IN THE UNITED STATES DISTRICT COURT
NORTHERN DISRICT OF OHIO
EASTERN DIVISION

LANE MIKALOFF,	:	
	:	Case No. 5:06-CV-0096
Plaintiff,	:	
	:	
-vs-	:	Judge James Gwin
	:	
SHERRI BEVAN WALSH,	:	Magistrate Judge Gallas
SUMMIT COUNTY PROSECUTOR,	:	
	:	
and	:	
	:	
STATE OF OHIO,	:	
	:	
Defendants.	:	

PLAINTIFF'S PRE-TRIAL
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

DAVID SINGLETON (#0074556)
Trial Counsel for Plaintiff
STEPHEN JOHNSONGROVE (#0078999)
Co-counsel for Plaintiff

OHIO JUSTICE & POLICY CENTER
617 Vine Street, Suite 1301
Cincinnati, OH 45202
Tel.: (513)421-1108 Ext: 103
Fax: (513) 562-3200
Email: dsingleton@ohiojpc.org
sjohnsongrove@ohiojpc.org

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PROPOSED FINDINGS OF FACTS

Plaintiff anticipates that the following facts will be established through the following witnesses at trial:

I. LANE MIKALOFF

A. Rape Convictions, Incarceration, Parole.

1. Plaintiff Lane Mikaloff will testify that he is 38 years old and that he lives at 1174 ½ Beardsley Street in Akron, Ohio. He has lived there since his release from prison on November 1, 2002.

2. The parties have stipulated that on or about January 7, 1987, Mr. Mikaloff pled guilty to three counts of rape, violations of Section 2907.02 of the Ohio Revised Code, as well as five counts of aggravated burglary with some specifications, four counts of aggravated robbery, one count of robbery, and one count of felonious assault.

3. The parties have stipulated that each of the rape convictions is "a sexually oriented offense that is not a registration-exempt sexually oriented offense" for the purposes of Section 2950.031 of the Ohio Revised Code.

4. These convictions stemmed from a serious of burglaries that Mr. Mikaloff committed with various co-defendants in late September and early October 1986. The rape convictions arose out of one burglary that he committed on or about October 3, 1986.

5. Mr. Mikaloff and the co-defendant had been drinking heavily and smoking hash prior to that burglary. They initially went into the house looking for money.

6. After entering the house, the co-defendant discovered a young woman there alone and began raping her. Mr. Mikaloff then raped her. The co-defendant then did it again, as did Mr. Mikaloff.

7. After taking some items, they left the scene and were arrested a few hours later. Mr. Mikaloff did not immediately confess to the crime upon arrest. He confessed some days later and then pled guilty to the rape counts. He was sentenced to 16-53 years in prison for the crimes to which he pled guilty.

8. In a separate hearing, Mr. Mikaloff was found to be a Sexual Predator under then-existing Ohio law.

9. During his prison term, Mr. Mikaloff participated in several rehabilitation programs, such as victim awareness, sex offender treatment and drug and alcohol treatment. He also facilitated at least one of these programs for other inmates.

10. He stopped using alcohol after his arrest for the rape and burglaries. He stopped using other illegal drugs in 1994. He has been drug and alcohol free since then.

Mr. Mikaloff successfully completed parole in December 2004. During his entire time on parole, the parole authority approved his address at 1174 ½ Beardsley Street despite the proximity of McEbright Elementary School.

B. Home and Family

11. Mr. Mikaloff's mother, Diane Blakney, owns the homes at 1174 ½ and 1174 Beardsley Street. She permits Mr. Mikaloff to stay in 1174 ½ Beardsley Street without paying her any rent.

12. This home was previously owned by Mr. Mikaloff's grandparents for nearly 50 years.

13. The parties have stipulated that 1174 ½ Beardsley Street is within 1000 feet of the school premises of McEbright Elementary School at 349 Cole Avenue, Akron, Ohio.

14. He has had a loving relationship with Mary Moffitt since about a month after his release from prison. Soon after they began their relationship, Ms. Moffitt moved in with him at 1174 ½ Beardsley Street.

15. Mr. Mikaloff and Ms. Moffitt have had two children together who are both now under the age of 5. Ms. Moffitt also has custody of two other children from prior relationships, ages 7 and 12.

16. Ms. Moffitt and the children have lived with Mr. Mikaloff on and off since 2002. They have lived together continuously since November 2005.

17. The home at 1174 ½ Beardsley Street is a very small home with two small bedrooms, a small kitchen dining area, and a bathroom.

18. In May 2006, Ms. Moffitt and the four children moved to the main house on the property, 1174 Beardsley Street, which is a larger two-bedroom house. She is also staying there rent free. Mr. Mikaloff still maintains his residence at 1174 ½ Beardsley Street.

19. Mr. Mikaloff is deeply committed to Ms. Moffitt and intends to live with her for the rest of his life. Because he does not agree with certain religious customs, however, he and Ms. Moffitt have decided to not get married.

C. Financial Situation

20. As of the date of trial, Mr. Mikaloff and Ms. Moffitt will be unemployed. Ms. Moffitt had been working the night shift at Little Tikes, a toy factory in Akron, but was recently laid off.

21. Since the birth of their second child together, Mr. Mikaloff has stayed home with the children because he could not find a job that would pay him enough to afford child care while

he would be away from home. Also, he has found it extremely difficult to find work because of his criminal convictions.

