In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2021-0579
	:	
Appellee,	:	On appeal from the Mahoning County
	:	Court of Appeals,
v.	:	Seventh Appellate District
	:	
CHAZ BUNCH,	:	Court of Appeals
	:	Case No. 18MA22
Appellant.	:	

BRIEF OF AMICUS CURIAE OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

STEPHEN P. HARDWICK* (0062932)
**Counsel of Record*
Assistant Public Defender
Office of the Ohio Public Defender
250 East Broad St., Suite 1400
Columbus, Ohio 43215
614-466-5394; 614-752-5167 fax
stephen.hardwick@opd.ohio.gov

Counsel for Appellant,
Chaz Bunch

PAUL J. GAINS (0020323)
Mahoning County Prosecutor
RALPH M. RIVERA (0082063)*
**Counsel of Record*
Assistant Chief, Criminal Division
CAITLYN A. ANDREWS (0098887)
EDWARD A. CZOPUR (0083314)
Assistant Prosecutors
Mahoning County Prosecutor's Office
21 W. Boardman St., 6th Floor
Youngstown, Ohio 44503

DAVE YOST (0056290)
Ohio Attorney General

SAMUEL C. PETERSON* (0081432)
**Counsel of Record*
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
samuel.peterson@OhioAGO.gov

Counsel for Amicus Curiae,
Ohio Attorney General Dave Yost

330-740-2330; 330-740-2008 fax
rrivera@mahoningcountyoh.gov

Counsel for Appellee,
State of Ohio

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

INTRODUCTION

The General Assembly has decided that certain juveniles must be transferred to adult criminal court without an amenability hearing. Its decision does not violate the Fourteenth Amendment's Due Process Clause. That is because juveniles have no right to such a hearing before they are transferred to adult criminal court. Every court to have considered the question has held that "there is no constitutional right to any preferred treatment as a juvenile offender." *Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978); *see also, e.g., State v. Orozco*, 483 P.3d 331, 337–39 (Idaho 2021). And so the General Assembly was free to decide when and how juveniles must be tried as adults.

This Court has reached the same conclusion, *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ("*Aalim II*") and Bunch offers no sound reason why it should revisit it. Bunch asserts a *procedural* due process challenge to the statutes that require that he be transferred, brought exclusively under the Fourteenth Amendment's Due Process Clause (that is, and not under Ohio's Constitution). *See* Bunch Br.28. His claim is without merit. To establish a violation of the Fourteenth Amendment, Bunch would need to show that the absence of an amenability hearing before transfer "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quotation and citation omitted). It does not. Even if the Court were to apply the more permissive procedural-due-process test established by *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the result

would not change. The threshold requirement under *Mathews* is the existence of a protected liberty interest. *See Mathews*, 424 U.S. at 332, 335. Bunch has not identified one; his unsupported allegation that juveniles have a protected interest in having their case heard by a juvenile court does not suffice. *See* Bunch Br.29.

The Court should never get that far. It should not address the merits of Bunch's claim. Bunch did not properly raise his constitutional challenge to R.C. 2152.10(A) and 2152.12(A), and he therefore failed to preserve his claim. If Bunch believed that due-process principles guaranteed him a right to an amenability hearing then he should have raised that claim on direct appeal. *See Smith v. May*, 159 Ohio St. 3d 106, 2020-Ohio-61, ¶¶31, 35. He did not. Instead, he waited until fifteen years after he was convicted of a brutal rape and kidnapping to allege that the statutory requirement that certain juveniles be tried as adults is unconstitutional. Because his claim could—and should—have been raised before, it is now barred by *res judicata*. *See id.*

STATEMENT OF AMICUS INTEREST

The Attorney General has several interests in this case. *First*, the Attorney General has an interest in carrying out his duty to defend legislation duly enacted by the General Assembly. Bunch challenges on constitutional grounds the Ohio statutes that require bindover for juveniles who commit certain crimes. As the "chief law officer for the state and all of its departments," the Attorney General has an interest in defending Ohio law. R.C. 109.02. *Second*, the Attorney General has an interest in supporting courts

throughout the State as they process juvenile offenders in an effort to protect the community and rehabilitate young offenders. *Third*, the Attorney General sometimes serves as special counsel in cases of significant importance, including cases that involve juveniles. In those contexts, the Attorney General is directly involved in the application of Ohio's mandatory and discretionary bindover statutes. Because of these interests, both direct and indirect, the Attorney General submits this amicus brief for the Court's consideration.

