No. 22-6121

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL PAUL CONN, PETITIONER

v.

STATE OF WEST VIRGINIA, RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the West Virginia Supreme Court of Appeals violate Petitioner's due process rights when it construed the phrase "convicted of an offense or an attempted offense" in West Virginia's Sex Offender Registry Act to include both the crime of an attempt to commit an assault while committing a felony and the underlying felony, proof of which was an essential element of the attempt crime?

ADDITIONAL RELATED PROCEEDINGS

Circuit Court for Cabell County, West Virginia:

State v. Conn, No. 98F39 (Jan. 12, 1998)

State v. Conn, No. 98F161 (Aug. 28, 1998)

Conn v. State, No. 03-C-1067 (Dec. 4, 2003)

State v. Conn, No. 14F512 (Dec. 2, 2014)

Supreme Court of Appeals of West Virginia:

Conn v. State, No. 32857(Sept. 14, 2005)

Conn v. Ferguson, No. 060290 (March 16, 2006)

State v. Conn, No. 21-0382 (March 21, 2022)

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# BRIEF FOR THE STATE OF WEST VIRGINIA IN OPPOSITION

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## JUDGMENT BELOW

The circuit court has not entered a final judgment. The opinion of the Supreme Court of Appeals of West Virginia answering the question certified by the state circuit court (Pet. App. 3-7) is reported at 879 S.E.2d 74. The Supreme Court of Appeals of West Virginia's order denying Petitioner's petition for rehearing is unpublished and found at Pet. App. 34.

## JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) because Petitioner does not seek review from a final judgment. See Jefferson v. City of Tarrant, 522 U.S. 75, 77-78 (1997) (dismissing a writ of certiorari "for want of a final judgment"

where Petitioner sought review of a state supreme court decision "on an interlocutory certification from the trial court").

## INTRODUCTION

In this case, the Supreme Court of Appeals of West Virginia explained that the crime of "attempt to commit an assault during the commission of a felony" -- when the underlying felony is sexual assault in the third degree -- is a qualifying offense under West Virginia's Sex Offender Registration Act. Petitioner insists this decision was so "unexpected and indefensible" that it constitutes a due-process violation. Bouie v. City of Columbia, 378 U.S. 347, 354 (1964). He argues he is entitled to a writ to fix that error. But Petitioner is wrong on both counts.

This Court cannot and should not grant a writ here. The Court lacks jurisdiction because the Supreme Court of Appeals's decision was an interlocutory opinion answering a certified question from the state trial court. Apart from that decisive jurisdictional issue, the unusual procedural posture -- involving a writ of error coram nobis and no substantial federal issue -- also makes this case a poor vehicle for review.

Those matters aside, the Supreme Court of Appeals also did not err, let alone botch a purely state-law issue so badly that it amounts to a problem of constitutional scale. Applying the state statute's text and a line of precedents, the court appropriately concluded that Petitioner had been convicted of a SORA qualifying

offense because he was convicted of one crime that in turn included a statutorily defined qualifying offense as an essential element of conviction. And holding that a person must register as a sex offender for life after admitting to sexually assaulting a thirteen-year-old girl is not "the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." Rogers v. Tennessee, 532 U.S. 451, 467 (2001).

The Court should deny the Petition.

STATEMENT

1. In early 1998, a Cabell County grand jury charged Petitioner with four counts of "3rd Degree Sexual Assault" for "unlawfully and feloniously engaging in sexual intercourse with" a thirteen-year-old girl in 1997 when Petitioner was 22 years old. Pet. App. 4; WVSCoA App. 1.* Petitioner first pled guilty to one of those counts, but he later withdrew that plea. Id. at 40.

Several months later, the State dismissed the indictment and refiled an Information charging Petitioner with "attempt[ing] to commit an assault during the commission of a felony." WVSCoA App. 3-4; see also W. Va. Code § 61-2-10. Petitioner entered an Alford plea to that information the same day. WVSCoA App. 5-7. During the plea hearing, the State noted "that the evidence of this crime would be that the Petitioner had sexual intercourse" with the same

* The State cites the Joint Appendix filed with the Supreme Court of Appeals of West Virginia as "WVSCoA App."

thirteen-year-old girl named in the original indictment. Id. at 41; see also Pet. App. 5. Petitioner did not object to that proffer. WVSCoA App. 41. The Court then accepted the guilty plea and sentenced Petitioner to one to three years imprisonment. Id. at 6-7. Petitioner did not appeal.

