IN THE SUPREME COURT OF OHIO
2021

In re D.R.	Case No. 21-934
(State of Ohio, Appellant)	On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals No. C-190594

MERIT BRIEF
OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLANT STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county 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 encourage best practices in law enforcement and community safety.

In light of these considerations, OPAA has significant concerns about the First District's decision here, which misapplied its "procedural due process" analysis. 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." *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003).

The First District conceded that, under an equal protection analysis, there is a rational basis for treating older juvenile offenders differently in terms of sex-offender registration. This same rational-basis conclusion ultimately negates any "substantive due process" challenge to the General Assembly's conclusion that early termination of a Tier

I registration duty should not be available for such offenders as soon as the end-of-disposition stage. The First District fundamentally erred in misapplying "procedural due process" to impose a substantive limitation on the General Assembly's prerogative to control the timing of early termination.

It was particularly dubious for the First District to entirely omit any reference to the fact that the statutory scheme allows the juvenile to seek early termination of the 10-year registration duty a mere three years after the end-of-disposition order. In effect, the statutory scheme requires that these mandatory registrants stay on the Tier I registration for a somewhat longer period, thereby giving the juvenile court a more-reliable record of their progress at the time any termination would take place. These juvenile registrants are still better off than adult Tier I offenders, who must wait 10 years before seeking termination of the adult's 15-year Tier I registration duty.

In the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the appellant State of Ohio.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's merit brief.

ARGUMENT

Amicus Proposition of Law: Pursuant to its legislative authority, the General Assembly can control if and when juvenile sex offenders can seek an early termination of their registration duties. There is no constitutional imperative to create early-termination opportunities whenever the sex offender or court might desire, and procedural due process would not require the creation of such opportunities.

While purporting to apply a "fundamental fairness" test, the First District 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 First District concluded that older juvenile sex offenders must be allowed to seek an early termination at the end-of-disposition stage merely because younger offenders are allowed to do so. This analysis defies the limits on procedural due process, and it disregards the 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.

A.

The General Assembly already 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. R.C. 2950.01(F)(1)(c); R.C. 2950.06(B)(2); 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. R.C. 2950.06(B)(1); 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. R.C. 2950.07(B)(3).

In terms of the possible early reduction or termination of the registration duties, the General Assembly has made even more allowances. 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. 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. R.C. 2152.83(B); but see R.C. 2152.82(A) (even 14- and 15-year-olds subject to registration if previously adjudicated for sexually oriented offense).[1] 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. R.C. 2152.84(A)(1) and (A)(2)(b) and (c). Even if the court continues some form of registration at the end-

[1] A category of "public registry-qualified juvenile offender registrant" (see R.C. 2950.01(N)) also exists for those juvenile sex offenders committing a narrow subset of the most-serious sexually oriented offenses and who have received a serious-youthful-offender disposition. But that narrow group of juvenile sex offenders is not addressed in this briefing.

of-disposition stage, see 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 if necessary. R.C. 2152.85(A) & (B).

The 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. R.C. 2152.83(A). But the court has discretion to choose a Tier level it deems appropriate to the juvenile, see 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. 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. 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. R.C. 2152.85(A) & (B).

B.

Even though the General Assembly has made these substantial allowances far beyond anything available to adult offenders, it is unsurprising that this juvenile offender wants more. If he had been age 14 or 15 at the time of the offense, he would have been

allowed to seek early termination of the Tier I duty at the end-of-disposition stage. But, under the nuanced statutory scheme, the General Assembly has determined that a longer duty is warranted for juveniles who were age 16 or 17 at the time of the offense. The end-of-disposition stage was determined by the General Assembly to be too soon to make the judgment as to whether to entirely terminate the duty to register. More time was thought to be warranted before termination, at least until three more years have passed.

Purely in terms of whether this was a wise legislative choice, it is difficult to second-guess the General Assembly, as this case shows. The initial Tier I registration duty had only been in place for less than ten months when the juvenile court had reached the end-of-disposition stage. 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 definitely predict or control how the juvenile would move forward without such treatment and without such supervision over the next number of years.

Moreover, nothing suggests 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 remain.