STATEMENT OF THE FACTS AND CASE

1. Chaz Bunch, together with Brandon Moore, engaged in "a criminal rampage of escalating depravity on the evening of August 21, 2001, in Youngstown." *State v. Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, ¶2. That night, Moore robbed M.K. at gunpoint as she was arriving for work at a group home for mentally handicapped women. *State v. Bunch*, 2005-Ohio-3309, ¶¶4–5 (7th Dist.). Moore forced M.K. into the passenger seat of her car before taking the wheel and driving away. *Id.* ¶5. When Moore stopped the stolen car, Bunch joined them. *Id*. ¶6. Bunch got into the backseat of M.K.'s car and put a gun to M.K.'s head. *Id*. Moore, who was still driving, began to penetrate M.K.'s vagina with his fingers. *Id.* ¶7.

Moore eventually parked M.K.'s car in a gravel lot at the end of a dead-end street. *Id.* ¶8. Bunch ordered M.K. out of the car. *Id.* Keeping their guns trained on her, Bunch and Moore took turns orally raping M.K. *Id.* Bunch and Moore next forced

M.K. around to the back of the car, where they opened the trunk and raped her anally. *Id.* ¶9. Bunch threw M.K. to the ground, and the rapes continued. *Id.* ¶10. Bunch and Moore took turns raping M.K. orally and vaginally. *Id.* While one of them raped M.K. vaginally, the other raped her orally. *Id.* The two men would then switch places, and continue to rape M.K. *Id.* As she was being raped, M.K. pleaded for her life, telling Bunch and Moore that she was pregnant, even though she was not. *See id.* ¶11.

Eventually, Jamar Callier, an associate of Bunch and Moore who had been present during the rapes, pushed Bunch off of M.K. and helped M.K. into her car. *Id.* Bunch was upset with Callier and wanted to kill M.K. *Id.* Callier prevented him from doing so; he told Bunch that he could not kill a pregnant woman. *Id.*

M.K. fled the scene. *Id.* ¶12. As she was driving, she kept repeating the license-plate number of the car that Bunch had been in before he joined Moore in her stolen vehicle. *Id.* M.K. drove to her boyfriend's parents' house. *Id.* Although she was hysterical, M.K. was able to communicate the license-plate number that she had memorized. *Id.* Her boyfriend's parents' took her to the hospital. *Id.* The police broadcast over the radio the license-plate number that M.K. had memorized along with a description of M.K.'s assailants. *Id.* at ¶13.

Not long after the broadcast, a Youngstown police officer observed a vehicle matching the description M.K. had given, and bearing a license plate number similar to the number that had been broadcast. *Id.* ¶15. But by the time the police pulled the car

over and approached it, the driver was no longer there. *Id.* ¶17. He had fled on foot. *Id.* Moore, Callier, and another man, Andre Bundy, were still in the car, as were some of M.K.'s belongings. *Id.*; *id.* ¶24.

Shortly thereafter, another police officer observed Bunch "trotting" down the road. *Id.* ¶19. Bunch slowed to a walk when the officer aimed a spotlight at him, and began knocking on the door to a nearby house. *Id.* Bunch did not know Lamont Hollingshead, the occupant of that house, but when Hollingshead answered the door, Bunch told him the police were after him for a curfew violation. *Id.* ¶20. At Bunch's request, Hollingshead told the police that he was Bunch's uncle. *Id.* Faced with that explanation, and with the fact that the clothes Bunch was wearing did not match the broadcast description of the clothing worn by the missing driver of the stopped car, the officer let Bunch go. *Id.* ¶21. Three days later, that officer identified Bunch from a photo array as the person he had seen and spoken to that night. *Id.* ¶23.