2. In 1999 and 2000, the West Virginia Legislature enacted its Sex Offender Registration Act, made it retroactive, and amended it to include attempt offenses. West Virginia's SORA requires a sex offender to register for life if he "has been convicted … of a qualifying offense … involving a minor." W. Va. Code § 15-12-4(a)(2). "Qualifying offenses" are those listed in W. Va. Code § 15-12-2(b)(2), see W. Va. Code § 15-12-2(e)(1), and they include third-degree sexual assaults, see W. Va. Code § 15-12-2(b)(2) (citing W. Va. Code § 61-8B-5). Separately, a sex offender must register for at least ten years if he "has been convicted of a criminal offense" found to be "sexually motivated." W. Va. Code § 15-12-2(c). These changes subjected Petitioner to registration requirements for the first time.

3. Petitioner petitioned for a writ of habeas corpus in 2003, arguing that he did not have to register as a sex offender. The circuit court summarily dismissed that petition. Petitioner appealed to the West Virginia Supreme Court of Appeals, which remanded the case for an evidentiary hearing to consider whether

Petitioner had been convicted of a "sexually motivated" crime under W. Va. Code § 15-12-2(c). See Pet. App. 6.

The circuit court held its hearing on sexual motivation in May 2006. See WVSCoA App. 16-39. During that hearing, Petitioner insisted that the court could consider only the named crime to which Petitioner pled (an "attempt to commit an assault during the commission of a felony"). But the court disagreed. It reasoned that because Petitioner pled to a crime that took place during the commission of a felony, "there would have to be a felony out there" also part of his conviction. Id. at 28. The central "question" therefore became: "[W]hat was the underlying felony?" Id. at 21. Based in part on the prosecutor's representations during the plea hearing, the circuit court reasoned that the only underlying felony in the record was the third-degree sexual assault. Id. at 28; see also id. at 32, 36. That offense, of course, was sexually motivated. Petitioner's counsel recognized that the West Virginia Supreme Court of Appeals would "probably" agree. Id. at 35.

The circuit court therefore dismissed Petitioner's petition for habeas corpus and ordered him to register as a sex offender. Petitioner, through counsel, acknowledged that he would need to register for life. WVSCoA App. 22 ("THE COURT: And he is required to register now how -- is it lifetime registration? MS. BREECE: I believe so, Your Honor.").

5. Petitioner did not register for life. Instead, he registered for a few years and then stopped. Authorities therefore indicted Petitioner on six counts of failure to register as a sex offender in 2014. And in early 2018, he pled no contest to two counts of failing to register as a sex offender. See WVSCoA App. 48-50. The court sentenced him to two one-to-five year terms to run consecutively. Id. at 49. Petitioner did not appeal. Petitioner then served two years in prison, was paroled, and registered with the West Virginia sex offender registry in mid-2020.

6. In March 2021, Petitioner petitioned for a writ of error coram nobis in Cabell County Circuit Court, asking the court to vacate his failure-to-register convictions and dismiss the original indictment. See WVSCoA App. 54-67. Among many other claims, Petitioner reasserted the same theory that he had offered at the May 2006 hearing, though under a different SORA subsection. Once more, Petitioner insisted that the court could not look specifically at the "felony" element of "attempted assault during the commission of a felony" to determine whether he needed to register under SORA. Id. Petitioner thus argued that the indictment was defective, his plea was involuntary, and his counsel was constitutionally ineffective. Id. at 61-67. Further, he contended that the indictment for failure-to-register failed to recite essential elements of the crime. Id. at 65-67.

After conducting a hearing -- but before making any final decision on the petition -- the circuit court certified to the Supreme Court of Appeals the question of whether Petitioner's 1998 conviction was a "qualifying offense" under SORA. The Supreme Court of Appeals reformulated the question to focus on whether Petitioner had committed a qualifying offense when "the underlying felony was … third degree sexual assault [and] … [Petitioner] had intercourse with a juvenile under the age of sixteen when he was twenty-two years of age." Pet. App. 10. The parties' briefs on appeal then focused solely on statutory-construction arguments under West Virginia state law.