The record shows that the juvenile had raped the victim twice – the second time

after he had been told to stop the first time. The victim reported that D.R. used his fingers and tongue to penetrate her vagina while she was at a sleepover at his mother's residence. (Trial Rec. 1, "Case Summary Sheet") As the magistrate found at the time of the initial disposition:

> **The nature of the sexually oriented offense.** [D.R.'s] mother and the victim's mother were best friends. During an overnight sleep over at [D.R.'s] house, [D.R.], the victim and other children were downstairs watching a movie. At some point the victim sat on [D.R.'s] lap. [D.R.] began to feel on the victim, age 12 and started to touch her vagina. She told him to stop. Later when it was bed time, [D.R.] began touching the victim again and ultimately penetrated her vagina with his tongue. The victim was scared and didn't like it, but didn't know what to do *(State's Exhibit No. 2, victim's letter)*. [D.R.], who was 16 years old at the time, took advantage of and sexually assaulted the victim, age 12 – someone he knew and grew up with. The victim and her family are devastated by this incident. *(State's Exhibit No. 3)*

(Trial Rec. 23, Magistrate's 8-23-18 "Findings", p. 1; emphasis sic) As the prosecutor noted, "this was the result of some opportunistic and really predatory behavior on the part of the defendant." (Tr. 8-17-18, p. 18)

The prosecutor was allowing the admission to the lesser charge of gross sexual imposition only because it was in the best interest of the child victim, not because of any lack of evidence as to the charged rape counts. (Tr. 4-4-18, p. 10-11) At the time of the initial disposition, the victim in her impact statement discussed the psychological trauma she continues to suffer as a result of these acts. (Tr. 8-17-18, p. 9-15) As the magistrate noted, however, D.R. was minimizing his actions and the harm he had caused. (Magistrate's 8-23-18 "Findings", p. 1) The magistrate emphasized that court-ordered treatment *and* registration were both needed to help reduce the danger that D.R. would

re-offend. (Id.) The magistrate also found that D.R. needed intensive treatment programming. (Id.)

Even with the progress reflected by the time of the end-of-disposition hearing less than ten months later, there would remain reasons to be concerned. Progress under less than ten months of the court's supervision can be viewed as a "small sample size" in relation to the question of whether the juvenile would continue such progress without such supervision. Even the positive reports included an indication that D.R. poses an *average* risk of reoffense and at least a "low risk". (Tr. 6-7-19 p. 7-8 – "On the Static-99, which is an instrument they generally use for adults, page 12, puts [D.R.] at an average risk * * *"; "Dr. Dryer opines that my client is at low risk") The defense's appellate briefing and its memorandum opposing jurisdiction have both conceded that there *still* will be a risk of recidivism, albeit lowered after treatment. Defense Appellate Brief, p. 4, 5, 15, 17, 22 (arguing that psychological evaluation opined that "he was a low risk to reoffend"; "his low risk to re-offend"; "now a low risk to re-offend"; "the court had before it evidence that D.R. had reduced his risk to re-offend to low."; "low rate of recidivism"; see, also, MSJ, p. 4, 9) The defense even cited a report in its appellate brief as indicating that, even after receiving treatment, supervision and support, juvenile sex-offender recidivism rates would be "at 4%-10%". Defense Appellate Brief, p. 22.

The 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." *Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003) (quoting another case). "The risk of recidivism posed by sex offenders is frightening and high." *Smith v. Doe*, 538 U.S. 84, 103 (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. This Court's "role is not to determine which view is the better-reasoned or more empirically accurate one, or to judge the wisdom of the General Assembly's conclusions" about recidivism risks. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶ 7 n. 2.

In a case in which the defense is conceding the existence of a risk of recidivism, albeit "low", and in which some evidence indicates "average" risk, there are legitimate concerns about the possibility of recidivism by this and other offenders that would not have gone away in the less than ten months between initial disposition and the end of disposition. With this juvenile already at the lowest-possible Tier I level, continuing him on that minimal registration status until a petition is filed three years hence would give the court concrete information on how the juvenile has progressed during that intervening time period while the offender is not under the supervision and ongoing treatment ordered by the court.

C.

Nothing in "procedural due process" required the General Assembly to adopt a different approach. As the Attorney General's brief explains, procedural due process is not an end in itself. 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 (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 (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.

