No. 22-864

In the Supreme Court of the United States

OHIO,

Petitioner,

v.

D.R.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in a case that is moot and in a decision that was not a final judgment, the Ohio Supreme Court erred in holding that the state and federal constitutions require that the state's juvenile courts must have discretion to remove from the sex offender registry juveniles who have completed the terms of their dispositions.

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The Court lacks jurisdiction under 28 U.S.C. § 1257(a) for three reasons. First, the case is moot. Second, the decision below is not a final judgment. Third, the decision below rests on the Ohio Constitution as well as the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Course of Law Clause of the Ohio Constitution, art. I, § 16, provides in relevant part: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

1. In 2017, when respondent D.R. was sixteen years old, a group of friends spent the night at his house. Hearing Transcript, 8/17/2018, at 9. S.L., who was twelve years old, was one of the friends who stayed that night. *Id.* D.R. and S.L. had known each other a long time. *Id.* Their mothers were best friends and the two had grown up together. *Id.* D.R. was romantically interested in S.L. and he believed there was mutual interest on her part. *Id.* at 26-27.

That night, while they were watching a movie, D.R. began to touch S.L., first over her clothes and then under. *Id.* at 10. S.L. told D.R. to stop. *Id.* Later

in the evening, D.R. again made advances towards S.L. and ultimately performed oral sex on her. *Id.* at 10, 18. S.L. said nothing during this portion of the encounter. *Id.* at 10. D.R. mistakenly interpreted S.L.'s silence as consent. Hearing Transcript, 6/7/2019, at 5-6.

In 2018, D.R. entered a plea of "admit" (the juvenile court equivalent of a guilty plea) to gross sexual imposition. The juvenile court ordered D.R. to pay restitution and to stay away from S.L. Pet. App. 4a. The court also ordered D.R. to complete a juvenile sex offender treatment program. *Id.* Because D.R.'s offense, if committed by an adult, would have constituted gross sexual imposition against a victim under the age of thirteen, state law required D.R. to register as a juvenile offender registrant. *Id.* at 2a, 4a. The court classified D.R. as a Tier I offender, the lowest level and the one with the least restrictive reporting requirements. *Id.* at 4a.

In 2019, D.R. completed the treatment program. His probation officer informed the juvenile court that D.R. had "done really well on probation," that he had graduated from high school, that he was working, and that he planned to attend college. *Id.* at 5a. D.R. had also arrived at a mature understanding of his offense and how it affected S.L. He

> reported that he talked extensively with his mother about what he learned about the victim's perspective, emphasizing how easy it is to freeze in those situations. He went on to state that while he had previously believed that the victim should have said "no" more seriously than she did, he noted that his group therapy

> helped him realize this was a cognitive distortion.
>
> He went on to note that he has since explained to his mother that he learned not all victims respond the same way and many do not know how to respond when they are abused, leaving them to freeze and not telling the perpetrator to stop.
>
> He noted that once he gained insight into the victim's perspective, he now feels completely responsible for the situation.

Hearing Transcript, 6/7/2019, at 5-6.

The juvenile court found that D.R. had "successfully completed all conditions imposed upon him by [the] Court." Pet. App. 5a. The court accordingly terminated D.R.'s probation. *Id.*

But the juvenile court reluctantly concluded that it had no power to terminate the requirement that D.R. register as a juvenile sex offender. *Id.* at 6a, 50a-52a. By statute, where a juvenile was sixteen or seventeen years old at the time of the offense, the juvenile had to continue registering as a sex offender no matter how effective his treatment was and no matter how little risk there was that he would reoffend. *Id.* at 3a (citing Ohio Rev. Code § 2152.84(A)(2)(b)). He could not seek to end this registration requirement until three years after the juvenile court order ending his disposition. *Id.* (citing Ohio Rev. Code § 2152.85(B)(1)).