The Supreme Court of Appeals concluded that Petitioner's 1998 conviction constituted a qualifying offense under SORA. See Pet. App. 4-17. That conviction was an attempt conviction, and the Court cited several West Virginia cases stressing that the crime of attempt "exists only in relation to other offenses." Id. at 14. The "other offense" in this case is the underlying felony. And because every element of an offense must be proven beyond a reasonable doubt, Petitioner "could not have been convicted" of his crime "unless he was also guilty of committing, or attempting to commit, a felony." Id. at 15-16. So, like the circuit court, the Supreme Court of Appeals considered the felony Petitioner was committing when he attempted to commit assault. Id. at 15. And like the circuit court, the Supreme Court was convinced by facts

recited at the initial plea hearing that the underlying felony was third-degree sexual assault. Id. at 15-16. The court thus "remanded to the circuit court for proceedings consistent with [its] opinion." Id. at 17. One justice dissented, reasoning that Petitioner was not separately convicted of a qualifying offense. Id. at 18-33.

Petitioner sought rehearing, arguing for the first time that requiring him to register as a sex offender for life would violate the due process principles described in Bouie, supra. Pet. App. 37-39. The Supreme Court of Appeals denied that petition in August 2022, with one justice again voting to grant it. Id. at 34.

ARGUMENT

The Petition fails both procedurally and substantively. Procedurally, the Court lacks jurisdiction to review the non-final order that Petitioner challenges. The unusual procedural posture of this case also makes it a poor candidate for review. And it does not present an issue warranting a grant of the writ. Substantively, the Supreme Court of Appeals of West Virginia reasonably applied ordinary principles of statutory construction to conclude that Petitioner had been "convicted" of a qualifying offense when that offense was an essential element of the crime to which Petitioner pled guilty. Nothing about how the court resolved this close and novel question under state law violated the Due Process Clause.

1. The Court need not consider the merits of Petitioner's claims because several other strong reasons favor denying the writ at the outset.

a. This court may review "[f]inal judgments or decrees rendered by the highest court of a State." 28 U.S.C. § 1257(a). A judgment or decree is "final" when it constitutes "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1349 (2020). So where the highest court of a State remands a case for further proceedings, the Court will -- with certain "limited" exceptions -- decline to consider the petition. O'Dell v. Espinoza, 456 U.S. 430, 430 (1982).

The Supreme Court of Appeals's decision here is not final. In Jefferson v. City of Tarrant, the Court "dismiss[ed] the writ for want of a final judgment" when petitioners sought review of an "interlocutory" decision made on "certification from the [state] trial court." 522 U.S. 75, 7-78 (1997). There, as here, the state supreme court's decision was "avowedly interlocutory," as it did not resolve all the petitioners' claims but instead "remanded." Id. at 81-82. And Petitioner never tries to explain how this Court could treat the decision as final. Instead, he mistakenly describes the decision as a "denial of state post-conviction coram nobis relief … on direct appeal." Pet. 1.

This case falls outside any of the "four exceptional categories of cases" that can be treated as "final" despite the promise of further proceedings below. Johnson v. California, 541 U.S. 428, 429-30 (2004) (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975)). It is not one where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." Jefferson, 522 U.S. at 82 (cleaned up). Nor is it one where "the federal issue is conclusive or the outcome of further proceedings preordained." Cox Broad. Corp., 420 U.S. at 479. The federal issue could be mooted by other state-law issues, such as Petitioner's claim that the indictment lacked critical language. See WVSCoA App. 63-65. And those same live state-law issues mean the result is not "preordained." Later review will also not be precluded. Jefferson, 522 U.S. at 82. The Supreme Court of Appeals's decision may be law of the case in that court going forward, but it will not bar later review before this Court when the case is final. Id. at 82-83. Lastly, waiting for a final judgment will not "seriously erode federal policy." Cox Broad. Corp., 420 U.S. at 483. Although due process is important, that same interest is present in every criminal case -- and the narrow facts of this one do not justify extraordinary intervention. "A contrary conclusion would permit the fourth exception to swallow the rule." Flynt v. Ohio, 451 U.S. 619, 622 (1981).

