meaningful role of defining criminal offenses and assigning punishment for those offenses"—a court cannot deviate from statutory restrictions on sentencing without violating the separation of powers. *State v. South*, 144 Ohio St. 3d 295, 2015-Ohio-3930 ¶28 (O'Connor, C.J., concurring).

All this is consistent with the Constitution's granting judicial power exclusively to the judicial branch. Recall that judicial power is the power to adjudicate a case and pronounce a judgment. In contrast, the power to constrain sentencing discretion is legislative. Questions about the appropriate consequences for criminal convictions are "peculiarly questions of legislative policy." *Gore* v. *United States*, 357 U.S. 386, 393 (1958). And legislatures can "surrender the public's right to punish people" without

"any judicial involvement." Caleb Nelson, *Adjudication in the Political Branches,* 107 Colum. L. Rev. 559, 570 (2007). Deciding guilt and innocence and imposing a particular sentence is a judicial function; assigning consequences for the guilty and setting the boundaries for sentencing discretion is a legislative duty.

The Registry Reduction Statute guides courts in resolving discrete cases and controversies—it lays down sentencing rules that courts must follow. While that law limits the sentencing discretion available to courts, its doing so does not constitute a deprivation or limitation of the judicial power, but rather an exercise of the legislative power.

The executive branch. The executive branch plays a role in the administration of the Registry Reduction Statute. In particular, executive actors (prosecutors and investigators) must recommend a less-than-lifetime registration obligation before the courts may impose a less-than-lifetime registration obligation. When executive actors make a recommendation that triggers judicial discretion, they exercise *executive* power, not judicial power. Accordingly, the Registry Reduction Statute's making sentencing discretion contingent on an executive actor's recommendation does not deprive the courts of any judicial power.

The executive branch plays a role in determining the consequences of guilt, though its role is more indirect than that of the legislative branch. When a prosecutor makes choices about whether to charge a crime, and which crime to charge, that choice can dramatically affect the sentence a court has the power to impose. The U.S. Supreme

Court explained the connection decades ago: "when an act violates more than one criminal statute, the Government may prosecute[] under either," even though doing so "enables the sentencing judge to impose" certain penalties and "precludes him from imposing" others. *United States v. Batchelder*, 442 U.S. 114, 123-125 (1979). In fact, nearly every act of prosecutorial discretion—pursuing certain charges rather than others, including or declining to include specifications, determining whether to drop charges in exchange for a plea—permits or prevents a court from considering certain sentences. Yet no court has suggested that such acts infringe on the judiciary's power. On the contrary, courts recognize that "prosecutorial discretion is rooted in" constitutional provisions conferring executive power. *In re Aiken Cnty.*, 725 F.3d 255, 262–63 (D.C. Cir. 2013) (Kavanaugh, J.); *see also Ysais v. New Mexico*, 373 F. App'x 863, 866 (10th Cir. 2010). Indeed, the Constitution itself, through the Pardon Clause, *see, e.g.*, Ohio Const., Art. III, §11, gives "an executive officer unilateral authority to set aside the public's penal rights even after an offender ha[s] been duly convicted in court." Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. at 570.

All told, when legislatures exercise their power to set mandatory sentencing elements, prosecutors end up with "an unprecedented measure of authority over particular sentences." Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 244 (2005). That discretion,

though, is part of the executive power to enforce the law, not the judicial power to adjudicate guilt or innocence.

Other courts have applied the lessons of prosecutorial discretion to statutes that give prosecutors a role in shaping sentences. The Florida Supreme Court upheld, against a separation-of-powers challenge, a statute that let the prosecutor "invoke" mandatory-sentencing provisions. *State v. Cotton*, 769 So. 2d 345, 347 (Fla. 2000). The Vermont Supreme Court likewise rejected the argument that "a prosecutorial veto power" over deferred sentencing breached the separation of powers. *State v. Pierce*, 163 Vt. 192, 196–97 (1996). And several federal circuit courts have said that there is no separation-of-powers problem with a federal statute that requires a prosecutor's motion to reduce a sentence below the statutory minimum. *See, e.g.*, *United States v. Huerta,* 878 F.2d 89, 92 (2d Cir. 1989); *United States v. Ayarza,* 874 F.2d 647, 653 (9th Cir. 1989); *United States v. Burton*, 6th Cir. No. 93-6272, 1994 U.S. App. LEXIS 21807, at *6 (Aug. 11, 1994).