This Court said as much in *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 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 *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003), 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. Id. at 7. The 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 of the lack of materiality 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 *Hayden*, the juvenile court at that point was required as a matter of law to continue the minimal Tier I classification. As in *Hayden*, the procedural due process challenge necessarily fails. 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.

Although the statute affords the defense a hearing in relation to 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. It would have been sufficient to allow the offender a meaningful opportunity to be heard three years later when the juvenile would be eligible. Even so, at the same time the juvenile court was addressing the issue of whether it would end its disposition, the statute conveniently allowed the defense to make a record of whatever information 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.

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 easily complies with procedural due process.

Contrary to the defense arguments, it is not a "red herring" to consider the fact that the statutory scheme will allow D.R. to seek early termination three years later. With the defense argument depending on wide-ranging notions of "fundamental fairness", the issue of "fairness" of course would consider the fact that D.R.'s eligibility is merely being postponed for three years rather than entirely precluded. The "fairness" of the statutory scheme's treatment of D.R. would be considered in light of the scheme as a whole, including R.C. 2152.85. See *In re R.B.*, 162 Ohio St.3d 281, 2020-Ohio-5476, ¶ 5 (noting scheme "is set forth in a series of statutes", including R.C. 2152.85).

To be sure, it is a fairly-unique feature of the statutory scheme that it affords a hearing at the end-of-disposition stage when the particular Tier I offender cannot receive a reduction as a practical matter and is not yet eligible for early termination. If there had been some ambiguity about whether the juvenile was statutorily eligible, then the allowance of a hearing at that time would have been an important indicator that the statute was meant to provide eligibility for early termination at that time too, instead of later. But the statutory scheme is crystal clear in multiple ways that these juvenile sex offenders originally classified as Tier I at the time of initial disposition under R.C. 2152.83(A) cannot receive an early termination at the end-of-disposition stage. R.C. 2152.84(A)(2)(b). In any event, the novel or rare nature of a provision does not make it unconstitutional. See *Martin v. Ohio*, 480 U.S. 228, 236 (1987).

Nor does the statutory scheme's creation of hearing procedures 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 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (existence of "a careful procedural structure" does not create protected liberty interest). Procedures provided at the end-of-disposition stage would be matters of state law that are not compelled by procedural due process.

The defense faces a high burden of proof in challenging the constitutionality of this provision.

> [A]ll enactments enjoy a strong presumption of constitutionality, and before a court may declare the statute unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provision are clearly incapable of coexisting. *State ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Further, doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute. *State, ex rel. Swetland, v. Kinney* (1982), 69 Ohio St.2d 567, 23 O.O.3d 479, 433 N.E.2d 217.

State v. Gill, 63 Ohio St.3d 53, 55 (1992). "[T]he General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions." *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas*, 9 Ohio St.2d 159, 162 (1967).

The defense has not demonstrated that the postponing of the juvenile's eligibility for early termination for three years is clearly incompatible with procedural due process beyond a reasonable doubt.

D.

As sought by the defense here, the decision to grant an early termination of the registration duty would be analogous to an adult court's decision on whether to grant "shock probation" or "judicial release". But these are "acts of grace" that are not dependent on the proof of any particular fact that would give the defendant an actual statutory right to early release, and these statutes involving the exercise of plenary discretion do not create a "substantial right" for the offender to receive an early release from prison. *State v. Coffman*, 91 Ohio St.3d 125, 127-28 (2001) (shock probation not "substantial right"); *State v. Chapman*, 1st Dist. No. C-210210, 2021 Ohio App. LEXIS 3858 (2021) (applying *Coffman* to judicial release).

The defense is seeking the application of a highly-discretionary "act of grace" early-termination process at the end-of-disposition stage, and it is contending that procedural due process requires such a process. 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). Under due process, "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 (1989).

As sought by the defense here, 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 necessary predicates for the court to grant or deny the relief, and the court in the end exercises its plenary discretion as an act of grace by considering everything without any standard controlling its ultimate judgment to do what it sees fit. By definition, due process is inapplicable to such a process lacking any substantive predicates, and, by definition, "procedural due process" would not demand the creation of an "act of grace" early-termination process.