Thus, the Court should deny the writ for lack of jurisdiction and go no further. Cf. Va. Mil. Inst. v. United States, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., respecting the denial of the petition for certiorari) (explaining that, even in federal cases in which Section 1257(a) is not implicated, the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

b. Even if the Court were to determine that it does have jurisdiction, the Court still should not take this case because it suffers from other complicating factors. Most obviously, on this spare record, it is "not clear that [the Court's] resolution of the constitutional question will make any difference even to these litigants." Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 122 (1994) (dismissing the writ); see also, e.g., Calderon v. Coleman, 525 U.S. 141, 152 (1998) (Stevens, J., dissenting) (explaining that the writ should have been denied where the decision was "unlikely to change the result below").

Success in this Court would be only one step on the long road to relief for Petitioner. The circuit court would then need to use that determination to decide Petitioner's specific legal claims -- that he was indicted defectively, that he involuntarily pled guilty, and that he received ineffective assistance of counsel. These claims, of course, each have their own tests with varying standards and burdens of proof. See, e.g., State v.

Johnson, 639 S.E.2d 789, 792-93 (W. Va. 2006) (defective indictment); State ex rel. Farmer v. Trent, 551 S.E.2d 711, 716 (W. Va. 2001) (involuntary plea agreement); State v. A.B., 881 S.E.2d 406, 414 (W. Va. 2022) (ineffective assistance of counsel). Petitioner has never explained why a favorable decision here would guarantee him relief under any of these theories, especially years after the fact.

It also matters that Petitioner is requesting coram nobis relief. Coram nobis "is an extraordinary remedy available at the far end of a postconviction continuum only for the most fundamental errors." 39 Am. Jur. 2d Habeas Corpus § 179 (2023 supp.). It is "more known for its denial than its approval" and comes with a "strong presumption that the judgment of conviction is valid." Id.; see, e.g., United States v. George, 676 F.3d 249, 254 (1st Cir. 2012) (describing how, in federal courts, "successful petitions for coram nobis are hen's-teeth rare"). In West Virginia, a petitioner is not entitled to this extraordinary remedy unless he establishes "a denial of a fundamental constitutional right" and three other elements. State v. Hutton, 806 S.E.2d 777, 780 (W. Va. 2017). For instance, "[f]ailure to establish a valid reason for failing to challenge the conviction earlier will defeat a petition for writ of error coram nobis," State v. Baughman, No. 17-0632, 2018 WL 4944549, at *3 n.4 (W. Va. Oct. 12, 2018). Yet Petitioner sought coram nobis relief here more than 20 years after

he was first convicted. So for this reason and others, Petitioner would still have hurdles to clear before he could secure relief below.

c. This Court reviews cases only when compelling circumstances require the Court's involvement to settle an important federal question. Sup. Ct. R. 10. A petition might meet this standard if it presents an important but as-yet-unaddressed federal question. Id. Or a petition might concern important federal questions that have been decided differently among different courts or that conflict with this Court's precedent. Id.

Yet this case presents no circumstances justifying a grant of certiorari. The Petition does not implicate a split between the circuits or the state courts of last resort. The Court would not address any unsettled federal issue here. At most, seeing as how the Bouie due process issue arose only on rehearing, Petitioner argues for simple error correction of the unpublished, one-line decision denying his request for rehearing below. But "error correction … is outside the mainstream of the Court's functions and … not among the 'compelling reasons' ... that govern the grant of certiorari." Stephen M. Shapiro, et al., Supreme Court Practice § 5.12(c)(3) (10th ed. 2013); see also United States v. Johnston, 268 U.S. 220, 227 (1925) ("[This Court] do[es] not grant a

certiorari to review evidence and discuss specific facts."). And as elaborated on below, no error occurred here, anyway.