D.R. argued that the statute was contrary to due process, but the juvenile court found that it was "constrained by current precedent" to reject the argument. *Id.* at 6a. The court explained that it lacked

"the authority to remove him from the registration right now. Until the higher court says it can happen, we're bound by those decisions, despite what I want to do." *Id.* at 53a.

D.R. appealed on several grounds, including that the statute violated his rights to procedural and substantive due process under both the federal and Ohio constitutions.

2. The Ohio Court of Appeals reversed. Pet. App. 37a-48a. The Court of Appeals held that by depriving juvenile courts of the discretion to remove juveniles from the sex offender registry, the relevant Ohio statute—section 2152.84(A)(2)(b)—violates the Due Course of Law Clause of the Ohio Constitution, art. I, § 16, and the Due Process Clause of the U.S. Constitution. *Id.* at 42a-47a. In reaching this conclusion, the Court of Appeals relied entirely on Ohio Supreme Court decisions. *Id.*

In seeking discretionary review in the Ohio Supreme Court, the state worded the question on which it sought review as whether the relevant statute "complies with state and federal due process and is fundamentally fair." Memorandum in Support of Jurisdiction, *In re D.R.* (Ohio Sup. Ct., July 29, 2021), at 6. The state argued that the Court of Appeals erred in accepting "D.R.'s claim that R.C. 2152.84 violated his procedural due process under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16 of the Ohio Constitution." *Id.* The Ohio Supreme Court agreed to review the question as worded by the state—whether the statute "complies with state and federal due process and is fundamentally fair." Pet. App. 7a.

3. The Ohio Supreme Court affirmed. *Id.* at 1a-36a.

Like the Court of Appeals, the Supreme Court relied on both the Due Course of Law Clause of the Ohio Constitution and the Due Process Clause of the U.S. Constitution. The court cited both clauses in the opinion's short syllabus. *Id.* at 1a. (Under Ohio law, the law in an opinion of the Ohio Supreme Court is contained in the opinion's syllabus as well as in its text. Ohio Sup. Ct. Rules for the Reporting of Opinions, Rule 2.2.)

The court began by noting that "[w]e examine juvenile procedural-due-process claims through a framework of fundamental fairness." Pet. App. 7a (citing *In re C.P.*, 967 N.E.2d 729, ¶ 72 (Ohio 2012)). The court observed that "[j]udicial discretion is essential to preserving that special nature of the juvenile process and to maintaining fundamental fairness in the juvenile-justice system." *Id.* at 8a (citing *State v. D.H.*, 901 N.E.2d 209, ¶ 59 (Ohio 2009)). The court cited several of its own decisions in which "we have determined that when a statute removes the discretion of the juvenile court at a critical time in the proceedings, it offends fundamental fairness." *Id.* (citing *In re C.P.* at ¶ 85; *State v. D.H.* at ¶ 59; and *In re D.S.*, 54 N.E.3d 1184, ¶¶ 32-37 (Ohio 2016).

The Ohio Supreme Court noted that "[t]he state agrees that fundamental fairness is the framework by which this court must evaluate D.R.'s constitutional argument." *Id.* at 11a. The state's sole contention, the court observed, was that the statute "is fundamentally fair when applied to D.R. and to similarly situated juveniles." *Id.* But the court concluded that "our review of relevant precedents affecting

Ohio's juvenile-offender-registration statutes indicates otherwise." *Id.* at 11a-12a.

To reach this conclusion, the court analyzed the facts and holdings of its own decisions—not any of this Court's decisions. *Id.* at 12a-14a. The Court held that under its own precedents, "individualized determination is necessary for registration to continue into adulthood for 16- and 17-year-old offenders." *Id.* at 16a. "In a system designed to advance rehabilitation over punishment and to shield juveniles from the stigma of their juvenile delinquency," the court explained, "D.R.'s automatic, continued status as a juvenile-offender registrant into adulthood is fundamentally unfair. Any decision to continue his classification requires a grounded determination by a juvenile court that such a penalty is warranted." *Id.*

Justice Fischer dissented. *Id.* at 18a-23a. In his view, the majority had misinterpreted the court's own precedents. *Id.* at 20a-21a. Justice Fischer concluded that the statute "complies with state and federal due process and is fundamentally fair." *Id.* at 23a.