Moreover, the narrow issue at stake is merely whether the 10-year duty to register as a Tier I offender will continue. While this Court has made statements indicating that registration is generally punitive for sex offenders, even juvenile sex offenders, see *In re D.S.*, 146 Ohio St.3d 182, 2016-Ohio-1027, ¶ 23, such statements would not necessarily control in the narrow context of whether it is "punitive" to have these juvenile Tier I offenders wait another three years before seeking "act of grace" early termination. Having to register and verify on an annual basis for ten years amount to de minimis requirements that are remedial and not punitive. *Hayden*, ¶ 15; *State v. Cook*, 83 Ohio St.3d 404, 412 (1998). And the very concept of providing an "act of grace" early-termination opportunity for the offender would be a remedial matter as well.

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. Juvenile courts are purely creatures of statute and were created long after the "due process" constitutional provisions were promulgated.

Due process "cannot have created a substantive right to a specific juvenile-court proceeding." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, ¶ 17.

In determining what procedural due process requires here, the First District remanded for the juvenile court to consider early termination as if D.R. were already eligible under the statutory scheme. In effect, the court determined that the dictates of procedural due process somehow exactly matched what the statute provided for 14-year-old and 15-year-old offenders who are statutorily eligible for early termination at the end-of-disposition stage. This copying of the statutory approach as to some offenders confirms that it does not arise out of fundamental conceptions of fairness owing to procedural due process, but, rather, merely arises out of the appellate court's view that the General Assembly should have applied the same approach to 16-year-old and 17-year-old offenders. At most, that kind of logic sounds in the realm of an equal protection challenge, not "procedural due process". The requirements of procedural due process would not serendipitously operate as an exact duplicate of what the statute provides as to other offenders.

Even if procedural due process would compel some kind of review of the registration duty by the juvenile court at the end-of-disposition stage, it would not compel a system in which the juvenile court is given standardless discretion as sought here. Consistent with procedural due process, the General Assembly could impose limits on when early reduction or termination would be allowed. Again, by copying the statutory approach as to 14-year-old and 15-year-old juvenile offenders, the First District has merely confirmed that it was *not* searching for what procedures would actually be required as a matter of fundamental conceptions of fairness.

E.

Much of the First District's logic assumes that a juvenile sex offender must be afforded the possibility of early reduction or termination at the end-of-disposition stage because offering such a possibility is an imperative of the juvenile system's policy goals of restoring and rehabilitating the juvenile offender. But this assumption ignores other goals of the juvenile system, which expressly include "protect[ing] the public interest and safety". 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." R.C. 2950.02(B). "The 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, ¶¶ 27- 28. Given such public-protective purposes, it is plain that the goals of restoring and rehabilitating juvenile sex offenders are not the only policy goals of the juvenile court generally or of the registration scheme as applicable to those offenders.

This kind of "policy"-driven analysis is misplaced in any event. The policy goals of the statutory scheme are to be gathered from the four corners of the relevant statutory text. "We should look * * * to the four corners of the enactment and thus determine the intent of the enacting body." *MacDonald v. Bernard*, 1 Ohio St.3d 85, 89 (1982) (quoting another case). "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so * * *." *Brogan v. United States*, 522 U.S. 398, 408 (1998). "[T]he intent of the law-makers is to be sought first of all in the language employed * * *. The question is not what did the general assembly intend to enact, but

what is the meaning of that which it did enact." *Slingluff v. Weaver*, 66 Ohio St. 621 (1902), paragraph two of the syllabus.

In light of these principles, a court cannot surmise a policy "goal" that is above and beyond or different than what the statutory text itself indicates and then claim that the General Assembly is violating that "goal". The juvenile-court system is entirely a creation of the General Assembly, and its goals for that system must be judged in relation to all of the statutory text. A statute cannot violate itself, and a court cannot extrapolate "purposes" and "goals" that are directly inconsistent with the four corners of the plain statutory text. A court cannot do this as a matter of "interpretation" or as a matter of creating a "goal" that the statutory text itself negates.

F.