If Petitioner could identify a significant federal question here, the case's idiosyncratic facts would still make it a poor vehicle to decide whatever issue he might find. At bottom, Petitioner objects to how the lower court applied a specific registration requirement to a specific kind of inchoate offense on atypical facts. He never suggests that similar statutes exist in other States -- or even that this problem is likely to repeat itself in West Virginia. This Court seldom intervenes in one-off cases. See Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers) (explaining that a case with "few if any ramifications beyond the instant case … does not satisfy any of the criteria for the exercise of this Court's discretionary jurisdiction").

2. Separately, the Court should deny the Petition because the Supreme Court of Appeals did not offend Petitioner's due process rights. See Bouie, supra.

a. Everyone agrees that a court may not retroactively punish previously lawful conduct through an "unexpected and indefensible" statutory interpretation. Bouie, 378 U.S. at 354 (cleaned up). This limitation flows from "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning." Rogers, 532 U.S. at 459. A construction is

"unexpected or indefensible" if it is "clearly at variance with the statutory language," Bouie, 378 U.S. at 354, 356, rather than a "reasonable interpretation" of it, Metrish v. Lancaster, 569 U.S. 351, 368 (2013), and lacks "the slightest support in prior [court] decisions," Bouie, 378 U.S. at 356.

Bouie takes no issue with courts extending legal principles in a commonsense way. Chambers v. McCaughtry, 264 F.3d 732, 742 (7th Cir. 2001). As lower courts have explained, the case prohibits only "unpredictable" changes in the law. United States v. Burnom, 27 F.3d 283, 284–85 (7th Cir. 1994). To implicate due process, then, an unpredictable change must truly be shocking -- a "radical and unforeseen departure from prior law." United States v. Walsh, 770 F.2d 1490, 1492 (9th Cir. 1985). Indeed, a court may even overturn lines of cases to retroactively criminalize conduct so long as the overturning is predictable. See Michael T. Morley, Erroneous Injunctions, 71 Emory L.J. 1137, 1195 (2022) (collecting cases).

Given the principles, it may come as no surprise that federal courts routinely deny Bouie claims. Harold J. Krent, Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause, 3 Roger Williams U. L. Rev. 35, 57 (1997) (summarizing a survey of Bouie claims and finding a "consistent judicial hostility to Bouie claims"); see also, e.g., Hawkins v. Mullin, 291 F.3d 658, 665–67 (10th Cir. 2002); United States v. Luersen, 278 F.3d

772, 774 (8th Cir. 2002); Chambers, 264 F.3d at 742–44; Hill v. Hopkins, 245 F.3d 1038, 1040 (8th Cir. 2001). And this Court has been averse to Bouie claims, too; the last successful one was decades ago. See generally Marks v. United States, 430 U.S. 188, 192 (1977). In short, "Bouie situations are exceedingly rare." United States v. Wheeler, No. 19-11022, 2022 WL 17729412, at *3 (5th Cir. Dec. 16, 2022); see also, e.g., Johnson v. Missouri, 143 S. Ct. 417, 417 (2022) (Jackson, J., dissenting from denial of application for stay) (noting that only in "rare cases" can "a litigant … credibly claim that a State's erroneous interpretation of, or refusal to comply with, its own law can amount to a federal due process violation").

Courts universally handle these claims carefully in part because they implicate federalism. Harold J. Krent, Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in Bush v. Gore, 29 Fla. St. U. L. Rev. 493, 497 (2001). Courts have always shown significant deference to how a state court construes its own statutes -- especially when it implicates the state legislature's intent. See Bradshaw v. Richey, 546 U.S. 74, 78 (2005) (calling state supreme court decisions in the Bouie context "authoritative"); see also Spanier v. Dir. Dauphin Cnty. Prob. Servs., 981 F.3d 213, 227, 229 (3d Cir. 2020) (noting states' "considerable latitude to rule on the meaning of statutes"). Bouie also does not prevent state

courts from developing their law or resolving uncertainties as their legal system evolves. See, e.g., Hamling v. United States, 418 U.S. 87, 116 (1974); Burnom, 27 F.3d at 284–85. And state courts have a general interpretive license to explain and expound both state statutory language, Luersen, 278 F.3d at 774, and case law, Ponnapula v. Spitzer, 297 F.3d 172, 183–84 (2d Cir. 2002). So taken all together, Bouie does not prevent a state court from "announcing a new rule of law to uphold a conviction." Spanier, 981 F.3d at 229.