The same principles apply here. The judiciary alone has the power to sentence a convicted offender. But the executive power includes the power to decide which charges and sentences to pursue. The decision whether to recommend reduced registration obligations is tantamount to deciding whether to charge a crime or specification that entails a mandatory sentence. Such decisions are within the executive power, and thus do not intrude upon the judicial power.

The judicial branch. Under the Registry Reduction Statute, the courts exercise the judicial power by exercising sentencing discretion when, and only when, the statute vests them with some discretion.

Although the Registry Reduction Statute limits the judiciary's sentencing discretion, that is hardly novel. Mandatory-sentence statutes do the same thing. True, the Registry Reduction Statute permits the executive branch to make recommendations that affect the breadth of sentencing discretion. But that is not novel either. Consider pretrial-diversion programs. By statute, a prosecuting attorney may run a pretrial-diversion program for offenders whom the prosecutor believes "probably will not offend again." R.C. 2935.36(A). The statute mandates that the court "shall dismiss the charges" "upon the recommendation of the prosecuting attorney." R.C. 2935.36(D). Appellate decisions addressing these programs detect no separation-of-powers problem with "making the court[']s right to dismiss subject to the prosecutor's recommendation." *Village of Ontario v. Shoenfelt*, 5th Dist. Richland No. CA 2302, 1985 Ohio App. LEXIS 6795, at *3 (July 30, 1985). Instead, these programs raise the possibility that a *court* will violate the separation of powers by invading the prosecutor's right to control a prosecution. Addressing one such instance, the Fifth District held that "it violates the constitutional concept of separation of powers for any judge to take the administrative and executive decision whether or not to proceed with prosecution away from the prosecuting attorney." *Id.* at *2; *see also State v. Dopart*, 2014-Ohio-2901 ¶9 (9th Dist.); *State v. Curry*, 134 Ohio App. 3d

113, 118 (9th Dist. 1999); *Cleveland v. Mosquito*, 10 Ohio App. 3d 239, 241 (8th Dist. 1983). The restriction on judicial power is especially stark under these statutes because courts undoubtedly have the power, outside of these programs, to dismiss criminal charges. *See Mosquito*, 10 Ohio App. 3d at 241. But within these legislative programs, the court cannot invade the executive power to control criminal charges. *Id*.

As the many statutes limiting judicial discretion show, the "judicial power" does not entail some minimum degree of sentencing discretion. It entails *only* the power to resolve cases and controversies according to the rules laid out by the legislature. Because the Registry Reduction Statute simply sets the rules that guide the sentencing of arsonists, the statute does not invade the judicial power. That is sufficient to affirm the Sixth District's judgment.

B. Even if the Registry Reduction Statute is unconstitutional, Daniel is not entitled to any relief.

If the Court disagrees with all the foregoing—if it holds that the Registry Reduction Statute violates the separation of powers—it will need to decide on a remedy. Here, the proper remedy is clear. If the Statute is unconstitutional, it is unenforceable and thus cannot be enforced in Daniel's case. But that requires *affirming* the Sixth District's judgment: if the Registry Reduction Statute is unenforceable, then prosecutors and investigators *may not seek* reduced registration requirements. And that would mean that Daniel must register for life, since no other statute empowers a court to impose a less-than-lifetime requirement.