Justice DeWine, joined by Justice Kennedy, also dissented. *Id.* at 23a-36a. Unlike his colleagues, Justice DeWine confined his analysis to the federal Due Process Clause. *Id.* at 25a-26a. He suggested that "D.R.'s challenge obviously sounds in substantive due process," *id.* at 28a, despite being "framed as a procedural-due-process challenge," *id.* at 29a. He contended that "[t]he United States Supreme Court has firmly rejected the attempt to recast a substantive-due-process claim like D.R.'s under the procedural component of the Due Process Clause." *Id.* at

29a (citing *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1, 7-8 (2003)).

Justice DeWine recognized that the majority had relied on several of the Ohio Supreme Court's own decisions. *Id.* at 33a. He urged his colleagues to "put out the dumpster fire that is our precedent." *Id.* By overruling the cases on which the majority relied, he argued, the court could "realign our interpretation of the Fourteenth Amendment to the United States Constitution with that of the United States Supreme Court and make clear that substantive-due-process claims are to be assessed under substantive-due-process standards." *Id.* at 35a.

REASONS FOR DENYING THE PETITION

The certiorari petition should be denied.

To begin with, the Court lacks jurisdiction for three reasons. The case is moot. The decision below is not a final judgment. And the decision below rests on the Ohio Constitution as well as the U.S. Constitution.

Even if the Court had jurisdiction, there would be no reason to review this case. The decision below does not conflict with any of this Court's decisions or with the decisions of any other lower courts.

Finally, even if the Court had jurisdiction, and even if the decision below conflicted with decisions of other courts, this case would be an exceedingly bad vehicle for reviewing any such conflict, for two reasons. First, there is a possibility that the record of this case will soon be expunged. Second, Ohio repeatedly urged the courts below, including the state supreme court, to apply the "fundamental fairness" framework that it rails against in its certiorari peti-

tion. Ohio can hardly complain that the state courts did what it asked.

I. The Court lacks jurisdiction.

Ohio has hit a rare trifecta: There are three independent reasons that the Court lacks jurisdiction to hear this case. First, the case is moot. Second, the decision below is not a final judgment. Third, the decision below rests on the state constitution as well as the federal constitution.

A. This case is moot.

By now, as Ohio concedes (Pet. 22), nothing the Court could do in this case could have any effect. The juvenile court had the authority to terminate D.R.'s classification as a juvenile offender registrant three years after the court's order regarding the end-of-disposition hearing. Ohio Rev. Code § 2152.85(B)(1). This three-year period expired on September 17, 2022.[1] Pet. App. 39a. On March 1, 2023, the juvenile court terminated D.R.'s classification pursuant to Ohio Rev. Code § 2152.84. Ohio elected not to appeal. This case is therefore moot.

Ohio errs in arguing (Pet. 23-24) that this case falls within the exception to the mootness doctrine for controversies that are "capable of repetition, yet evading review," on the theory that three years is not enough time to litigate the question it seeks to present here. In fact, three years will be plenty of

[1] The juvenile court's order was entered on September 17, 2019. Pet. App. 39a. Ohio's certiorari petition erroneously starts the three-year period on the date of the hearing before the magistrate (June 7, 2019), not the date of the juvenile court's order. Pet. 22.

time to litigate this question in future cases. The issue is now settled in Ohio, so there will be no need for oral argument or extensive briefing as the case moves up the appellate ladder. The state's appellate courts have an accelerated calendar for such cases that provides for briefing in a mere fifteen days. Ohio R. App. P. 11.1. D.R.'s case was the first in Ohio to raise the issue, so the state courts appropriately took their time to decide it carefully. But future cases raising the same issue can be decided much more quickly.