22. He has made a partial attempt towards starting his own painting business, including purchasing painting supplies and a large truck. However, he is having a difficult time coming up with money for other start up costs such as licensure, bonding, insurance, and incorporation paperwork.

23. His grandmother died a few years ago and left all of her estate to Diane Blakney, Mr. Mikaloff's mother. Ms. Blakney has provided financial assistance to Mr. Mikaloff at various times, including allowing him to live rent-free in his current home, but this is out of money and resources that belong solely to her. No money was left directly to Mr. Mikaloff nor to Ms. Blakney in trust for Mr. Mikaloff.

24. Mr. Mikaloff has minimal savings.

25. To the best of his knowledge, he will not be able to find a residence nearly as affordable as his current arrangement. He reasonably believes that he could not find an apartment or home to rent that Ms. Moffitt and he could afford and that would accommodate all of their children. It will also be very difficult for Mr. Mikaloff and Ms. Moffitt to afford moving expenses.

II. SECTION 2950.031 OF THE OHIO REVISED CODE

26. Section 2950.031 of the Ohio Revised Code, Ohio's sex offender residency restriction, went into effect on July 31, 2003, more than sixteen years after Mr. Mikaloff was sentenced for his rape crime and nine months after he was released from prison and began living at 1174 ½ Beardsley Street.

27. Section 2950.031 prohibits anyone who has pled guilty to or been convicted of a "sexually oriented offense that is not a registration-exempt sexually oriented offense" from living within 1000 feet of school premises. The parties have stipulated that Mr. Mikaloff is currently in violation of this law.

28. There are no exceptions contained in this statute. It applies for life to any and all convicted sex offenders for their entire lives. There is no mechanism to petition to be relieved from the residency restriction.

29. Unlike a comparable law in Iowa that was challenged in *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), Iowa Code § 692A.2A, there is no exception for anyone who lived in their home prior to the statute's effective date. Likewise, there is no exception for situations where a new school opens within 1000 feet of a sex offender's residence, regardless of how many times the sex offender has had to move in the past because of the residency restriction.

30. Currently seventeen states and hundreds of municipalities in the United States have sex offender residency restrictions. The first of these were passed in the 1990s likely in response to the high profile murders of Polly Klaas, Jessica Lunsford and Megan Kanka. None of these unfortunate cases had anything to do with the previously-convicted sex offender living near a school.

III. EXPERT OPINIONS OF DR. LUIS ROSELL, PSY.D.

A. Qualifications

31. Dr. Rosell earned his Psy.D. in Clinical Psychology from the Miami Institute of Psychology in 1998. He earned his Master's Degree in Clinical Psychology from the University of Cincinnati in 1987, and earned his Bachelor's degree in from Catholic University of America.

32. Since 2002, he has operated LBR Psychological Consultants, which provides treatment, assessment, and testing of adults, children and adolescents. His practice includes a forensic component, in which he conducts psychological evaluations in criminal and civil cases. As part of his practice, he has consulted in over 70 sexual violent predator cases in Missouri, Iowa, Illinois, Wisconsin, Washington and Massachusetts.

33. Dr. Rosell has testified as an expert in at least 25 cases in various states, most involving civil commitment of sexually violent predators.

B. Opinion: Ohio's Sex Offender Residency Restriction Is Not and Will Not Be Effective In Reducing Child Sex Abuse.

34. Dr. Rosell will opine that, to a reasonable degree of psychological certainty, Ohio's sex offender residency restriction, O.R.C. § 2950.031, is not and will not be effective in protecting children from harm or reducing sexual recidivism among sex offenders.

35. There are several bases for this opinion. First, there is an extensive body of reliable research, with which Dr. Rosell is familiar, that has found various factors in sex offenders' lives or circumstances that statistically increase the likelihood of sexual re-offending. *See, e.g.,* R. Karl Hanson & Monique Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 2, 348-362 (1998); *and* R. KARL HANSON & KELLY MORTON-BOURGON, PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS, (Public Safety and Emergency Preparedness Canada, 2004), *available at* http://ww2.psepc-sppcc.gc.ca/publications/corrections/pdf/ 200402_e.pdf.

36. There is also reliable research on the prevalence of various characteristics among sex offenses. *See, e.g.,* HOWARD N. SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT, (Bureau of Justice Statistics, U.S. Dept. of Justice, July

2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf[1]; D. Finkelhor, J. Hotaling, I. A. Lewis, and C. Smith, *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics and Risk Factors*, 14 CHILD ABUSE AND NEGLECT 19-28 (1990); D.M. Elliot, and J. Briere, *Forensic Sexual Abuse Evaluations: Disclosures and Symptomatology,* 12 BEHAVIORAL SCIENCES AND THE LAW 261-77, (1994).

37. Not all of this research is in perfect harmony, but there is a consensus on many of the factors that would indicate whether sexual re-offense is likely to happen in a given situation. Some of those factors are "static"; that is, aspects of the offender's life or situation that he cannot presently change by some attitudinal, behavioral or circumstantial shift. Static factors include the offender's age, the number of offenses he committed in the past, and the gender and age of his past victim or victims.