b. Moving to this case, Bouie and the cases that apply it are an ill fit because Bouie focuses on a "state court's construction of a criminal statute." 378 U.S. at 354 (emphasis added). The decision below, however, does not purport to construe a criminal statute. Instead, it construes the registration provisions of SORA -- a civil, regulatory statute. Haislop v. Edgell, 593 S.E.2d 839, 845 (W. Va. 2003); see also, e.g., State v. Whalen, 588 S.E.2d 677, 679 n.2 (W. Va. 2003) ("[T]he Act is a civil regulatory statute and not a criminal penalty statute."). SORA's registration requirements do not "punish the offender," "make an action which was innocent when done[] criminal," or "aggravate a crime or make it greater than when it was committed." Hensler v. Cross, 558 S.E.2d 330, 335 (W. Va. 2001). So construing those registration requirements cannot, by definition, "involve any expansion in the scope of criminal liability" that would in

turn implicate Bouie. Ortiz v. N.Y.S. Parole in Bronx, 586 F.3d 149, 158 (2d Cir. 2009); see also, e.g., United States v. Dupas, 419 F.3d 916, 920 (9th Cir. 2005) ("Bouie applie[s] only to after-the-fact increases in the scope of criminal liability."). Although the lower court's decision might indirectly affect criminal liability by touching on the crime of failure to register, the Court has never extended and applied Bouie to such indirect circumstances like those. And the crime of failure to register remains the same in West Virginia both before and after the decision here. See Mendez v. Small, 298 F.3d 1154, 1159 (9th Cir. 2002) (finding that judicial construction of a sex offender registration statute did not violate Bouie in part because it "did not make previously lawful conduct illegal").

c. But if Bouie did apply here, it would still afford no reason to grant the Petition, let alone reverse.

Start with the statutory language. SORA requires a person "convicted of," among other things, "an attempted offense" listed in subdivision (b)(2) that "involve[ed] a minor" to register for life. W. Va. Code §§ 15-12-2(b)(2), 15-12-4(a)(2). Petitioner pled guilty to "attempting to commit an assault during the commission of a felony" under W. Va. Code § 61-2-10, which makes it a felony to "shoot, stab, cut or wound another person" while also committing a "felony." The Supreme Court of Appeals construed Section 15-12-2(b)(2)'s reference to "convicted" to embrace

Section 61-2-10's "felony" element -- here, third-degree sexual assault. This decision was a reasonable construction of "convicted," predictably evolving from West Virginia law for at least five reasons.

First, in West Virginia, "convicted," "conviction," and similar words have not been universally limited to the offense recorded on the final judgment of a criminal trial. True, the Legislature sometimes uses "conviction" in a formal sense, contemplating that the word "embraces a final judgment." State v. Pishner, 81 S.E. 1046, 1047 (W. Va. 1914), superseded by statute on other grounds as stated in State v. Allman, 813 S.E.2d 36, 42 (W. Va. 2018). But "conviction" is "generally understood" to mean "simply the establishing of guilt" -- for example, by "plea." Id. West Virginia courts will thus construe the word based on context, surrounding statutory language, and the meaning the "Legislature evidently intended it to have." Id.

Examples are many. In State ex rel. Baker v. Bolyard, for example, the court understood that "conviction" could broadly embrace "the state of having been proved guilty." 656 S.E.2d 464, 467 n.2 (W. Va. 2007), superseded by statute W. Va. Code § 17C-5A-1a (citing Black's Law Dictionary 358 (8th ed. 2004)). In Dye v. Skeen, a defendant who was convicted of two separate crimes on the same day was not "twice before convicted," again implying that something more than the formal judgment defines the "conviction."

62 S.E.2d 681, 688 (W. Va. 1950). And in State ex rel. Combs v. Boles, the court stressed that "[a] plea of guilty is an admission of whatever is well charged in the indictment and the acceptance thereof by the court effects a conviction for that offense." 151 S.E.2d 115 (W. Va. 1966) (emphasis added). So, like other States, West Virginia can apply a broader understanding of conviction depending on the context. See, e.g., State v. Pixton, 98 P.3d 433, 436 (Utah Ct. App. 2004) (defining "conviction" as any "judicial determination" that a "defendant is guilty").

