No. 22-864

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

D.R.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Fourteenth Amendment's Due Process Clause entitle juvenile sex offenders to hearings at which courts have discretion to lift statutorily mandated sex-offender-registration obligations?

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REPLY

When he was sixteen, D.R. sexually assaulted a twelve-year-old friend. He pleaded guilty in a juvenile court. That court, as required by Ohio law, designated D.R. a sex offender. Ohio Rev. Code §2152.83(A)(1). The juvenile court classified him as a lowest-tier (Tier I) sex offender. Ohio law required him to continue registering for three years following the completion of his juvenile sentence. *See* Ohio Rev. Code §2152.84(A)(2)(b), (D); Ohio Rev. Code §2152.85(B)(1).

A divided Ohio Supreme Court held that the statutory requirement that D.R. continue to register violated his procedural-due-process rights. It held that judicial discretion "is a significant procedural protection in the juvenile-justice system," Pet.App.9a, and that statutes "offend[] fundamental fairness" when they "remove[] the discretion of the juvenile court at a critical time in the proceedings," Pet.App.8a. The court determined that Ohio law ran afoul of this fundamental fairness principle—thereby violating the Fourteenth Amendment's Due Process Clause—by denying juvenile courts the power to extinguish registration obligations during the three-year, post-sentence period. Pet.App.18a.

The Ohio Supreme Court's decision is indefensible. So D.R. wisely offers no sustained defense. He instead denies the case created a circuit split, insists the Court lacks jurisdiction to hear this case, and identifies a couple of supposed vehicle flaws. Each of his arguments comes up short. The Court should summarily reverse or, failing that, issue a writ of certiorari and set the case for argument.

I. The Ohio Supreme Court created a split of authority.

According to D.R., the Ohio Supreme Court's decision neither creates nor exacerbates any split of authority in the lower courts. That would be irrelevant if it were true; as the State's petition showed, the Ohio Supreme Court's error was plenty egregious to justify "the strong medicine of summary reversal." *Dudley v. Stubbs*, 489 U.S. 1034, 1039 (1989) (O'Connor, J., dissenting from denial of certiorari). But it is not true.

Two decades ago, this Court held that States may adopt bright-line rules concerning who must register as a sex offender. *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 7–8 (2003). It further held that, once the State elects to make sex-offender registration mandatory, sex criminals like D.R. have no right to a hearing on the question whether they are dangerous enough to justify mandatory registration obligations. The Due Process Clause does not require courts to engage in the "bootless exercise" of holding a hearing on a statutorily irrelevant issue. *Id.*

The same reasoning applies here. Ohio law required D.R. to register as a sex offender for at least three years after completing his juvenile sentence. Ohio Rev. Code §2152.84(A)(2)(b), (D); Ohio Rev. Code §2152.85(B)(1). That clear statutory command makes "bootless" any juvenile-court hearing about the appropriate duration of a juvenile sex-offender classification. Nevertheless, the Ohio Supreme Court held that the *procedural* protections of the Fourteenth Amendment's Due Process Clause entitled D.R. to a hearing at which he could seek to have his registration obligations extinguished. Pet.App.7a, 18a. The Ohio Supreme Court thus created a new procedural-due-

process right without ever identifying the substantive right that the additional process would protect.

The Ohio Supreme Court's holding, by contradicting *Connecticut Department of Public Safety*, contradicts numerous lower-court decisions. In the years following *Connecticut Department of Public Safety*, courts around the country have "rejected arguments that juvenile sex offenders are entitled to an individualized hearing before they can be classified as sex offenders." Pet.12 (collecting cases). "If juvenile sex offenders are not entitled to a hearing *before* the imposition of registration obligations, then they are not entitled to a hearing *after* the imposition of such obligations, either." *Id.* Thus, the Ohio Supreme Court's holding that D.R. was entitled to a hearing after completing his sentence contradicts these cases. The court's decision also contradicts the many cases rejecting procedural-due-process challenges to mandatory registration requirements, and the many other cases rejecting the proposition that procedural-due-process principles entitle juveniles to special criminal procedures. *Compare, e.g.*, *United States v. Juvenile Male*, 670 F.3d 999, 1013–14 (9th Cir. 2012), *and Woodard v. Wainwright*, 556 F.2d 781, 785–86 (5th Cir. 1977), *with* Pet.App.3a–4a.

While D.R. highlights claimed factual differences between these cases and his, *see* BIO.20–21, he identifies no relevant legal distinction.

D.R. barely even mentions the conflict between the decision below and *Doe v. Mich. Dep't of State Police*, 490 F.3d 491 (6th Cir. 2007). He simply asserts in passing that *Doe* was different, as it involved a claim of substantive due process rather than procedural due process. BIO.21. That misreads *Doe*, which

recognized that *Connecticut Department of Public Safety* "foreclosed" procedural-due-process challenges to mandatory registration requirements. 490 F.3d at 502. That recognition directly contradicts the Ohio Supreme Court's decision holding that procedural-due-process principles forbid imposing mandatory registration requirements on juvenile sex offenders. As a result, Ohio's state courts now recognize a due-process claim that its federal courts do not.