38. Other factors are "dynamic"; that is, they can be presently changed by some attitudinal, behavioral or circumstantial shift in the offender's life. Dynamic factors that affect sexual re-offending against children include the stress level in the offender's life, his connectedness to positive social support, his participation in and completion of sex offender treatment, his sexual interest in children and his ability to easily access and develop relationships with children. Hanson & Bussiere (1998); Hanson & Morton-Bourgon (2004); R. Karl Hanson & Andrew Harris, *Where Should We Intervene? Dynamic Predictors of Sexual Recidivism*, 27 CRIMINAL JUSTICE & BEHAVIOR 1, 6-35 (2000).

39. Dr. Rosell will opine to a reasonable degree of psychological certainty that the sex offender residency restriction is not and will not be effective because the factors it appears to be

[1] These statistics were derived from the National Incident-Based Reporting System using 60,991 incidents of sexual assault (child and adult victims) reported from 1991-1996. *Id.* at 1.

trying to limit have not been shown to contribute to sexual offending and because the restriction fails to actually address the factors it purports to address.

40. It appears that the residency restriction law may be intended to reduce sex offenses against children by increasing the distance between school grounds and sex offenders' residences. For all the research that is available on factors contributing to sexual offending, there is none that shows any correlation between child molestation and the molesters' residential proximity to a school. To the contrary, there is some research that shows that those sex offenders who do re-offend do not use their residential proximity to schools to commit these new crimes. MINNESOTA DEPT. OF CORRECTIONS, LEVEL THREE SEX OFFENDER PLACEMENT ISSUES, at 13 (Jan. 2003; rev'd Feb. 2004) ("There is no evidence in Minnesota that *residential* proximity to schools or parks affects re-offense."); COLORADO DEPT. OF PUBLIC SAFETY, SEX OFFENDER MGMT. BD., REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY, at 30 (15 Mar. 2004) (residences of supervised sex offenders who recidivated during 15-month period were randomly located and were usually not located within 1000 feet of a school or child-care center).

41. Alternatively, it appears the residency restriction may be intended to reduce sex offenses against children by limiting sex offenders' ability to easily access and develop relationships with children. There is no research, however, indicating that sex offenders would actually have a greater ability to access and develop relationships with children simply by living closer to a school. Dr. Rosell will assume the common-sense proposition that residences of children are relatively evenly dispersed throughout a given area; that is, children live everywhere, not just near schools. In other words, a sex offender living within 1000 feet of a school, who might be able to access a child walking home from school, would just as easily be

able to access children playing around his home if he moved more than 1000 feet from a school. Furthermore, the residency restriction apparently does nothing to limit the ability of sex offenders who are intent on accessing children to simply walk or drive to school grounds.

42. Also, it is widely understood in the field of sex offender treatment that the vast majority of sex offenses against children are committed by family members or by those who had some pre-existing relationship with the child. *See, e.g.,* Snyder at 10 (July 2000) (34.2% committed by family; 58.7% by acquaintances; 7% by strangers); Finkelhor, et al. (1990) (80% of abused girls and 60% of abused boys were abused by family or someone known to victim); Elliott & Pierre (1994) (nearly one-half of child victims abused by parent or family member). Thus, the residency restriction would do nothing to prevent the vast majority of child sex offenses insofar as the abusers are accessing their child victims by way of their familial or other trust relationships (e.g. the sex offender is a sports coach, school employee or clergy).

43. These statistics also demonstrate that abduction and sexual abuse of children by strangers is rare. Dr. Rosell will draw the analogy to airplane crashes: they are relatively rare and harm far fewer people each year than automobile crashes, yet they receive extraordinarily more attention in the media. Likewise, the horrible child abduction and sex abuse cases that are widely publicized are the exception rather than the rule.

44. Based on his experience and knowledge of the field, Dr. Rosell will testify that the offenders who commit such heinous crimes tend to be bolder in committing their offenses. Thus, they would have less reluctance towards simply walking or driving to or near a school that is far from their residence in order to find a stranger-child-victim.

45. Also based on his experience and knowledge of the field, Dr. Rosell will testify that the offenders who commit such crimes tend to seek situations where they are anonymous in

order to commit their offenses. Thus, there is little likelihood that these particularly heinous offenders would commit a stranger-child-abduction in the vicinity of their residence where it would be more difficult to maintain anonymity.

46. Dr. Rosell will also testify that sex offender recidivism rates, while hotly debated and somewhat important to some areas of sex offender policy, are not relevant to the considerations at issue with the residency restriction law.

47. One kind of recidivism data is the rate at which sex offenders re-offend. Some studies reveal a relatively low rate of sexual recidivism among sex offenders. Hanson & Bussiere, at 351 (1998) (*n* = 23,393; heterogeneous sample of sex offenders; Results: 13.4% overall sexual recidivism over 4-5 year period; 18.9% for rapists of adults; 12.7% for child molesters); OH DEPT. OF CORRECTIONS, TEN YEAR RECIDIVISM FOLLOW UP OF 1989 SEX OFFENDER RELEASES, at 11 (Apr. 2001) (*n* = 14,261; included all sex offenders released during 1989; Results: 11% sexual recidivism over 10 years, including new convictions and technical parole violations (e.g. possession of pornography)). Other studies indicate a higher rate of recidivism. Robert Prentky, et al., *Recidivism Rates Among Rapists and Child Molesters: A Methodological Approach*, 21 LAW AND HUMAN BEHAVIOR 6, 635-659, at 645 (1997) (*n* = 251; sample included only civilly committed sex offenders from Massachusetts Treatment Center for Sexually Dangerous Persons; Results: 39% projected[2] sexual recidivism by rapists over 25 years; 52% projected recidivism by child molesters). It is sometimes emphasized that these recidivism rates are likely to be underestimations because sex crimes are under-reported. *See, e.g.,* CENTER FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS, at 3 (May 2001).

