

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 OF AMICUS CURIAE
OHIO PROSECUTING ATTORNEYS ASSOCIATION
IN SUPPORT OF PETITIONER**

—◆—

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STATEMENT OF AMICUS INTEREST¹

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports Ohio's 88 elected county prosecutors. OPAA's mission is to assist prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and sponsors continuing legal education programs that facilitate access to best practices in law enforcement and community safety.

In light of these considerations, OPAA has a strong interest in this Court accepting review over the question presented. Although the context presented here is one of juvenile sex-offender registration duties, the Ohio Supreme Court's logic is a recipe for importing a juvenile judge's limitless "discretion" into a wide range of judgments that the Ohio General Assembly should be allowed to make as to juvenile offenders. For example, as mentioned in Justice DeWine's dissent below (*D.R.*, ¶¶ 70-71), the same notion of unfettered judicial discretion had been invoked in 2016 to overturn Ohio's statutory system governing the mandatory bindover of the worst juvenile offenders to adult

¹ No counsel for any party authored any part of this brief, and no monetary contribution was made by any counsel or party intended to fund the preparation or submission of this brief. The OPAA notified the parties, through the parties' attorneys, of its intent to file this amicus brief more than ten days before its due date, and the parties' attorneys confirmed the receipt of that notification.

court for prosecution. That decision was fortunately reconsidered in 2017, but, now, the decision below seeks to resurrect the same flawed claim that “due process” imposes a requirement of unfettered judicial discretion.

From the perspective of Ohio’s prosecutors, juvenile-court judges do not have any monopoly on assessing the goals of the juvenile-justice system and how those goals will be applied to juvenile offenses and offenders, including those offenders who at ages 16 or 17 have committed felony sex offenses. The Ohio General Assembly itself set those goals, which go beyond just “rehabilitation”, and it also can assess how felony sex offenders and other serious offenders should be treated within that system.

In terms of public policy, the Ohio Supreme Court’s ruling represents an avoidance of the reasoning as to why the Ohio General Assembly would require a modest three additional years of sex-offender registration beyond the time the offender’s juvenile sentence was concluded. In fact, juvenile D.R.’s case could be considered “Exhibit A” as demonstrating those reasons, including the fact that D.R.’s “progress” so far represented only a very small sample size and was a poor bellwether of how he might progress over the next succeeding years when he would no longer be under court-ordered supervision and treatment. It would have been just too soon to make that judgment after just ten months of supervision; the Ohio General Assembly could conclude that more information would be needed, and such information would only

be obtainable through the passage of time. Imposing a wait of three years to allow the gathering of more information on the juvenile's progress makes perfect sense, but the Ohio Supreme Court notably failed to address those possible grounds for the legislature's action.

The public policy informs the legal question too. Even accepting the *D.R.* majority's loose application of a "fundamental fairness" test, any assessment of "fundamental fairness" would be broad and would include an assessment of the reasons for the waiting period. But the Court gave zero attention to this aspect of the problem, and it instead focused on giving the juvenile judge a limitless "discretion". Instead of searching for some "fundamental" interest that would require overturning the legislature's approach to the issue, the majority substituted its own preference for unfettered judicial discretion – to the exclusion of any other possible interest that could be involved. The majority's assessment of "fairness" went in only one direction – unfettered judicial discretion.

As petitioner State of Ohio contends, the majority failed to acknowledge the difference between procedural due process and substantive due process claims. Justice DeWine's dissent pointed out the basic distinction between the two forms of due process analysis, citing a leading case that even involved the issue of sex-offender classification, *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). But the *D.R.* majority claimed that neither the Ohio Supreme Court nor this Court had ever adopted this

“different constitutional analysis”. (*D.R.*, ¶ 21 n. 1) This claim inspires a sense of wonderment, as the *Doe* decision was accurately summarized in the dissent, and it showed that this Court clearly *has* adopted this approach. The Ohio Supreme Court had also applied the same approach in the sex-offender classification context in a decision that even predated *Doe*. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502 (2002).