Ohio has proven that it can be an extraordinarily speedy litigant—when it wants to be. *See, e.g.*, *Ohio v. Department of Labor*, No. 21A247 (2022) (filing a stay application and a certiorari petition in this Court on December 18, 2021, as the culmination of a challenge to a federal policy that was announced only six weeks earlier). In D.R.'s case, by contrast, Ohio proceeded in a more leisurely fashion. In the state court of appeals, Ohio obtained two extensions of time before filing its brief. After losing in the state court of appeals, Ohio took more than six months to file its opening brief in the state supreme court. Ohio thus bears a considerable part of the responsibility for the delay. If the state were to litigate this issue with the tenacity it brings to some of its other cases, it could easily bring the issue to this Court within three years.

Three years, moreover, is substantially longer than the periods the Court has deemed short enough to qualify as "evading review." *See Turner v. Rogers*, 564 U.S. 431, 440 (2011) (one year); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (eighteen months); *Kingdomware Techs., Inc. v. United*

States, 579 U.S. 162, 170 (2016) ("less than two years"). Of course, any assessment of whether a given period is too short for litigation must be highly sensitive to context because some kinds of proceedings take longer than others. The categorical rule Ohio proposes (Pet. 24), that three years is always too short, thus makes no more sense than the opposite categorical rule that three years is never too short. The question is always "too short for what?" Here, three years would be plenty of time for Ohio to litigate the issue it wishes to litigate.

As Ohio points out (Pet. 23), the state will have many opportunities in the future to litigate the issue in cases where it will affect the parties. In this case, by contrast, there is no longer an article III case or controversy. D.R. and Ohio no longer have "adverse legal interests." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (internal quotation marks omitted). Nothing the Court could decide in this case would affect D.R. in the slightest. The case is moot.

B. The decision below was not a final judgment.

In cases arising from state courts, this Court has jurisdiction to review only "[f]inal judgments." 28 U.S.C. § 1257(a). "To be reviewable by this Court, a state-court judgment must be final … as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (internal quotation marks omitted). The finality requirement serves several important purposes. It "avoids piecemeal review of state court decisions," it "avoids giving advisory opinions in cases where there may be no

real 'case' or 'controversy,'" and it "limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

As Ohio implicitly concedes (Pet. 25), the decision below was not a final judgment. The Ohio Supreme Court remanded the case to the juvenile court "with instructions to hold a new completion-of-disposition hearing and to determine whether D.R.'s Tier I classification should be continued or terminated." Pet. App. 18a. At that point, the case was not over. It was still uncertain whether the juvenile court would continue or terminate D.R.'s classification as a sex offender. And once the juvenile court made that decision, there was still the possibility of an appeal. The Ohio Supreme Court's decision was an important step toward the end of the litigation, but it was not the final step.[2]

Ohio tries to shoehorn this case (Pet. 25-26) into the third of the four exceptions to the finality requirement described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975)—the category of cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate out-

[2] Had the dissenters prevailed in the Ohio Supreme Court, the decision would still not have been a final judgment, because the dissenters would have remanded the case to the state court of appeals for consideration of D.R.'s remaining arguments. Pet. App. 36a. *See Johnson v. California*, 541 U.S. 428, 429-31 (2004) (per curiam).

come of the case." But Ohio misunderstands the contours of this narrow exception.

The third *Cox Broadcasting* category is for cases in which "later review of the federal issue cannot be had." *Id*. This situation typically arises from the asymmetry inherent in criminal appeals—the defendant can appeal a conviction, but the state cannot appeal an acquittal. Where the state loses on a federal issue in the state supreme court and the case is remanded for a trial, there would be no way for the state to bring the issue to this Court without this exception to the finality requirement. After a remand, if the defendant is acquitted, the state cannot appeal, and if the defendant is convicted, any appeal would have to be based on some issue other than the one on which the defendant already prevailed in the state supreme court. Nor could the state bring the issue to the Court in any future case because all future trials will likewise be conducted in compliance with the state supreme court's view of the federal issue, with the same consequences for any appeal.