The defense errs in relying on *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446. *C.P.* was addressing whether an automatic Tier III lifetime registration requirement violated cruel and unusual punishment under the Ohio Constitution. The lifetime duty could not be shortened until 25 years elapsed. *C.P.*, ¶ 23. In sharp contrast, D.R. does not face any lifetime registration duty, and the juvenile court had the discretion to recognize a Tier level as low as Tier I at the initial disposition, and it did so here. At most, only a 10-year registration duty applies to this juvenile under Tier I, and even that time frame is not "automatic", as the court can terminate the 10-year duty as soon as three years after the end-of-disposition stage.

C.P. is also distinguishable because it involved the initial imposition of the Tier III lifetime duty, and the juvenile court completely lacked discretion at that stage. *C.P.* was not addressing what procedural due process might require in terms of the availability

of "act of grace" early-termination possibilities at the end-of-disposition stage.

While *C.P.* is manifestly distinguishable and limited to the lifetime Tier III duty it was addressing, this Court's decision in *In re D.S.*, 146 Ohio St.3d 182, 2016-Ohio-1027, is closer to the mark, holding that a 25-year Tier II registration duty in that case was not invalid because it would last beyond the juvenile's 18th and 21st birthdays.

G.

In claiming a denial of procedural due process, the defense is largely complaining about the General Assembly's decision to make the distinguishing classification based on the age of juvenile sex offenders. Juvenile sex offenders who were 14 or 15 years old at the time of the offense can seek early reduction and early termination at the end-of-disposition stage, while offenders who were 16 and 17 years old can only seek reduction and not termination at that stage. But "States are not barred by principles of '*procedural* due process' from drawing such classifications. Such claims 'must ultimately be analyzed' in terms of substantive, not procedural, due process." *Doe*, 538 U.S. at 8 (citation omitted; emphasis in quoted case).

The First District conceded that a rational basis existed for this differing treatment of 16- and 17-year-old juvenile sex offenders as opposed to younger offenders. The same rational basis would lead to the rejection of any substantive due process challenge to the classification (even if there were a cognizable due process interest at stake in an act-of-grace mechanism as to a Tier I duty). As stated by the First District in an earlier case:

> {¶2} M.I.'s sole assignment of error alleges that the mandatory classification of 16- and 17-year-old sex offenders under R.C. 2152.83(A) and 2152.84(A)(2)(c)

violates the Equal Protection Clauses of the United States and Ohio Constitutions, because there is no rational basis for treating juvenile sex offenders differently based upon their ages. Under the juvenile-sex-offender laws, sex offenders 13 or younger may not be classified, classification is discretionary for 14-and 15-year-old sex offenders, and 16- and 17-year-old sex offenders must be classified. R.C. 2152.83. The juvenile court has the discretion to determine the appropriate tier in which to place 16- and 17-year-old sex offenders, but the court must classify them. *Id.* Once a juvenile sex offender has been classified, the juvenile court may lower the classification at the end-of-disposition hearing, but the court has no authority to declassify the juvenile. R.C. 2152.84(A)(2)(c). Nor may the court increase the classification. *Id.*; R.C. 2152.84(B)(2).

* * *

{¶4} M.I. argues that there is no rational basis for treating juvenile sex offenders differently based on their ages. The Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Appellate Districts have considered and rejected this argument. *See In re R.G.*, 11th Dist. Geauga No. 2016-G-0064, 2016-Ohio-8426; *In re T.M.*, 11th Dist. Geauga, 2016-Ohio-8425, 78 N.E.3d 349; *In re D.C.*, 8th Dist. Cuyahoga No. 103854, 2016-Ohio-4571; *In re D.D.*, 5th Dist. Stark No. 2015CA0043, 2015-Ohio-3999; *In re A.W.*, 5th Dist. Knox No. 15CA3, 2015-Ohio-3463; *In re M.R.*, 7th Dist. Jefferson No. 13 JE 30, 2014-Ohio-2623; *In re Forbess*, 3d Dist. Auglaize No. 2-09-20, 2010-Ohio-2826; *In re C.P.*, 4th Dist. Athens No. 09CA41, 2010-Ohio-1484, *rev'd on other grounds*, 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729. We have found no Ohio appellate court case holding that treating juvenile sex offenders differently based upon their ages violates equal protection.