Thus, no reasonable person should have been surprised that the Supreme Court of Appeals would entertain a broader understanding of "conviction" when construing SORA's text. The decision here was an ordinary application of a line of cases recognizing that a conviction can mean more than the specifically delineated crime listed on the judgment following a jury trial. Cf. State v. Penwell, 483 S.E.2d 240, 245 (W. Va. 1996) ("[I]t would not be possible … to prove an assault in the commission of, or attempt to commit, [a] felony … without proving each and every element of the commission of, or attempt to commit, the [underlying felony]."). It "added a 'clarifying gloss' to the prior construction." Hamling, 418 U.S. at 116. So the Supreme Court of Appeals's definitional choice was neither unexpected nor indefensible -- it reasonably resolved a difficult definitional challenge. See, e.g., Webster v. Woodford, 369 F.3d 1062, 1072

(9th Cir. 2004) (finding that California court's broad construction of "immediate presence requirement" for robbery did not violate Bouie in light of earlier cases applying a similarly "expansive" understanding). And under that definition, Petitioner was "convicted" of third-degree sexual assault, as he now appears to concede.

Second, West Virginia law forbids courts from considering attempt crimes in isolation -- they must consider the underlying conduct, too. West Virginia law says that a "crime of attempt does not exist in the abstract but rather exists only in relation to other offenses." State v. Starkey, 244 S.E.2d 219, 223 n.2 (W. Va. 1978), overruled on other grounds by State v. Guthrie, 461 S.E.2d 163 (W. Va. 1995). Put another way, attempt crimes are "inextricably linked to the offense that was attempted." State v. James F., No. 15-0194, 2016 WL 2905508, at *3 (W. Va. May 18, 2016). Other state courts have adopted the same formulations. See, e.g., State v. Richter, 956 N.W.2d 421, 423 (N.D. 2021); Stackowitz v. State, 511 A.2d 1105, 1107 (Md. App. 1986). So no reasonable legal observer would be surprised that the court refused to view Petitioner's attempt conviction in a vacuum.

West Virginia law treats enhancement crimes the same way. Because Section 61-2-10 can be used only when another crime has already been committed, it "acts as an enhancement statute." Penwell, 483 S.E.2d at 245. The Supreme Court of Appeals has never

wavered in calling Section 61-2-10 an enhancement statute. State v. Richardson, No. 14-0382, 2016 WL 5030312, at *3 (W. Va. Sept. 16, 2016); State v. Henson, 806 S.E.2d 822, 830 (W. Va. 2017); State v. McGilton, 729 S.E.2d 876, 882 n.6 (W. Va. 2012); State v. Tidwell, 599 S.E.2d 703, 705 (W. Va. 2004). Consequently, every application of Section 61-2-10 involves "two separate offenses" -- the underlying felony and the attempted assault. Penwell, 483 S.E.2d at 245.

The Supreme Court of Appeals approached the statute here just as it had approached statutes in earlier cases involving either an attempt crime or an enhancement. A conviction under Section 61-2-10 will always involve a second crime. So the court below properly thought it was crucial to consider the underlying felony. Petitioner would prefer to pretend that he pled to only the first half of under Section 61-2-10 ("attempting to commit an assault") and not the second half, too ("during the commission of a felony"). Attempted assault is indeed a crime -- but a different one. See W. Va. Code § 61-2-9(b). The offense here is different in that it embraces an underlying felony of third-degree sexual assault. The whole crime matters, not just the first half Petitioner highlights. Nothing is "indefensible" in thinking just that.