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[2] Because information on all of the offenders was not available over the 25-year span, Dr. Prentky projected the failure rate by calculating the average recidivism rate of the offenders for whom data was available for all 25-years and then projecting that the offender for whom data was not completely available would offend at the same rate. *See* Prentky, et al., at 641.

48. The rate at which sex offenders re-offend is irrelevant to Dr. Rosell's opinion of the effectiveness of the residency restriction because, as explained above, the residency restriction does not address the actual factors contributing to sexual offending against children. That is, even if sexual abuse of children is happening at a far higher rate than reported in some of the recidivism studies, the residency restriction will still completely fail to limit the ability of abusing family members or other acquaintances to access their child victims. Likewise, as explained above, regardless of the recidivism rates, the residency restriction does nothing to deter a sexual predator, who is bent on abducting and sexually abusing an unknown child, from walking or driving to a distant school to find a victim.

49. The degree to which sex offenders commit sex offenses against different demographic categories—commonly referred to as "cross-over"—is also largely irrelevant to Dr. Rosell's opinion on the ineffectiveness of the residency restriction. There are several studies that demonstrate that sex offenders who have multiple offenses have often offended against different kinds of victims. *See, e.g.,* studies collected in Jill S. Levenson & L. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 INT'L J. OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 2, 168, at 175-76 (2005). Nonetheless, even if an adult rapist were to recidivate against a child, for all the reasons explained above, the residency restriction would not actually reduce his ability to access child victims.

50. To summarize, the sex offender residency restriction fails to actually address the mode and manner in which child sex offenses happen. It does not address the vast majority of sex offenses that occur within family and other pre-existing trust relationships between offender and victim. It also fails to actually address the nature of those offenders who commit the rare

stranger-abduction cases. These failures hold true regardless of the precise rate of sexual recidivism and regardless of the degree of "cross-over." Thus, Dr. Rosell will opine that, based on extensive reliable research and his own experience in the field and to a reasonable degree of psychological certainty, Ohio's sex offender residency restriction is not and will not be effective in reducing sexual abuse of children.

C. Opinion: Ohio's Sex Offender Residency Restriction May Increase the Likelihood Of Child Sex Abuse.

51. Dr. Rosell will further opine that, based on research with which he is familiar and his own professional experience and to a reasonable degree of psychological certainty, the projected effects of Ohio's sex offender residency restriction will be to increase the likelihood that sexual abuse will occur. Stated more precisely, Dr. Rosell does not know and cannot opine that Ohio's sex offender residency ordinance definitely will have certain counter-productive effects. Rather, he will opine that certain effects of the law can be reasonably hypothesized and, if those effects obtain, the ultimate result will be to increase the likelihood of sexual recidivism among the sex offenders whose residences the law restricts.

52. As stated above, Dr. Rosell will educate the Court regarding static and dynamic factors that contribute to sexual recidivism. Dynamic factors that affect sexual re-offending against children include the stress level in the offender's life, his connectedness to positive social support, his participation in and completion of sex offender treatment, his sexual interest in children and his ability to easily access and develop relationships with children. Hanson & Bussiere (1998); Hanson & Morton-Bourgon (2004); Hanson & Harris (2000).

53. While stress is a very general term, Dr. Rosell will testify that it is undeniably stressful for a person to be forced to leave their home. He will also testify that the stress level

increases if the person has a very limited income and has very limited housing options. He will further testify that this kind of stress rises to the level of stress found significant in the studies regarding dynamic predictors of recidivism. This does not guarantee that any particular offender will re-offend if forced to move; rather, it indicates that he will be in a category of offenders who are more likely to re-offend, other things being equal, than those offenders who do not have that level of stress. Thus, he will opine that this is one way in which the residency restriction may increase the likelihood of sexual recidivism.

54. Having positive social support tends to reduce a former sex offender's likelihood of re-offense, while lacking positive support or having negative support tends to increase the likelihood of re-offense. Hanson & Bussiere (1998); Hanson & Morton-Bourgon (2004); Hanson & Harris (2000). For instance, the Colorado Department of Public Safety found that

> [w]hile [sex offender residency] ordinances are designed to limit options available to sex offenders, in many cases, it is nearly impossible for these offenders to find appropriate housing away from schools, parks and/or childcare centers throughout metropolitan areas. Ironically, this situation may increase their risk of re-offending by forcing them to live in communities where safe support systems may not exist or in remote areas providing them with high degrees of anonymity.

Report on Safety Issues…, at 9. This report went on to define positive social support:

> Sex offender treatment providers and supervising officers encourage sex offenders to utilize and identify people in their lives that will act in the capacity of a support system. These people are asked to hold the offender accountable for behaving in compliance with the terms and conditions of their community placement and to abide by their pro-social treatment contracts. These "support systems" are an important component of sexual offenders' community management process.

Id. at 9, fn. 6.

55. Dr. Rosell will opine that, to the extent that the residency restriction uproots sex offenders from positive social support and makes it difficult for them to remain in contact with that support, it increases the likelihood that sexual re-offending will happen.