The *D.R.* majority’s confusion is perhaps best exemplified by the remedy it imposed based on purported “procedural” due process. As Gertrude Stein might say, “there is no there there.” The majority imposed no substantive standard on the juvenile courts in making the declassification decision, even though, without a “substantive predicate” that controls the decision, there can be no process “due” as a matter of law. And if constitutional due process actually applied, it would involve the recognition of burdens of going forward and burdens of persuasion governing the constitutionally-mandated procedure being imposed. None of this was discussed by the *D.R.* majority, and, in the end, the *D.R.* majority’s imposition of standardless discretion lays bare the fact that its ruling was wholly unmoored from a true procedural-due-process analysis.

Given OPAA’s concerns about the *D.R.* precedent in relation to Ohio’s mandatory-bindover system, and given that the work of prosecutors will be affected by *D.R.*-based unfettered-discretion arguments in other aspects of juvenile justice in Ohio, amicus curiae OPAA respectfully urges this Court to grant the petition for a

writ of certiorari. OPAA also approves of petitioner State of Ohio's request for summary reversal.



SUMMARY OF THE ARGUMENT

When a statute precludes particular relief at a particular time, the issue would not be a matter of “procedural due process” as far as whether the statute affords the right to be heard at a meaningful time in a meaningful manner. Instead, the issue would be whether there is some substantive constitutional principle barring the legislature from imposing the limitation on relief at that time. If the statute does not afford relief at that time, it is a substantive limitation, not a procedural one, and the challenge would need to be based on substantive due process or equal protection. “Such claims ‘must ultimately be analyzed’ in terms of substantive, not procedural, due process.” *Doe*, 538 U.S. at 8.

While purporting to apply a “fundamental fairness” test, the *D.R.* majority failed to analyze the issue of whether it is really a “fundamental” constitutional imperative that a juvenile sex offender must be allowed to seek the termination of his Tier I duty to register just ten months after the initial classification. Instead of asking that “fundamental” question, the majority concluded that older juvenile sex offenders must be allowed to seek an early termination at the end-of-disposition stage because of a “due process” imperative that juvenile judges have unfettered discretion. This

analysis defies the limits on *procedural* due process, and it disregards the Ohio General Assembly's prerogative to craft the registration scheme as it thinks appropriate in light of the dangers of sex-offender recidivism that are reasonably thought to exist.

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ARGUMENT

PROCEDURAL DUE PROCESS DOES NOT COMPEL THE CREATION OF ACT-OF-GRACE OPPORTUNITIES FOR A JUVENILE COURT TO SHORTEN A JUVENILE SEX OFFENDER'S REGISTRATION PERIOD BASED ON ITS EXERCISE OF UNFETTERED DISCRETION.

The Ohio Supreme Court's analysis short-circuited the proper constitutional analysis and, in the end, imposed its own conception of "fairness" by requiring that juvenile judges be given unfettered discretion. This amounts to the imposition of an act-of-grace process, with no substantive predicate controlling the juvenile court's decision, and with no actual procedures being compelled by this supposed constitutional right.

A.

The Ohio General Assembly has made substantial allowances for juvenile sex offenders, as shown by the present case. Juvenile D.R. was adjudicated delinquent for committing gross sexual imposition against a 12-year-old victim, an offense which would have resulted

in a Tier II mandatory sex-offender registration duty for an adult offender lasting 25 years and requiring verification every 180 days. O.R.C. 2950.01(F)(1)(c); O.R.C. 2950.06(B)(2); O.R.C. 2950.07(B)(2). Under the statutory scheme as applicable to juveniles, however, the juvenile court at the time of the initial disposition was allowed to reduce the registration requirement to a Tier I level, which, for juveniles, would only require 10 years of registration with annual verification. O.R.C. 2950.06(B)(1); O.R.C. 2950.07(B)(3). Even this Tier I status as a juvenile sex offender represented a reduction from what an adult offender would have faced, since adult offenders would have faced a 15-year requirement, instead of the 10-year requirement faced by this juvenile. O.R.C. 2950.07(B)(3).