Third, SORA's legislative intent should have signaled that courts would construe the Act in a broader way -- and, indeed, were likely to. West Virginia's chief goal in construing statutes

"is to ascertain and give effect to the intent of the Legislature." State ex rel. Morrisey v. Copper Beech Townhome Cmtys. Twenty-Six, LLC, 806 S.E.2d 172, 178 (W. Va. 2017) (cleaned up). A court may discern "legislative intent" using, among other things, the "overarching design of the statute." Id. (cleaned up); accord State v. George K., 760 S.E.2d 512, 522 (W. Va. 2014). And West Virginia interprets SORA broadly to achieve that legislative intent. See State v. Bostic, 729 S.E.2d 835, 843 n.13 (W. Va. 2012) (applying SORA's "expansive 'scope of registration'"); accord State v. Beegle, 790 S.E.2d 528, 537 (W. Va. 2016); see also State v. Hoyle, 836 S.E.2d 817, 826 (W. Va. 2019) (noting SORA is quite "broad in scope").

The decision here advanced the statute's legislative intent. See Pet. App. 11-12, 14 (focusing on SORA's intent). The Legislature intended SORA to "protect the public from sex offenders." W. Va. Code § 15-12-1a(a). And SORA requires offenders to register for ten years after some crimes but a lifetime after others, showing that the Legislature believes some sex offenders are more dangerous than others. Adults who have sex with children are one of those "more dangerous" categories. No one disagrees that Petitioner had sex with a child several times. That admitted conduct makes him the sort of sex offender for which the Legislature designed heightened protections. Thus, the lower court reasonably implemented SORA's legislative intent.

Fourth, the Court should be especially reluctant to find a due-process violation in a case of first impression, as this Court affords special deference to a state supreme court "addressing a particular issue for the first time." Metrish, 569 U.S. at 367-68; Ponnapula, 297 F.3d at 183–84 (explaining how courts give leeway in matters of first impression). Cases of first impression should not create Bouie violations because Bouie is meant to apply to situations when a court unreasonably breaks from prior precedent or unmistakably clear statutory text. See Bouie, 378 U.S. at 354-56 (describing how due process is offended when a decision "overrules a consistent line of … decisions" without basis or finds "not the slightest support in prior [state court] decisions"). As lower courts have explained, "[u]ntil the state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled." Hagan v. Caspari, 50 F.3d 542, 547 (8th Cir. 1995). A defendant "cannot rely on an unsettled law for a particular outcome." Bryant v. Myers, No. 94-15684, 1994 WL 621195 (9th Cir. 1994).

If a question is one of first impression, then that question below is necessarily unsettled. See, e.g., Ehrenfeld v. Mahfouz, 489 F.3d 542, 549 (2d Cir. 2007); United States v. Turrietta, 696 F.3d 972, 981 (10th Cir. 2012) (similar); Nat'l Treasury Emps. Union v. Von Raab, 808 F.2d 1057, 1059 (5th Cir. 1987). In other

words, with no prior case law -- let alone contrary case law – a state court's holding cannot be dubbed an "unexpected" departure.

Petitioner concedes that this decision did not mark a break from any prior West Virginia precedent. Before this case, the West Virginia Supreme Court of Appeals had never considered SORA's definition of "convicted." And Petitioner fails to offer a case -- let alone a West Virginia case -- that contradicted the court's analysis below. Instead, he relies on his own unsupported insistence of what the words of the statute must mean. See, e.g., Pet. 8. But SORA's text is subject to more than one reasonable interpretation, so he needs more to overcome the Supreme Court of Appeals's "authoritative interpretation of [West Virginia] law." Bradshaw, 546 U.S. at 78.

Fifth, and finally, the record establishes that none of the Supreme Court of Appeals's interpretive work in fact surprised Petitioner. During the 2006 hearing, Petitioner's counsel referred to the initial admission of guilt as to the third-degree sexual assault as a "conviction." WVSCoA App. 21. She likewise said she believed Petitioner would need to register for the rest of his life. Id. at 22. And Petitioner's 2006 habeas petition was denied precisely because the circuit court refused to consider the attempt crime apart from its relation to his third-degree sexual assault. Id. at 41. Petitioner ignored his counsel's wisdom to his detriment. He cannot now claim to have been ambushed

by what his own lawyer publicly recognized more than a decade earlier.

For these many reasons, the Supreme Court of Appeals of West Virginia did not render an "unexpected and indefensible" decision here. Bouie, 378 U.S. at 354. The Court thus has no need to grant the writ.

## CONCLUSION

The Court should deny the Petition.

Respectfully submitted.

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