56. Likewise, Dr. Rosell will opine that, to the extent that former sex offenders are forced to live in areas where they will have more difficulty accessing sex offender treatment, the residency restriction increases the likelihood that sexual re-offending will happen.

57. Dr. Rosell will report that there is little high-quality research available that specifically focuses on the effect of sex offender residency restrictions. However, his opinions are further supported by the only reports or studies available on the issue, which all point towards these restrictions being unnecessary, ineffective, and potentially counter-productive. Minn. Dept. of Corrections, at 4-9 (none of the sexual re-offenses within sample were related to school proximity); Colo. Dept. of Public Safety, at 30 (residences of supervised sex offenders who recidivated during 15-month period were randomly located and were usually not located within 1000 feet of a school or child-care center); Levenson & Cotter, at 173-74 (2005) (self-reports from sex offenders on their increased stress levels because of residency restrictions and anecdotal evidence regarding the ineffectiveness of the restrictions limiting the offenders' access to children); IOWA COUNTY ATTORNEYS ASSOCIATION, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA, at 1-5 (14 Feb. 2006) (reporting that enforcement of law has caused offenders to become homeless, fail to report, register false addresses, or just disappear; the law drains scarce law enforcement resources with no measurable gain in community safety; confessions and plea in child sex crimes have decreased, thus further draining prosecutorial resources and requiring children to testify more often in court; physically and mentally disabled sex offenders have been forced from family or social services that they rely on for assistance).

58. To summarize, Dr. Rosell will opine that Ohio's sex offender residency restriction may be counter-productive insofar as it makes it more difficult for sex offenders to stay connected to positive social support networks (including parole officers) and it makes it more

difficult to access sex offender and other mental health treatment. The law may also be counter-productive insofar as it increases the stress level in a sex offender's life and insofar as it motivates many offenders to fail to register or register false addresses, thus compromising the effectiveness of the state-wide registry and notification system. There is reliable research to demonstrate that each of these factors are correlated to an increase in the likelihood of recidivism. There is also reliable preliminary research and anecdotal evidence that, in states such as Florida and Iowa where there are similar residency restrictions, these negative effects are in fact happening.

IV. EXPERT OPINION OF DR. JAMES ORLANDO

59. Plaintiff anticipates that the State's expert, Dr. James Orlando, will testify that Ohio's sex offender residency restriction is rationally related to the State's alleged purpose of protecting children from sexual abuse by previously-convicted sex offenders.

60. Dr. Orlando will testify that he believes the law will prevent sex abuse of children by reducing sex offenders' ability to access and develop relationships with children.

61. However, Dr. Orlando will concede, as he must, that children live everywhere, not just near schools. He must also concede that he has no reason to believe that sex offenders will have any less access to children if they live more than 1000 feet from a school.

62. Therefore, Dr. Orlando will be unable to conclude to a reasonable degree of scientific certainty that the residency restriction actually protects or will protect children.

V. TIMOTHY BURGENER

A. Qualifications

63. As of the date of trial, Timothy Burgener will have graduated with a Master of City and Regional Planning degree, with an emphasis in Geographic Information Systems (GIS), from The Ohio State University. He received his B.A. in Spanish from the University of Illinois Urbana-Champaign in 2001.

64. He has taken several courses in GIS. He is also currently employed by the Public Utilities Commission of Ohio where his primary responsibility is to analyze potential environmental and social impacts of proposed major utility facilities (gas and electric transmission lines, power plants) using mapping software. His analyses typically involve consideration of about twenty unique data sets that include social, ecological, and engineering constraints to the construction of new facilities.

65. As part of his coursework and employment, he has been trained in the use of ArcView 9.1 from ESRI, a widely-used GIS software program. He considers himself an intermediate user of ArcView.

66. Mr. Burgener will testify that the geographic data that he will present at trial, discussed below, requires only a beginner's level ability in the use of ArcView.

B. Geographic Data Demonstrating Effect of Sex Offender Residency Ordinance

67. Mr. Burgener may[3] present tables and a map that he generated using four sets of data that are all public records under Rules 803(8) and 1005 of the Federal Rules of Evidence. Those data sets are: (a) a table of addresses, obtained from the Summit County Prosecutor, of

[3] Due to constraints on Mr. Burgener's time and other reasons, Plaintiff is not certain that these charts and this map will be presented at trial.

148 sex offenders who lived in violation of the 1000-foot rule prior to enforcement actions by the Summit County Sheriff and Prosecutor in November 2005; (b) a table of addresses of those same 148 sex offenders, also obtained from the Summit County Prosecutor, as of May 31, 2006; (c) parcel data for all school properties in Summit County, Ohio, obtained from the Summit County GIS Department; and (d) census data showing population density of children in census tracts in Summit County, Ohio, obtained from the U.S. Census Bureau.

68. Mr. Burgener will not be giving an expert opinion under Rule 702 of the Federal Rules of Evidence. Rather, he will be reporting on and presenting a summary of voluminous data that is otherwise admissible, pursuant to Rule 1006 of the Federal Rules of Evidence.

PROPOSED CONCLUSIONS OF LAW

I. STANDARDS FOR GRANTING A PERMANENT INJUNCTION AND DECLARATORY JUDGMENT.

69. To succeed in his motion for a permanent injunction, Plaintiff must show: (a) that he has suffered an irreparable injury; (b) that remedies available at law are inadequate to compensate for that injury; (c) that considering the balance of hardships between Plaintiff and Defendants, a remedy in equity is warranted; and (d) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, __U.S.__, 126 S.Ct. 1837, 1839, 164 L. Ed. 2d 641, 646 (2006); *see also* 35 U.S.C.S. § 283.