In terms of the possible early reduction or termination of the registration duties, the Ohio General Assembly has made even more allowances for juveniles. Adult Tier II offenders cannot obtain any early reduction or termination. Adult Tier I offenders can seek early termination only after at least 10 years of registration have occurred. O.R.C. 2950.15(C)(1).

For juvenile sex offenders who were age 14 or 15 at the time of the offense and who were not previously adjudicated delinquent for a sexually oriented offense, the juvenile court need not apply a registration duty to the offender at the time of initial disposition. O.R.C. 2152.83(B). In these discretionary-registration situations, if the court applies a registration duty at the time of initial disposition, it can reduce or terminate the registration requirements at the end-of-disposition

stage when the court ends its supervision of the juvenile. O.R.C. 2152.84(A)(1) and (A)(2)(b) and (c). Even if the court continues some form of registration at the end-of-disposition stage, see O.R.C. 2152.84(A)(2)(a), the juvenile can petition for a reduction or elimination of the continuing duty to register as soon as three years after the end of disposition, and can continue to seek such relief at three-year or five-year intervals thereafter. O.R.C. 2152.85(A) & (B).

The Ohio General Assembly makes a distinction as to juveniles who were 16 or 17 years old at the time of their offense. For those offenders, the court must impose a registration duty at the time of initial disposition or upon release from their commitment from a secure facility. O.R.C. 2152.83(A). But the court has discretion to choose a Tier level it deems appropriate to the juvenile, see O.R.C. 2152.83(A)(2), and this can include, as here, choosing a Tier I level of registration even though the offense is otherwise defined for adult offenders as a Tier II offense. Then, at the end-of-disposition stage, the court can reduce the Tier level it originally applied, reducing a Tier III offender to a Tier II or Tier I level, and reducing a Tier II offender to a Tier I level. O.R.C. 2152.84(A)(2)(c) & (B)(2). However, at the end-of-disposition stage, if the offender is already at the lowest Tier I level, then no reduction is possible, and the offender is not eligible for a termination of the duty to register, and the court may only continue the offender at the Tier I level. O.R.C. 2152.84(A)(2)(a) & (b). Nevertheless, as soon as three years after the end-of-disposition order, even this

offender can petition to have the Tier I duty eliminated. O.R.C. 2152.85(A) & (B).

Purely in terms of whether this was a wise legislative choice, it is difficult to second-guess the Ohio General Assembly in imposing this three-year waiting period on older juvenile offenders. The initial Tier I registration duty had only been in place for less than ten months in this case when the juvenile court had reached the end-of-disposition stage in this case. Although there were positive signs presented as to the juvenile's progress in various regards, this juvenile was now being cut loose from all juvenile-court supervision. Juvenile D.R. had been under intensive treatment as required by the court, which had now ended, and he had been under the court's probation supervision, which was now ending as well. The juvenile's positive signs of progress so far – all occurring *under the intensive treatment and supervision* required by the court's probation order – would not necessarily and definitively predict how the juvenile would move forward without such treatment and without such supervision over the next number of years.

Moreover, nothing suggested that the risk of recidivism would have entirely dissipated in the less than ten months since the initial disposition applying the lowest possible Tier level to this offender. Indeed, substantial concerns about recidivism would have remained, as even the defense information in the case indicated at least a “low risk” of reoffense. “Low risk” does not mean “no risk.”

The Ohio General Assembly was dealing with the cold and hard fact that sex offenders reoffend in substantial numbers. “Sex offenders are a serious threat in this Nation.” *Doe*, 538 U.S. at 4 (quoting another case). “The risk of recidivism posed by sex offenders is frightening and high.” *Smith v. Doe*, 538 U.S. 84, 103, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (internal quotation marks omitted). Even when an offender is not likely to reoffend, a risk of recidivism in any degree still provides a rational basis for legislative action.