D.R.'s halfhearted defense of the Ohio Supreme Court's decision comes up short. He claims the Ohio Supreme Court correctly applied this Court's "fundamental fairness" precedent, and that its decision "consists entirely of conventional legal reasoning based on precedent." BIO.19. In fact, the court egregiously misapplied the fundamental fairness test.

The fundamental fairness test asks whether challenged procedures offend "'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Speiser v. Randall*, 357 U.S. 513, 523 (1958) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). That inquiry could not possibly justify the Ohio Supreme Court's decision, since the practice of giving sex offenders a chance to have their registration obligations lifted is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See* Pet.16–18.

In concluding otherwise, the Ohio Supreme Court badly botched the fundamental fairness test. Indeed, it did exactly what the Court has said *not* to do in applying that test: it created a new constitutional right derived from the court majority's "personal and private notions of fairness." *See Dowling v. United States*, 493 U.S. 342, 353 (1990) (quotation omitted).

Tellingly, D.R. identifies no holding by this Court that could even conceivably support the decision below.

II. This Court has jurisdiction.

Rather than defend the merits of the Ohio Supreme Court's decision, D.R. highlights supposed barriers to the Court's review. Nothing he says is new. The State already explained in its petition why the Ohio Supreme Court's decision is final, rests exclusively on federal law, and can be adjudicated notwithstanding mootness concerns. *See* Pet.19–26. D.R.'s brief does not alter the analysis.

Federal question. This Court cannot review state-court decisions that rest on "adequate and independent state law grounds." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020). A state-court decision will be held to rest on an independent state ground *only* if the state court "clearly and expressly" states that its decision rests on state law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *see also Ohio v. Robinette*, 519 U.S. 33, 44–45 (1996) (Ginsburg, J., concurring in the judgment). State courts do not satisfy the clearly-and-expressly standard simply by citing state constitutions or state-court decisions. *Robinette*, 519 U.S. at 36–37 (majority). Instead, unless it is "clear from the face of the opinion" that the state-law basis for a state court's decision is not "interwoven with the federal law," this Court will presume the state court "decided the case the way it did because it believed that federal law required it to do so." *Long*, 463 U.S. at 1040–41.

Regardless of whether the Ohio Constitution provided an *adequate* ground for the Ohio Supreme Court's decision, it provided no *independent* ground. Pet.20.

As an initial matter, D.R. pressed a single theory before the Ohio Supreme Court: he argued that Ohio mandatory-registration obligations violated the Fourteenth Amendment's Due Process Clause. D.R. disclaimed any argument that the Ohio Constitution provided an independent basis to award him relief; he noted that the due-process protections in the Ohio Constitution are identical to those in "the Due Process Clause of the Fourteenth Amendment." D.R. Br.7–8, *In re: D.R.*, Ohio Supreme Court Case No. 2021-0934; *see also* Pet.App.25a–26a (DeWine, J., dissenting) (observing D.R.'s failure to argue that the Ohio Constitution "provides different due-process protections than its federal counterpart").

D.R. now insists that the state-law ground he never raised below qualifies as an independent basis for the Ohio Supreme Court's decision. He notes, for example, that the court cited the Ohio Constitution alongside the Fourteenth Amendment in announcing its holding. *See* BIO.14. (An aside: D.R. wrongly asserts that the Ohio Supreme Court cited the Ohio Constitution in its "syllabus." BIO.15. The decision below contains no syllabus—the language D.R. cites comes from "[i]ntroductory material" that is "not… controlling" and exists for "research and indexing aid." Rule 2.4, Ohio Supreme Court Rules for the Reporting of Opinions.) D.R. also notes that the Ohio Supreme Court's opinion cites Ohio Supreme Court precedents. But these citations do not suffice to clearly and expressly ground the decision in state law. *See Robinette*, 519 U.S. at 36–37. At most, they are clues suggesting that the Ohio Supreme Court *might* have or *could* have relied on the Ohio Constitution. Under the "clearly and expressly" standard, which is supposed to keep the Court from having to divine the true

intentions of state-court judges, these clues cannot establish an independent state-law ground.

Mootness. Juvenile courts in Ohio may terminate a sex-offender classification three years after a juvenile completes his sentence. The Ohio Supreme Court issued its decision after that time had expired. *See* Ohio Rev. Code §2152.84(D); Ohio Rev. Code §2152.85(B)(1). Thus, D.R. already had a right to the hearing he sought—a hearing on the question whether to lift his mandatory registration obligations—before the Ohio Supreme Court issued its decision.

While these facts would normally moot the case, this case falls within the exception for matters "'capable of repetition, yet evading review.'" *Kingdomware Techs, Inc. v. United States*, 579 U.S. 162, 170 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). The State explained why in its petition. *See* Pet.22–24. Every case presenting the question whether the challenged provisions violate the Due Process Clause will be mooted (absent an exception to the mootness doctrine) within three years. And three years is not enough time to litigate a case through state courts to a decision in this Court.