1. To understand this conclusion, one must understand the nature of judicial review.

We often speak of courts "striking down" unconstitutional laws. That might be useful shorthand, but it is not accurate. Again, courts have only the "judicial power," which is the power to resolve specific cases and controversies. *See De Camp v. Archibald*, 50 Ohio St. 618, 625 (1893); *Murphy v. NCAA*, 138 S.Ct. 1461, 1485 (2018) (Thomas, J., concurring). This power necessarily includes the power of judicial review; because the Constitution "is superior to any ordinary act of the legislature," *Marbury v. Madison*, 1 Cranch 137, 178 (1803), an "act which is inconsistent" with the Constitution is "not *law*" at all, *Rutherford v. M'Faddon*, unpublished (1807), available at https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2001/2001-Ohio-56.pdf. Thus, in resolving particular cases, courts must refuse to give any effect to laws that violate the Constitution. That is all judicial review entails—resolving concrete disputes between parties by denying effect to unconstitutional laws. When courts purport to "strike down" laws, what they are really doing is holding those laws unconstitutional and either enjoining them or denying them effect in a particular case.

No aspect of this process requires "striking down" anything. And historically, when courts "determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). Courts did not "have the power to 'excise' or 'strike down' statutes." *Id.* (cita-

tions omitted); *accord* Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018). *Cf.* Ohio Const., Art. I, §18 ("No power of suspending laws shall ever be exercised, except by the general assembly."). That makes sense. The decision whether to "excise" a duly enacted, constitutional statute is an inherently legislative act. Courts "cannot take a blue pencil to statutes." *Murphy*, 138 S.Ct. at 1486 (Thomas, J., concurring); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509–10 (2010). So when a court holds that a law is unconstitutional, the correct resolution is to simply deny effect to the unconstitutional provision. There is no next step in which courts decide how much of the statute to "retain," because courts that hold a law unconstitutional are not *eliminating* or *excising* anything—they are simply refusing to give effect to the law in question.

Admittedly, this Court has strayed from this traditional understanding. In *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927), this Court announced a "test" for determining which parts of a partially unconstitutional law to "sever." The test requires courts to ask the following questions:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

In *Geiger*, the Court held unconstitutional a statute that allowed parties to appeal from probate courts to common pleas courts. *Id.* at 465, syl. ¶3. *Geiger* decided, though, that the one provision's unconstitutionality did not affect another part of the statute (or other related statutes), which were capable of standing on their own. *Id.* at 467–70. Accordingly, the Court held that the challenged provisions could be severed from the rest of the law—they could, in other words, be permitted to remain in effect. *Id.* at 470.

Geiger engages the "writ-of-erasure fallacy." *See* Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933. It presupposes that courts have the power to remove unconstitutional laws from the books, when in reality they have only the power to adjudicate constitutionality in the course of deciding a concrete case or controversy.

But the General Assembly responded by enacting R.C. 1.50, which codifies principles of severability in a manner that is largely consistent with the traditional view of judicial review. It says that, "[i]f any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable." R.C. 1.50. To be sure, this statute specifies that provisions may be "severable." But it cautions that any such remedy must be as limited as possible. It directs that an invalid application of a statute does not affect other applications of the statute that may be valid. In other words, it limits the courts' power to undertake the quintes-

sentially legislative task of deciding how much of a statute ought to stand when part of the statute is held unconstitutional.

Even if it is too late in the day to restore the traditional approach that avoids the severability question entirely, the Court can treat severability as an exercise in statutory interpretation. *See Murphy*, 138 S.Ct. at 1486 (Thomas, J., concurring). Upon finding a statute partially unconstitutional, Ohio courts should apply standard tools of statutory interpretation to determine whether the remaining "parts of [the] statute[] are ineffective as written." John C. Harrison, *Severability, Remedies and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 88–89 (2014). That is what R.C. 1.50 demands. And, if adhered to, it will ensure that this Court only rarely invades the legislative province of deciding how a law is to be modified upon a finding of partial constitutionality.