C.

Nothing in “procedural due process” required the Ohio General Assembly to adopt a different approach. In a due process challenge, “the first inquiry is whether a protected property or liberty interest is at stake.” *State ex rel. Haylett v. Ohio Bur. of Workers’ Comp.*, 87 Ohio St.3d 325, 331, 720 N.E.2d 901 (1999). Due process “protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake.” *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). But if the substantive law affords no relief at the particular time, then no cognizable due process interest is “at stake” at the time, and there is no due process justification to afford an opportunity to be heard at that time. Providing a “meaningful opportunity to be heard” would relate to being afforded an opportunity at a time appropriate to the public official’s decision, usually before the decision is made. But if there is no relief

available at the time, there is no need as a matter of procedural due process to afford a meaningful opportunity to be heard.

The Ohio Supreme Court said as much in *Hayden*, in which the sex offender complained that he had been deprived of due process because he was not afforded a hearing on the issue of whether he was a sexually oriented offender. Due to the conviction that had already occurred, the trial court was merely recognizing a status that “attaches as a matter of law”, and, as a result, there was no procedural due process interest requiring that he be afforded the opportunity to be heard. *Hayden*, syllabus. When the court’s ultimate action is to “merely engage[] in the ministerial act of rubber-stamping the registration requirement on the offender”, there is no need for an adversarial hearing as a matter of procedural due process. *Hayden*, ¶ 16 (quoting appellate dissent).

Likewise, in *Doe*, the plaintiff argued that procedural due process was violated because the statutory scheme did not allow him to prove lack of dangerousness. But the presence or absence of dangerousness was not an element or defense to the operation of the registration scheme. That fact was “of no consequence” to the law in question. *Doe*, 538 U.S. at 7. This Court held that “due process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme.” *Id.* at 3. A hearing on current dangerousness would have been a “bootless exercise” because it was immaterial of the issue. *Id.* at 8. Those “who assert a right to a hearing under the Due Process Clause

must show that the facts they seek to establish in that hearing are relevant under the statutory scheme.” *Id.* at 8.

In the present case, there could be no procedural due process justification for affording the juvenile the opportunity to be heard on the issue of whether his registration duty would be entirely terminated at the end-of-disposition stage. As a matter of law, he was not entitled to such relief at that time, and there was no cognizable due process interest *at stake* at that point. As in *Doe*, procedural due process afforded D.R. no right to a hearing at that time to engage in the bootless exercise of factually disputing whether the registration duty would be continued; that consequence followed as a matter of law. There was no state-law interest at stake at that time and no “procedural due process” justification for affording D.R. a hearing at a time when, as a matter of state law, he could not receive early termination.

Although the statute afforded the defense the opportunity to be heard on the issue of early reduction or termination at the end-of-disposition stage, the hearing was not required as a matter of procedural due process. For this group of juvenile Tier I sex offenders who were not statutorily eligible for early termination, the General Assembly could have dispensed with the hearing as to such offenders. In that regard, the statute conveniently allowed the defense to make a record of whatever information that would also be helpful to the court three years later when the court likely will be addressing whether to terminate the juvenile’s duty at

that time. But the juvenile is *also* afforded the opportunity to be heard three years later when he files his petition for termination. By affording the juvenile *two* opportunities to be heard before the court makes its decision three years hence, the statutory scheme would easily comply with notions of procedural due process.

Nor does the statutory scheme's creation of a hearing mechanism at the end-of-disposition stage perforce mean that procedural due process commands such procedures. "The State may choose to require procedures * * * but in making that choice the State does not create an independent substantive right." *Olim v. Wakinekona*, 461 U.S. 238, 250-51, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) (existence of "a careful procedural structure" does not create protected liberty interest). "The mere expectation of receiving a state afforded process does not itself create an independent liberty interest protected by the Due Process Clause." *Doyle v. The Oklahoma Bar Assn.*, 998 F.2d 1559, 1570 (10th Cir. 1993).