This is the rationale for the third exception to the finality requirement described in *Cox Broadcasting*. *See, e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 168 (2006); *Pennsylvania v. Ritchie*, 480 U.S. 39, 47-48 (1987); *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984); *South Dakota v. Neville*, 459 U.S. 553, 558 n.6 (1983). It is a narrow exception for cases in which "later review of the federal issue" would otherwise be literally impossible.

This is not such a case. Ohio would like this Court to opine on whether the court below erred in holding that juvenile courts must have the discretion to end the sex offender registration requirements imposed

on certain juveniles. As Ohio effectively acknowledges (Pet. 23), however, Ohio can raise this issue in any future case involving a juvenile who was sixteen or seventeen years old at the time of the offense. Ohio can simply object to the juvenile court's application of its discretion. When the juvenile court nevertheless exercises its discretion, Ohio can appeal. The asymmetry inherent in criminal appeals does not exist in this context. The state could not appeal an acquittal, but it *can* appeal the juvenile court's decision to remove a juvenile from the sex offender registry.

Ohio is certainly correct in observing (Pet. 25) that the issue "will not survive remand in *this* case" (emphasis added). But that is only because this case is just as moot in the lower courts as it is here, for the same reason. If the case were not moot, the issue *would* survive remand. It would be strange indeed for a case's mootness to be a reason for this Court to disregard the finality requirement of 28 U.S.C. § 1257(a). Just as two wrongs don't make a right, two reasons the Court lacks jurisdiction don't combine to create jurisdiction.

C. The decision below rests on the Ohio Constitution.

"This Court will not take up a question of federal law in a case if the decision of the state court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Cruz v. Arizona*, 143 S. Ct. 650, 658 (2023) (citations, brackets, and internal quotation marks omitted). This doctrine is "the product of two fundamental features of our jurisdiction"—first, that

the Court "cannot disturb state-court rulings on state-law questions," and second, that "Article III empowers federal courts to render judgments, not advisory opinions." *Id.* at 662 (Barrett, J., dissenting).

The decision below rests on both the Due Course of Law Clause of the Ohio Constitution, art. I, § 16, and the Due Process Clause of the federal Constitution. In this situation, where a state court decision relies on both state and federal law, this Court examines the state court's opinion to determine whether "the state court rested its decision primarily on federal law" or whether, to the contrary, the opinion includes "a plain statement that the decision below rested on an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1042, 1044 (1983).

Ohio does not dispute that the Ohio Constitution's Due Course of Law Clause is an *adequate* state ground. The clause provides in relevant part: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." The text of the Due Course of Law Clause is broader than the federal Constitution's Due Process Clause in some important respects. Unlike the Due Process Clause, it does not require a deprivation of life, liberty, or property before it can be invoked. And unlike the Due Process Clause, it explicitly protects "reputation." This additional protection is especially pertinent to registration as a sex offender, which causes a grave injury to the registrant's reputation. There is no doubt, therefore, that the Due Course of Law

Clause is an adequate state ground for the decision below.

Ohio's claim is that the Due Course of Law Clause is not an *independent* state ground, because, Ohio asserts, "the Ohio Supreme Court cited the Ohio Constitution only in passing and only in connection with the Fourteenth Amendment." Pet. 20. But this assertion is simply false. The Ohio Supreme Court relied primarily on the state constitution, and only secondarily on the Fourteenth Amendment.

To begin with, the syllabus written by the court, which summarizes the decision in a single sentence, cites both the Due Course of Law Clause and the Fourteenth Amendment. Pet. App. 1a. The syllabus is a "plain statement," *Long*, 463 U.S. at 1044, that the decision rests on both clauses, not merely the Fourteenth Amendment.

In the body of the opinion, the court likewise explains that it will address whether the state's procedure for ending a juvenile's status as a sex offender "violated D.R.'s due-process rights under the Fourteenth Amendment to the United States Constitution and Article I, Sections 2 and 16 of the Ohio Constitution and should therefore be held unconstitutional." Pet. App. 5a.