{¶5} As set forth in R.C. 2950.02, the purpose of sex-offender registration is to protect the public. Those appellate courts finding no equal-protection violation have reasoned that the legislature's concerns for recidivism and public safety provide a rational basis for treating juvenile sex offenders differently based on their ages. *Id.* The courts have reasoned that it is a core premise of the juvenile court system that as the juvenile ages, he is more responsible and

> accountable for his actions. A juvenile who is almost an adult has less time in the juvenile system to be rehabilitated and may be less responsive to rehabilitation. Therefore, more tracking is needed after the juvenile ages out of the system. It is not irrational to conclude that younger children are less culpable and accountable for their actions and less dangerous than older offenders. Younger children have more time in the juvenile system to be rehabilitated and may be more susceptible to rehabilitation than older children.
>
> {¶6} We agree with this reasoning and hold that the juvenile-sex-offender-classification system is rationally related to the legitimate governmental interest of protecting the public from sex offenders. Therefore, it does not violate M.I.'s right to equal protection of the law.

In re M.I., 2017-Ohio-1524, 88 N.E.3d 1276, ¶¶ 2, 4-6 (1st Dist.). "We find that the age-based juvenile sex offender classification system set forth in R.C. 2152.83 can reasonably be found to reflect consideration of a greater of risk of recidivism and a higher level of seriousness of offenses as the age of the offender rises, and, therefore, the interest in protecting the public increases as the age of the juvenile sex offender increases." *In re N.W.*, 6th Dist. No. WD-19-051, 2020-Ohio-290, ¶ 16-17.

Rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" and does not "authorize 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Heller v. Doe*, 509 U.S. 312, 319 (1993) (citations omitted). "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Am. Assoc. of Univ. Professors v. Central State University*, 87 Ohio St.3d 55, 58 (1999) (quoting another case). "Under the rational

basis standard, we are to grant substantial deference to the predictive judgment of the General Assembly." *State v. Williams*, 88 Ohio St.3d 513, 531 (2000). The burden is on the challenger to negate every conceivable rational basis for the law. *Discount Cellular, Inc., v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 33.

"While some may question whether the registration requirements are the best way to further public safety, questions concerning the wisdom of legislation are for the legislature. Whether the court agrees with it in that particular or not is of no consequence. If the legislature has the constitutional power to enact a law, no matter whether the law be wise or otherwise it is no concern of the court. It is undisputed that the General Assembly is the ultimate arbiter of public policy and the only branch of government charged with fulfilling that role." *State v. Blankenship*, 145 Ohio St.3d 221, 2015-Ohio-4624, ¶ 37 (plurality) (brackets, ellipses, citations, quote marks all omitted).

All of the foregoing takes on greater weight when it is considered that the defense here is demanding the constitutional creation of an "act of grace" framework. While the General Assembly has given the juvenile court a discretionary carte blanche to extend dispensation in terms of registration duties as to younger offenders, no constitutional principle would require that a legislature create a similar carte blanche as to all offenders at all times. The legislative choice to deny eligibility for early termination of older Tier I offenders at the end-of-disposition stage, but then allow eligibility three years hence, represents a legislative judgment, not a constitutional one.

The constitutional question would be whether, under all of the circumstances, the legislative act of postponing eligibility to a date three years hence would violate the constitution. The General Assembly's decision to postpone D.R.'s eligibility for three

years to await a fuller record of D.R.'s progress makes rational sense, especially in a case involving two original charges of rape against a child victim, involving the short time frame of less than ten months between the original disposition and the end of disposition, and given the legislative concerns about risks of recidivism as they would still exist for an offender no longer under court supervision.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court reverse the judgment of the First District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on December 6, 2021, to the following counsel of record: Paula E. Adams, Assistant Prosecuting Attorney 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, paula.adams@hcpros.org, counsel for State of Ohio; Jessica Moss, Assistant Public Defender, 125 East Court Street, Ninth Floor, Cincinnati, Ohio 45202, jmoss@hamiltoncountypd.org; Counsel for Appellee; Benjamin M. Flowers, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, benjamin.flowers@OhioAGO.gov, counsel for amicus curiae Ohio Attorney General Dave Yost.

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