70. "The Declaratory Judgment Act, 28 U.S.C.S. § 2201, provides the mechanism for seeking pre-enforcement review of a statute. Declaratory judgments are typically sought before a completed 'injury-in-fact' has occurred, but must be limited to the resolution of an 'actual controversy.' When seeking declaratory and injunctive relief, a plaintiff must show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-

enforcement review." *Nat'l Rifle Ass'n of America, et al. v. Magaw, et al.*, 132 F.3d 272, 279 (6th Cir. 1997).

II. PLAINTIFF WILL SUFFER IRREPARABLE HARM IF DEFENDANT WALSH IS PERMITTED TO FORCE HIM TO LEAVE HIS HOME IN VIOLATION OF THE EX POST FACTO CLAUSE.

A. The Significance of the Ex Post Facto Clause and the Intent-Effects Test.

71. Both state and federal governments are prohibited from passing ex post facto laws. U.S. CONST. art. I, § 9 (federal) & art. I, § 10 (states).

72. An ex post facto law is "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action; 2d. Every law that aggravates a crime, or makes it greater than it was, when committed; 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive." *Calder v. Bull*, 3 U.S. (Dall.) 386, 390-391 (1798).

73. "The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty." *Collins v. Youngblood,* 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), *citing Calder*, 3 U.S. at 297 (Paterson, J., concurring).

74. The Framers of the Constitution held the protections of the Ex Post Facto clause in extraordinarily high regard. Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1275-76 (1998), *citing The Federalist*, No. 44, at 282 (J. Madison), and No. 84, at 511 (A. Hamilton) (Clinton Rossiter ed., 1961). "The Ex Post Facto Clause was designed to guard against the Framers' fears of retroactive penal laws forged

by 'hot-blooded' legislatures, laws that deprive Americans of notice that particular behavior is wrongful and/or serve to subject them to vindictive or arbitrary sanctions retroactive in their effect." Logan, at 1277.

75. In analyzing whether a challenged statute imposes retroactive punishment, this Court must first determine whether the legislature intended the law to create criminal punishment versus "merely civil proceedings." *Smith v. Doe* (2003), 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164. If the law is explicitly criminal, then the analysis is completed and the law should be found unconstitutional. *Id.* If, however, the legislature denominates the statute as civil, the Court must determine whether the law is nonetheless "so punitive either in purpose or in effect as to negate the State's intention to deem it civil." *Id.* (citations and internal quotations omitted). Only "the clearest proof" of punitive purpose or effect will serve to overcome the legislature's civil denomination. *Id.* This standard is often referred to as the "intent-effects test."

76. In determining whether Plaintiff has met this "clearest proof" standard, this Court should consider the following five factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether its operation will promote the traditional aims of punishment; (4) whether an alternative purpose to which it may rationally be connected is assignable for it; and (5) whether it appears excessive in relation to the alternative purpose assigned. *Smith v. Doe*, 538 U.S. at 97; *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-69. These factors are "neither exhaustive nor dispositive" but are to be used to determine whether, on balance, a statute effectively inflicts criminal punishment or merely institutes a civil remedial scheme. *Smith v. Doe*, 538 U.S. at 97.

77. Given the centrality and importance of the Ex Post Facto Clause, this Court should conduct a robust analysis of O.R.C. § 2950.031 within the context of the *Smith/Kennedy* five-

factor test. Courts such as the Eighth Circuit in *Doe v. Miller* gave great deference to the legislature and appeared to reduce the analysis to a mere rational-relationship test. The constitutional significance of the Ex Post Facto Clause demands a more vigorous review than mere rationality.

B. Ohio's Sex Offender Residency Restriction Was Intended By the Legislature To Be a Criminal Punishment.

78. "The ex post facto prohibition encompasses punitive conditions outside the sentence." *State v. Ahedo*, 14 Ohio App. 3d 254, 258 (Oh. App. 8th Dist., 1984), citing *Weaver v. Graham*, 450 U.S. 24, 32, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). "Subtle ex post facto violations are no more permissible than overt ones." *Collins*, 497 U.S. at 46.

79. To determine whether a statutory scheme is civil or criminal, this Court must consider the statute's text and structure to ascertain the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617, 4 L.Ed.2d 1435, 80 S.Ct. 1367. To do so, the courts "must first ask whether the legislature, in establishing a penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson v. U.S.,* 522 U.S. 93, 99, 139 L.Ed.2d 450, 118 S.Ct. 488 (citations omitted).

80. Section 2950.031 itself contains no expression as to whether it is criminal or civil, punitive or civil regulation. This Court should not assume that the statute is civil simply because the statute is silent on this point.

81. The formal attributes of a statute such as the manner of the statute's codification and its enforcement procedures are also probative of legislative intent. *Kansas v. Hendricks*, 521 U.S. 346, 361, 138 L.Ed.2d. 510, 117 S.Ct. 2072; *Hudson*, 522 U.S. at 103.

82. Section 2950.02 of the Ohio Revised Code merely states that the *registration and notification portions* of Chapter 2950 have a "non-punitive purpose." Section 2950.031 imposes a restriction of an entirely different order than the sex offender registration and notification laws.