The "Analysis" section of the opinion, *id.* at 7a-18a, includes 32 citations to court decisions (including references to decisions cited by other decisions, but not including the case cited at 11a n.1 in response to an argument made by one of the dissents). Twenty-five of these citations are to the Ohio Supreme Court's own decisions. Only seven citations are to this Court's decisions. The opinion relies principally on three Ohio cases that rely on the state

constitution as well as the federal constitution, each of which relies in turn on other Ohio decisions that also rely on both constitutions. *See In re D.S.*, 54 N.E.3d 1184, 1191-93 (Ohio 2016); *In re C.P.*, 967 N.E.2d 729, 746-50 (Ohio 2012); *State v. D.H.*, 901 N.E.2d 209, 215-16 (Ohio 2009).

While the opinion does cite a few of this Court's decisions interpreting the federal constitution, the opinion does *not* say that the state supreme court is bound to interpret the state constitution in the same way that this Court interprets the federal constitution. Nor does the opinion treat this Court's decisions as inexorable commands when it comes to the state constitution.

This case is thus very different from those in which the Court has found that state law was not an independent state ground. In those cases, the lower courts relied almost entirely on the federal constitution and mentioned state law only in passing. *See, e.g.*, *Long*, 463 U.S. at 1043 ("[T]he court below relied *exclusively* on its understanding of *Terry* and other federal cases. Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional."); *Florida v. Powell*, 559 U.S. 50, 57-58 (2010) ("[T]he Florida Supreme Court trained on what *Miranda* demands."); *Ohio v. Robinette*, 519 U.S. 33, 37 (1996) ("Indeed, the only cases [the state court opinion] discusses or even cites are federal cases, except for one state case which itself applies the Federal Constitution.").

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to

decide cases where there is an adequate and independent state ground." *Long*, 463 U.S. at 1040. Here, respect for the Ohio Supreme Court means taking the court at its word. There is no reason to doubt the honesty of the court's explanation that its judgment relies on the state constitution as well as the federal constitution.

II. The decision below does not conflict with any of this Court's decisions.

Even if the Court had jurisdiction, certiorari would not be warranted, because the decision below is correct.

Ohio errs in claiming (Pet. 10-12) that the decision below conflicts with *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003). Ohio did not even mention *Doe* in its briefing in the state supreme court or the state court of appeals. And for good reason. *Doe* has no bearing on this case.

In *Doe*, the Court held that under a statutory scheme requiring adult sex offenders to register regardless of their current dangerousness, the Due Process Clause does not entitle such offenders to a hearing to prove that they are not currently dangerous. *Id.* at 7-8. The Court explained that because the Connecticut courts had no discretion to alter an adult's sex offender status based on the offender's dangerousness, "any hearing on current dangerousness is a bootless exercise." *Id.*

The decision below, by contrast, involves juvenile offenders, not adults. It involves a statutory scheme completely different from the one at issue in *Doe*, a scheme in which Ohio's juvenile courts *are* vested with ongoing discretion to alter the sex offender sta-

tus of juveniles throughout the course of their dispositions. In Ohio, a hearing on whether to lower the juvenile's tier classification or declassify a juvenile after he completes his disposition is *not* a bootless exercise but is rather a central feature of the juvenile court system. As the Ohio Supreme Court explained, under state law, "[j]udicial discretion is essential to preserving th[e] special nature of the juvenile process." Pet. App. 8a.

Ohio also errs in suggesting that the decision below conflicts with *Doe* in a more diffuse sense. In *Doe*, the Court disapprovingly noted that "[i]t may be that respondent's claim is actually a substantive challenge to Connecticut's statute recast in 'procedural due process' terms." *Doe*, 538 U.S. at 8 (citation and internal quotation marks omitted). Ohio accuses D.R. (Pet. 10) of committing the same sin. Here, Ohio is simply wrong. In the state court of appeals, D.R. brought separate challenges based on procedural and substantive due process. D.R. Ct. App. Br. 8-18 (first issue: procedural due process); *id.* at 18-20 (second issue: substantive due process). The Court of Appeals agreed with D.R.'s procedural due process argument, so it did not address his substantive due process argument. Pet. App. 47a. When Ohio appealed to the state supreme court, the supreme court likewise only had occasion to consider procedural due process. Throughout this litigation, D.R. has been scrupulous in distinguishing between procedural and substantive due process. So have the state appellate courts.