D.

The *D.R.* majority doubly erred in its analysis because it was replacing the waiting period with a discretionary "act of grace" early-termination process at the end-of-disposition stage. But procedural due process by definition would *never* require such a process. This is because discretionary "act of grace" opportunities for an applicant do not thereby create liberty or

property interests protected by due process. *United States v. Herrera-Pagoada*, 14 F.4th 311, 320 (4th Cir. 2021). In order for due process to apply, “an individual claiming a protected interest must have a legitimate claim of entitlement to it” based on “substantive predicates” that “mandat[e] the outcome to be reached upon a finding that the relevant criteria have been met.” *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460-62, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989).

The *D.R.* majority appeared to be concluding that the juvenile court should have the same ability to grant early termination at the end-of-disposition stage as it would have had for 14-year-old and 15-year-old offenders. But that statutory process depends on no particular finding by the court and creates no particular right to early-termination relief. While the statute provides for the mandatory consideration of various factors, the presence or absence of those factors or considerations are *not made necessary predicates* for the court to grant or deny the relief, and the court in the end exercises plenary discretion as an act of grace by considering everything without any standard controlling its ultimate judgment to do whatever it wants. By definition, due process is inapplicable to such a process lacking any controlling substantive predicate, and, by definition, “procedural due process” would not demand the creation of an “act of grace” early-termination process.

It is particularly inappropriate to think that the constitutional standard of procedural due process would have reached down to micromanage when a court must

consider early termination or would dictate that a court must be given standardless discretion in making such a decision.

In addition, this copying of the statutory approach as to some offenders would confirm that it does not arise out of fundamental conceptions of fairness owing to procedural due process. The requirements of procedural due process would not serendipitously operate as an exact duplicate of a state's act-of-grace provision as applicable to other offenders.

E.

The *D.R.* majority also engaged in statutory cherry-picking in its purported "procedural" due process assessment. While the Ohio General Assembly has stated that the juvenile system's policy goals include restoring and rehabilitating the juvenile offender, it *also* has stated that there are other goals, including "protect[ing] the public interest and safety" and "hold[ing] the offender accountable for the offender's actions". O.R.C. 2152.01(A). By providing for the registration of "certain delinquent children who have committed sexually oriented offenses", "it is the general assembly's intent to protect the safety and general welfare of the people of this state." O.R.C. 2950.02(B). As the Ohio Supreme Court has conceded, "[t]he General Assembly has determined that certain juveniles adjudicated delinquent for certain offenses must register as sex offenders to protect the public

***.” *State v. Buttery*, 162 Ohio St.3d 10, 2020-Ohio-2998, 164 N.E.3d 294, ¶¶ 27-28 (2020).

The *D.R.* majority at one point acknowledged the multiple general policy goals of the juvenile system. (*D.R.*, ¶ 1) But the majority’s analysis cherry-picked from the list, contending that judicial discretion was needed “to promote that system’s rehabilitative purpose” and that the system “is designed to advance rehabilitation over punishment and to shield juveniles from the stigma of their juvenile delinquency.” (*D.R.*, ¶¶ 16, 31)

In imposing a mandatory three-year wait, the Ohio General Assembly plainly was *not* elevating the consideration of “rehabilitation” over all other considerations. Waiting three years promotes other goals and interests, including allowing the gathering of additional information so that the public-protective purposes of the registration requirement are not prematurely terminated before an adequate track record is established by the offender. As the *D.R.* majority itself conceded, this waiting-period provision ensured that D.R. would be “entering adulthood with a moniker that was meant to ensure public safety and accountability for his wrongdoing as a juvenile.” (*D.R.*, ¶ 33) Those interests provided a rational basis for the law and should have been sufficient to uphold the “fundamental fairness” of the law.



CONCLUSION

In light of the foregoing, amicus curiae OPAA respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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