2. Under the traditional approach, this is an easy case. If the Court finds the Registry Reduction Statute unconstitutional, the proper remedy is to deny that provision effect. In other words, the defendant should be sentenced as though the Registry Reduction Statute does not exist. That would mean that a defendant convicted of an arson-related offense would have to register (and re-register annually) under R.C. 2909.15(D)(1), and that the registration obligation would continue for life under R.C. 2909.15(D)(2)(a). Put differently, if the option to impose a less-than-lifetime registration requirement is invalid, courts have authority only to impose a lifetime registration re-

quirement—no constitutional provision in the Arson Registry Law permits anything else.

The case comes out the same way under the *Geiger* test and R.C. 1.50. Again, *Geiger* says that, upon finding that a statute is partially unconstitutional, courts should consider whether the "constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself." *Geiger*, 117 Ohio St. at 466. And R.C. 1.50, along the same lines, requires that courts continue giving effect to constitutional provisions in a partially unconstitutional law, as long as they "can be given effect without the invalid provision or application." That test is satisfied here. If the courts deny effect to the Registry Reduction Statute, they can go on giving effect to every other provision in the Arson Registry Law. Relevant here, denying effect to the Registry Reduction Statute in no way impairs courts' ability to continue imposing the default registration requirement: registration for life. Because the default rule's application does not depend on the option for a reduced sentence, it can be given effect without regard to whether the Registry Reduction Statute is given effect. So that default provision must be severed, allowed to stand, and applied to Daniel's case. This means Daniel, even if he is right about the Registry Reduction Statute, was properly sentenced to a lifetime of registration obligations.

II. Daniel's and his *amicus curiae*'s counterarguments do not require a different conclusion.

A. Daniel argues that the Registry Reduction Statute violates the separation of powers by invading the judicial power to determine guilt in a criminal matter and to sentence the defendant. Br.5–12; OPD Br. at 4–6, 9–10. But he is mistaken, for the reasons discussed above. In the Registry Reduction Statute, the General Assembly properly exercised its power to prescribe sentences for crimes. That the statute allows for the prosecutor and investigator to exercise *executive* power by recommending a shorter registration period does not deprive courts of any *judicial* power. There is no dispute that a statute imposing a mandatory registration obligation for arson offenders, without providing for any exception, would comport with the separation of powers. *Cf.* April 21, 2021 Sentencing Tr. at 6. The constitutional analysis does not change simply because the law leaves courts with *some* discretion in cases where executive officers recommend a lower sentence.

B. Daniel and his supporting *amicus* also maintain that the Arson Registry Law is punitive. Br.8–11; OPD Br. at 6–8.

Whether or not the Registry Reduction Statute counts as "punitive" has no bearing on the separation-of-powers question. Consequences that flow from crime may be regarded either as punishment or as non-punitive. *Compare, e.g.*, *State v. Williams*, 129 Ohio St. 3d 344, 2011-Ohio-3374 ¶21, *with State v. Hubbard*, 167 Ohio St. 3d 77, 2021-Ohio-3710 ¶32. But whether a consequence is "punitive" does not bear on the question

whether the judiciary has some kind of inherent, exclusive authority to decide whether to impose it. Prison sentences, for example, are no doubt punitive. But that does not mean judges must be given discretion to enter whatever sentence they deem appropriate.

Moreover, *State v. Hubbard*, 167 Ohio St. 3d 77, 2021-Ohio-3710, refutes Daniel's attempt to characterize the Registry Reduction Statute as "punitive." *Hubbard* presented the question whether Ohio's violent-offender-registry statute was unconstitutionally retroactive in violation of Article II, §28. A criminal law violates this provision if it retroactively increases punishment for the commission of an offense. *See Hubbard*, 167 Ohio St. 3d 77 at ¶18; *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824 ¶39. In *Hubbard*, the Court held that the violent-offender registry was *not* punitive in its application to offenders whose crimes predated the statute's enactment. Because the duty to register did not "retroactively increase the punishment" for an offense committed before its enactment, it did not qualify as "punitive" in the relevant sense. *Hubbard,* 167 Ohio St. 3d 77 at ¶30–45; *accord*, *State v. Jarvis*, 167 Ohio St. 3d 118, 2021-Ohio-3712 ¶12 (citation omitted).