83. The Ohio General Assembly chose to place the sex offender residency restriction within Chapter 2950 of the Ohio Revised Code. The statute is thus part of Title 29, Ohio's criminal law and procedure. Unlike the registration and notification statutes, there is no legislative declaration removing the natural assumption that the residency restriction is also a punitive criminal law.

84. Furthermore, although the enforcement mechanism is a civil suit for injunctive relief, the individuals empowered to bring such suits include the same persons entrusted with enforcement of the criminal laws—namely, county prosecuting attorneys or other chief legal officers in towns and municipalities. O.R.C. § 2950.031(B).

85. Moreover, if the residency restriction were indeed targeted at effectively improving community safety, one would assume that the legislature would not apply it to those sex offenders who have shown little to no inclination to harm children or those sex offenders who have not re-offended after many years. However, the burdens of the residency restriction are placed on all sex offenders for the rest of their lives, regardless of their individual risk factors. Thus, it appears that the General Assembly did not have a civil safety regulation in mind, but rather a blanket punishment enhancement for any and all persons convicted of sex offenses.

86. Therefore, this Court should conclude that § 2950.031 was intended by the Ohio General Assembly to be a criminal punishment. Accordingly, application of the residency restriction to Plaintiff, who committed his crime over sixteen years before the law went into effect, would violate the Ex Post Facto Clause.

C. The Overwhelming Effect Of Ohio's Sex Offender Residency Restriction Is To Impose Criminal Punishment.

87. Even if this Court does not find that the General Assembly *intended* the residency restriction to be criminal punishment, Plaintiff can show by the clearest proof that the overwhelming *effect* of the law is to impose punishment.

1) Ohio's sex offender residency restriction imposes an onerous affirmative disability and restraint.

88. The testimony of Lane Mikaloff will establish how the residency restriction places an onerous burden on him and his family. He has extremely limited funds. His mother is graciously allowing him to live rent-free in a home that has been in his family for nearly 50 years. He has lived in this home since before the effective date of the statute. There is nowhere else he could reasonably afford to live that would adequately accommodate his family in the way that the homes at 1174 and 1174 ½ Beardsley Street do. Forcing him to move would cause a great deal of chaos in his personal and family life.

89. Thus, retroactive application of Ohio's sex offender residency ordinance undeniably imposes an affirmative disability and restraint on Plaintiff.

2) Ohio's sex offender residency restriction is analogous to parole, an historical form of punishment.

90. Parole is a form of punishment. It is "an established variation on imprisonment of convicted criminals. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey v. Brewer* (1972), 408 U.S. 471, 477, 92 S. Ct. 2593, 33 L. Ed. 2d 484; *see also Stinson v. United States* (1993), 508 U.S. 36, 41, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (citing

the federal Guidelines Manual promulgated pursuant to the Sentencing Reform Act of 1984 as providing direction as to the appropriate type of punishment to be imposed: probation, fine, or term of imprisonment).

91. The force and effect of the residency restriction is to place control over the location of sex offenders' residence in the hands of law enforcement. This is directly analogous to one of the most typical conditions of parole; namely, that the parole officer requires the parolee to notify him of any address change and has the power to disapprove any new residence.

92. The residency restriction is more onerous than parole, however, because (a) it applies for life, whereas parole is always time-limited, usually to a few years after release from incarceration; and (b) it applies to any and all sex offenders regardless of their risk factors, whereas a parole officer would normally disapprove an address based on an individual sex offender's risk factors.

93. While the State may argue that the residency restriction does not approximate the full panoply of restrictions that are a part of parole, this fails to recognize that the Ex Post Facto clause prohibits incremental *enhancements* to punishment as much as it prohibits entirely new punishments. *Collins*, 497 U.S. at 41. Mr. Mikaloff was placed on parole once already upon being released from prison for his sex offense; the clear effect of the residency restriction is to again force him to comply with an enhanced aspect of parole.

94. Thus, retroactive application of the residency restriction to Plaintiff is analogous to a historical form of punishment.

3) Ohio's sex offender residency restriction promotes the traditional aims of punishment, deterrence and retribution.

95. Retribution and deterrence are the two primary traditional aims of punishment. *See Smith v. Doe*, 538 U.S. at 102; *Doe v. Miller*, 405 F.3d at 720. "[R]etribution and general deterrence are [goals] reserved for the criminal system alone." *Kansas v. Hendricks*, 521 U.S. 346, 373, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (2002) (Kennedy, J., concurring). The primary effect of § 2950.031 is to promote both of these goals.

96. As this Court rightly pointed out during the oral argument for the Temporary Restraining Order, the State's attempt to attribute a "civil" purpose to the residency restriction—"protection of community safety"—is in fact merely a renaming of general deterrence, "[a] goal[] reserved for the criminal system alone."

97. Moreover, the public has been made well-aware of the enforcement of the sex offender residency restriction in Summit County and across Ohio. The clear message behind this law is: "Commit a sex offense—any sex offense—and you may never be able to live in your home again. And you can be forced to move at a moment's notice if a new school moves near you." The burdensomeness and overbroad application of this law thus highlight its deterrent effects.