In *Kingdomware*, this Court observed that "a period of two years is too short to complete judicial review." 579 U.S. at 170. D.R. says three years is "substantially longer," BIO.9, but never justifies his *ipse dixit*. Nor does he say anything at all about the circuit cases holding that three- and four-year periods are insufficient to permit full review. *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019–20 (9th Cir. 2010) and *Montgomery Envtl. Coal. v. Costle*, 646 F.2d 568, 582 (D.C. Cir. 1980).

Next, D.R. speculates that it might be possible for the State to litigate future cases more quickly because it litigated *Ohio v. Department of Labor*, No.21A247 (2022), on an expedited timeline. *See* BIO.9. But *Ohio* was an unusual case: given the immense importance of the question presented (whether OSHA could impose a vaccine mandate), and given the imminence of the challenged rule, the Court agreed to hear oral argument on an emergency stay motion. The Court's facilitating such speedy review in that unusual context hardly suggests it would do the same in a kiln-run case about the constitutionality of an ordinary state law.

D.R suggests that the State might be able to obtain a decision in a future case more quickly if it seeks expedited review. BIO.8–9. The circuits are divided over whether opportunities for expedited review matter when determining whether a case is capable of repetition yet evading review. Some circuits have held that they do not. *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 321 (D.C. Cir. 2014); *Del. Dep't of Nat. Res. & Envtl. Control v. United States EPA*, 746 F. App'x 131, 134 (3d Cir. 2018). Others have held that they do. *See Empower Texans, Inc. v. Geren*, 977 F.3d 367, 371–72 & n.1 (5th Cir. 2020) (noting that the "circuits are not unanimous" about whether the possibility for expedited review should be considered when deciding whether an issue might evade review). The Court need not resolve that question here. Even if the State might be able to seek a slightly accelerated briefing schedule, it has no way of accelerating the pace at which courts issue their decisions. D.R. speculates that future courts might act faster than the courts did in this case, but he never supports this speculation.

At bottom, the State has no practical ability to do all of the following within a three-year period: raise, brief, and argue the issue before a state trial court; litigate an appeal in the Ohio Court of Appeals; petition for review in the Ohio Supreme Court; potentially argue the case in that court; petition this Court for review; brief and argue the case in this Court; and obtain a decision from this Court.

Finality. 28 U.S.C. §1257(a) allows this Court to review "final" state-court decisions. The decision below was "final." True, the Ohio Supreme Court remanded D.R.'s case so that the trial court could decide whether to terminate his registration obligations. But, because three years have already passed since the end of D.R.'s conviction, the trial court now has *statutory* authority to lift D.R.'s registration obligations. *See above* 7. As such, the federal issue whether D.R. has a *constitutional* right to seek the lifting of his registration obligations is irrelevant to, and cannot again arise in, D.R.'s case. In short, this case falls within *Cox Broadcasting*'s third category: 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 outcome of the case." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 481 (1975). Cases like that are "final." *Id.* (quotation omitted).

D.R attempts to limit *Cox*'s third category to cases in which the double-jeopardy consequences of an acquittal make later review impossible. BIO.12. But *Cox* itself imposes no such limit. While third-category cases most often arise in the circumstances to which D.R. points, they arise in other situations too. Indeed, *Cox* itself identified *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156

(1973), as a third-category case. *Cox*, 420 U.S. at 469. *Snyder's* was not a criminal case, and thus did not implicate double-jeopardy concerns.

In the end, even D.R. admits that *Cox*'s third category applies when "later review of the federal issue would … be literally impossible." BIO.12 (quotation marks omitted). Here, that high bar is met: there is literally no way for the State to press the federal issue again in this case after remand.

III. D.R. identifies no other barriers to review.

D.R. identifies two supposed vehicle flaws, but neither should deter the Court from granting review.

Start with D.R.'s argument that the juvenile court might expunge or seal his record, complicating review. BIO.22. This is not a real problem. If the Court has concerns that the state court might alter the record, it can call for the record now. Regardless, D.R. misunderstands Ohio law. Upon the filing of an appeal in Ohio courts, the lower court is "divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *State ex rel. Bohlen v. Halliday*, 164 Ohio St. 3d 121, 128 (2021) (quotation omitted). So if D.R. is right that sealing or expunging his records would pose a barrier to the Court's review, then the juvenile court lacks jurisdiction to do so. (For what it is worth, the State has objected to sealing or expunging D.R.'s records. *See* Ohio Rev. Code §2151.356(C)(2)(d)(1); Ohio Rev. Code §2151.358(B)(4)(a).)

Now consider D.R.'s argument that the State forfeited its objection to the Ohio Supreme Court's application of the "fundamental fairness" standard by arguing "*in favor* of" that standard's application below.

BIO.23. D.R. senses a conflict where there is none. In its briefing below, the State argued that the "fundamental fairness" standard governed and required a ruling in favor of the State. *See* State Br.4–6, 11–12; Ohio Attorney General Br.6–7, *In re: D.R.*, Ohio Supreme Court Case No. 2021-0934. That is the same argument the State makes here; Ohio takes issue with the way in which the Ohio Supreme Court applied that standard, not with its decision to apply the standard in the first place.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted,

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