Ohio errs once more in claiming (Pet. 14-18) that the decision below conflicts with the general thrust of this Court's due process jurisprudence, on the the-

ory that the Ohio Supreme Court based the decision "on its own perceptions of fairness" rather than on the law (Pet. 16). This claim is a gross misreading of the decision below. Nothing in the court's opinion suggests that the justices "impose[d] their personal and private notions of fairness" (Pet. 15; internal quotation marks omitted). To the contrary, the opinion consists entirely of conventional legal reasoning based on precedent, as it should.

Ohio's harsh words for the state's judiciary are especially ill-mannered in this case, because Ohio itself argued below that the state supreme court was *required* to apply a "fundamental fairness" standard. In its brief, Ohio insisted that "fundamental fairness is the overarching concern." Ohio State Sup. Ct. Br. 5. In the sole point heading of the brief's argument, Ohio urged the state supreme court to find that the statute at issue "is fundamentally fair." *Id.* at 3. The state supreme court conducted precisely the analysis that Ohio asked it to, by interpreting the very cases that Ohio cited.

The decision below relies primarily on state law, as explained above, but to the extent the decision rests on the federal Constitution, it is faithful to this Court's precedents. In juvenile proceedings, "'fundamental fairness' [is] required by due process." *Schall v. Martin*, 467 U.S. 253, 263 (1984). *See also Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 24 (1981) (in juvenile proceedings, due process "expresses the requirement of 'fundamental fairness'"); *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (plurality opinion) ("[T]he applicable due process standard in juvenile proceedings, as developed by

Gault and *Winship*, is fundamental fairness."). This is the standard that the courts below applied.

III. There is no lower court conflict.

Certiorari is also unwarranted because there is no lower court conflict to resolve. The certiorari petition cites no cases that have even addressed the issue that was decided below by the Ohio Supreme Court—whether juveniles are entitled to a hearing regarding the termination of their registration obligations after they complete their dispositions. So far as we are aware, there are no such cases.

Instead, the petition strings together citations to several lower court cases that decided different questions:

- *State v. N.R.*, 495 P.3d 16, 26-27 (Kan. 2021) (cited at Pet. 12), addressed due process only under the Kansas Constitution.

- *State v. Eighth Judicial Dist. Ct.*, 306 P.3d 369, 379 (Nev. 2013) (cited at Pet. 12), addressed the same issue this Court decided in *Connecticut Dep't of Public Safety v. Doe*. The same is true of *People ex rel. C.B.B.*, 75 P.3d 1148, 1150-51 (Colo. Ct. App. 2003) (cited at Pet. 12); *In re J.R.*, 793 N.E.2d 687, 696-99 (Ill. Ct. App. 2003) (cited at Pet. 12); *United States v. Juvenile Male*, 670 F.3d 999, 1013-14 (9th Cir. 2012) (cited at Pet. 12); and *Fullmer v. Michigan Dep't of State Police*, 360 F.3d 579, 582-83 (6th Cir. 2004) (cited at Pet. 13).

- *Doe v. Moore*, 410 F.3d 1337, 1342-46 (11th Cir. 2005) (cited at Pet. 12), addressed only substantive due process, not procedural due process.

- *Cutshall v. Sundquist*, 193 F.3d 466, 478-82 (6th Cir. 1999) (cited at Pet. 13), addressed whether Tennessee's adult sex offender registration requirement infringed a constitutionally protected liberty or property interest.

- *Bruggeman v. Taft*, 27 F. App'x 456, 458 (6th Cir. 2001) (cited at Pet. 13), was an unpublished opinion that merely repeated the holding of *Cutshall*.