98. The statute also furthers retributive purposes. It applies regardless of the type of offense committed, the offender's classification level, and his risk of re-offense. Imposing a blanket prohibition restricting sex offenders from living with 1000 feet of schools, regardless of their individual risk factors, smacks of retribution and community outrage, not reasonable, non-punitive regulation.

99. It is, of course, appropriate and constitutional for the collective will of the people to express moral outrage towards and to seek to deter sex offenses, such as the rape Mr. Mikaloff

committed in 1986, by punishing sex offenders. But to do so for a second time, eighteen years after he was originally sentenced, is simply unconstitutional. The Ex Post Facto Clause was written into the Constitution precisely to contain the unbridled moral outrage of the people or their legislature if they ever sought to increase the punishment on a person after a crime had been committed. This case is exactly such a situation.

100. Thus, the retroactive application of Ohio's sex offender residency restriction to Plaintiff forcefully promotes the traditional aims of punishment, deterrence and retribution.

4) Ohio's sex offender residency restriction is not rationally-related to the non-punitive purpose of protecting children from harm and is excessive in relation to this alleged purpose.

101. The testimony of Dr. Luis Rosell will demonstrate in detail that the residency restriction is not, in fact, rationally related to a civil, non-punitive purpose. Dr. Rosell will opine to a reasonable degree of psychological certainty that the sex offender residency restriction is not and will not be effective because the factors it appears to be trying to limit have not been shown to contribute to sexual offending and because the restriction fails to actually address the factors it purports to address.

102. Dr. Rosell will testify that the residency restriction does nothing to prevent the vast majority of child sex offenses, which are committed by family members or acquaintances of the child-victims. He will also testify that the residency restriction also does nothing to prevent the rare stranger-child-abduction cases because those sex offenders are bold enough to drive or walk to within 1000 feet of a school if that is how they wish to find their victims. Also, such sexual predators often seek locations where they can maintain anonymity, rather than schools that are in close proximity to their homes.

103. Dr. Rosell will also opine that the residency restriction tends to increase dynamic risk factors that have been shown to correlate with an increase in sexual recidivism. Specifically, he will testify that the overall effect of the residency restriction is to significantly increase the stress level for sex offenders; to remove them from positive social support; to make it more difficult for them to access sex offender, substance abuse, and other behavioral health treatment; and to influence many sex offenders to fail to register or to register false addresses, thus compromising the ability of law enforcement to track their whereabouts. Dr. Rosell's opinion on this point is corroborated by reliable, though limited, anecdotal reports and research in other states employing or considering sex offender residency restrictions such as Iowa, Florida, Minnesota and Colorado.

104. Ohio's sex offender residency restriction is excessive insofar as it lacks any exceptions for those who have not harmed children, who committed their sex offenses many years ago and have not re-offended, or who lived in their homes prior the effective date of the statute.

105. Accordingly, this Court should find that Ohio's sex offender residency restriction is not rationally-related to the State's alleged purpose of protecting children from sexual abuse and is excessive in relation to that purpose.

106. Having provided the clearest proof that each of the five *Smith/Kennedy* factors demonstrates the punitive nature of § 2950.031, this Court must find that application of that law to Plaintiff Lane Mikaloff violates the Ex Post Facto Clause.

III. PLAINTIFF DOES NOT HAVE AN ADEQUATE REMEDY AT LAW.

107. Plaintiff seeks a permanent injunction and declaratory judgment to prevent Summit County from forcing him, pursuant to O.R.C. § 2950.031, to leave his home. Plaintiff could not

sue Summit County for damages if he were forced to move in violation of his constitutional rights. U.S. CONST., amend. XI.

IV. GRANTING PLAINTIFF'S REQUEST FOR AN INJUNCTION IS NOT CONTRARY TO THE PUBLIC INTEREST.

108. For all the reasons set forth above, enforcement of Ohio's sex offender residency ordinance against Plaintiff does not further the public interest. Rather, it is contrary to the public interest to countenance a blatant violation of Plaintiff's right to be free from retroactive punishment.

V. PRE-ENFORCEMENT REVIEW IS APPROPRIATE BECAUSE PLAINTIFF'S INJURY-IN-FACT IS SIGNIFICANTLY POSSIBLE.

109. As Defendant Walsh made clear at the pre-trial conference on Thursday June 8, 2006, she is merely waiting for the outcome of this case to begin her enforcement of O.R.C. § 2950.031 against Plaintiff and other similarly situated sex offenders in Summit County. The parties have stipulated that Mr. Mikaloff is currently in violation of the residency restriction and that Defendant Walsh is empowered to enforce that restriction against him. This threat to Plaintiff's constitutional rights is neither hypothetical nor speculative. At the same time, the Ex Post Facto Clause is a central and foundational right in our constitutional order. Accordingly, pre-enforcement review and a declaratory judgment are appropriate in this case.

Respectfully submitted,

/s/ David Singleton
DAVID SINGLETON (#0074556)
Trial Counsel for Plaintiff
STEPHEN JOHNSONGROVE (#0078999)
Co-counsel for Plaintiff
OHIO JUSTICE & POLICY CENTER

CERTIFICATE OF SERVICE

I, David A. Singleton, Lead Attorney for Plaintiff, hereby certify that I filed a digital version of the foregoing Plaintiff's Brief with the Court's electronic case filing system on this 12th day of June, 2006. True and correct digital copies will be served on counsel for all parties through that system.

/s/ David Singleton
David Singleton, Esq. (#0074556)