C. Daniel also contends that the Registry Reduction Statute invades the inherent judicial power of appellate review. Br.11. Daniel claims that the statute "gives the prosecuting attorney the power to make a judicial decision that prejudices the defendant without any review from the courts." Br.11. This argument fails because courts

have no inherent and exclusive power to review and revise mandatory sentences—if a sentence is mandatory, and if a trial court imposes it, the appellate court has no choice but to affirm.

Daniel's reliance on *State v. Sterling*, 113 Ohio St. 3d 255, 2007-Ohio-1790 ¶34, does not help him. *Sterling*'s problem with the DNA Review Statute was that the statute gave prosecutors a role in determining guilt. *Id.* at ¶¶34–35. That statute allowed inmates to request DNA testing in hopes of challenging their convictions. But prosecutors could object to these requests. If the prosecutor objected to a request made by a defendant who pleaded guilty or no contest, the prosecutor's objection barred the courts from allowing DNA testing. *Id.* at ¶¶32, 34. This Court held that the statute violated the Constitution. The statute, it reasoned, improperly delegated judicial power—namely, the power to determine guilt in a criminal matter—to an executive officer (the prosecutor). *Id.* at ¶34. Whatever one thinks of *Sterling*, it has little bearing on this case. The Registry Reduction Statute does not allow any non-judicial officer to decide guilt or innocence. Instead, it allows a non-judicial officer to make decisions that control the sentence for which a defendant is eligible. But the legislature and the executive branch do that all the time—the legislature often controls sentencing discretion by statute, and the executive controls it by deciding which charges to pursue. Thus, the Registry Reduction Statute does not give any branch power that rightly belongs to another.

Nor is Daniel aided by *State ex rel. Portage County Welfare Department v. Summers*, 38 Ohio St. 2d 144 (1974)—a case his brief fails to mention. In *Portage County*, this Court denied effect to a statute that permitted courts to entertain adoption proceedings regarding children in foster care *only* with the consent of a county agency. *Id*. at 151. The Court opined that the permission requirement invaded the judicial power. It explained: "it is in our courts that personal liberties and property rights are vindicated and adjudicated." *Id*. (quotation omitted). And it stressed that the resolution of adoption proceedings in particular implicates the judicial power. The statute in question thus impermissibly infringed this power by giving an executive agency the ability to veto the initiation of adoption proceedings—in essence, the statute empowered the executive agency to deny a request for adoption, and thus exercise the judicial power. That, the Court held, infringed the judicial power. But the Registry Reduction Statute contains no similar flaw. The Statute defines the sentences that courts may impose, which is a *legislative* power, and gives no executive actor the power to block the initiation of judicial proceedings.

D. Finally, Daniel asks this Court, if it agrees with him on his constitutional challenge to the Registry Reduction Statute, to carve out only the portion of the statute that conditions a judge's ability to limit an arson registrant's duty on a request from the prosecutor and investigator. Br.12–13. But for the reasons addressed above, *see* pp. 14–19, such a slicing and dicing of the General Assembly's work is not the appropriate re-

lief. The Registry Reduction Statute creates a *conditional* judicial power to reduce the registration duty's length. If the condition (a recommendation from the executive branch) goes away, the power to reduce the time period evaporates with it. That is, the whole provision giving judges a conditional power to reduce the registration obligation must be deemed unenforceable, leaving in place the General Assembly's command that the registration obligation lasts for life. R.C. 2909.15(D)(2)(a).

CONCLUSION

For the above reasons, the Court should affirm the Sixth District's judgment.

Respectfully submitted,

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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 28th day of November, 2022, by e-mail on the following:

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