- *Doe v. Michigan Dep't of State Police*, 490 F.3d 491, 497-502 (6th Cir. 2007) (cited at Pet. 13), addressed only substantive due process, not procedural due process.

- Finally, the cases cited at Pet. 17—*State v. Orozco*, 483 P.3d 331 (Idaho 2021); *Commonwealth v. Concepcion*, 164 N.E.3d 842 (Mass. 2021); *State v. Watkins*, 423 P.3d 830 (Wash. 2018); *State v. Rudy B.*, 243 P.3d 726 (N.M. 2010); *State v. Angel C.*, 715 A.2d 652 (Conn. 1998); *State v. Behl*, 564 N.W.2d 560 (Minn. 1997); *People v. Hanna*, 504 N.W.2d 166 (Mich. 1993); *W.M.F. v. State*, 723 P.2d 1298 (Alaska 1986); *State v. Cain*, 381 So. 2d 1361 (Fla. 1980); *Stokes v. Fair*, 581 F.2d 287 (1st Cir. 1978); *Woodard v. Wainwright*, 556 F.2d 781 (5th Cir. 1977); and *People v. Jiles*, 251 N.E.2d 529 (Ill. 1969)—merely held that it is not unconstitutional to try certain juveniles as adults.

These decisions do not conflict with the decision below because none of them even addressed the same issue.

IV. This case would be a very poor vehicle to address the question Ohio asserts is presented.

Even if this Court had jurisdiction, and even if the decision below conflicted with decisions of this Court or lower courts, certiorari would still not be warranted, for two independent reasons.

First, there is a possibility that the record of this case will soon be expunged—that is, destroyed. Under state law, D.R. is entitled to request the sealing and expungement of the record. Ohio Rev. Code §§ 2151.356(C), 2151.358(B). The juvenile court may order both sealing and expungement, or just sealing, if it finds that D.R. "has been rehabilitated to a satisfactory degree." *Id.* §§ 2151.356(C)(2)(e), 2151.358(B)(5). D.R. filed applications for sealing and expungement in April 2023. A hearing is pending.

If the court orders expungement, the record of this case will be physically destroyed and electronically deleted, so that it is permanently irretrievable. *Id.* § 2151.355(A). Even if the court merely orders the sealing of the record, the record will be automatically expunged when D.R. reaches his 23rd birthday. *Id.* § 2151.358(A). D.R. is currently 22 years old. He will turn 23 in January 2024.

There is a possibility, therefore, that the record of this case will soon cease to exist—perhaps even before the Court can decide the case. This is one reason that this case would be a poor vehicle for addressing the question Ohio asserts is presented.

The second reason is that the argument Ohio proffers in its certiorari petition is the opposite of the ar-

gument it made below. The certiorari petition argues that the Ohio Supreme Court went badly astray in applying the "fundamental fairness" standard to the juvenile sentencing procedure at issue. Below, however, Ohio argued *in favor* of applying this standard. Ohio State Sup. Ct. Br. 5. Ohio, quoting the state supreme court's precedents, contended that "fundamental fairness is the overarching concern," *id.*, and that "[f]undamental fairness is discovered in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake," *id.* at 5-6. Ohio's sole argument below was that the statute at issue *is* fundamentally fair. *Id.* at 6-12. The state supreme court duly applied the framework that Ohio asked it to apply. Pet. App. 7a-8a.

Ohio has now changed its litigation strategy. Now it is attacking the standard it urged upon the lower courts. To grant certiorari despite this U-turn would only encourage future litigants to engage in the same kind of sandbagging. Ohio could easily have preserved the claim it wishes to make in this Court by arguing below in the alternative—first, that "fundamental fairness" is the wrong standard, and second, that if it is the right standard, the juvenile sentencing procedure is fundamentally fair. But Ohio did not do that. Having successfully urged the state supreme court to use the fundamental fairness standard, Ohio should not be heard now to argue for some other standard instead.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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