As part of the investigation into M.K.'s rape and kidnapping, the police showed M.K. a series of photographic line-ups. *Id.* ¶25. M.K. immediately identified Moore as one of her assailants, Callier as the person who stopped the rape, and Bundy as being present the entire time. *Id.* ¶25. When presented with a photograph of Bunch, M.K. stated that she believed that he was the second rapist, but that she wanted to see a full-body photograph to be sure. *Id.* ¶26. The police, however, were unable to prepare a line-up of full body photographs. *Id.* When M.K. eventually did see a partial-body

photograph of Bunch in the newspaper, she knew immediately that Bunch was the second gunman and rapist. *Id.*

Callier confirmed that Bunch was, in fact, M.K.'s second assailant. *Id.* ¶31. He told the police that Bunch and Moore were the ones who had raped M.K. *Id.* He also stated that Bunch had asked Callier and the others to tell the police that Bunch's name was "Shorty Mack." *Id.* Shorty Mack was the name used by the driver who fled from the car the police stopped on the night of M.K.'s rape, *id.* ¶17, and of the individual that Moore blamed for forcing him to rape M.K, *id.* ¶30.

2. Because he was sixteen years old at the time he raped M.K, *see id.* ¶21, Bunch was initially charged in juvenile court. His case was then transferred (or "bound over") to the general division of the Mahoning County Court of Common Pleas. *See* Docket, *State v. Bunch*, No. 2001 CR 01024 (Mahoning Cnty. Ct. of Common Pleas). After Bunch was bound over to adult criminal court, a grand jury indicted him on three counts of aggravated robbery (two of which involved victims other than M.K.), three counts of rape, three counts of complicity to rape, one count of kidnapping, one count of conspiracy to commit aggravated robbery, and one count of aggravated menacing. All of the counts except for aggravated menacing included a firearm specification. *Bunch*, 2005-Ohio-3309, ¶32. Bunch pleaded not guilty to all counts. *Id.*

A jury found Bunch guilty on ten of the twelve counts. *Id.* ¶34. The jury convicted him of the three counts of rape, three counts of complicity to rape, and one count

each of aggravated robbery, kidnapping, and menacing. *Id.* The only charges on which the jury acquitted Bunch were the two charges involving victims other than M.K. *Id.* For the charges on which it convicted Bunch, the jury also convicted him of all the related firearm specifications. *Id.* The trial court sentenced Bunch to the maximum sentences on all of the charges except the menacing charge. *Id.* ¶35. Bunch's total sentence amounted to 115 years. *Id.*

Bunch appealed his conviction and sentence. *Id.* ¶35. Significantly for purposes of this appeal, Bunch did not challenge the juvenile court's decision to bind him over to adult court. *See generally id.* The Seventh District Court of Appeals affirmed the majority of Bunch's convictions and sentence. *Id.* ¶233. It reversed only with respect to Bunch's conviction on the conspiracy charge and the attendant firearms specification. *Id.* Bunch appealed to this Court, which accepted a single proposition of law and held the appeal for its decisions in *State v. Quinones*, Case No. 2004-1771, and *State v. Foster*, Case No. 2004-1568, which challenged certain sentencing laws, including those related to consecutive sentences. *State v. Bunch*, 107 Ohio St. 3d 1680, 2005-Ohio-6480. After the Court decided *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, it remanded Bunch's case for resentencing consistent with that decision. *See In re Crim. Sentencing Statute Cases*, 109 Ohio St. 3d 313, 2006-Ohio-2109, ¶92.

On remand, the Mahoning County Court of Common Pleas sentenced Bunch to 89 years in prison. *See State v. Bunch*, 2007-Ohio-7211, ¶4 (7th Dist.). Bunch again ap-

pealed, challenging the sentence he received on remand. *Id.* As with his original appeal challenging his conviction, Bunch did not challenge the transfer of his case from juvenile court to adult criminal court. *See generally id.* The Seventh District affirmed, *id.* ¶1, and this Court denied review, *State v. Bunch*, 118 Ohio St. 3d 1410, 2008-Ohio-2340.

Five years after the Court denied review, Bunch yet again attempted to challenge the sentence he had received on remand following *Foster*. He filed an untimely motion for reconsideration under App.R.14(B) and 26(B). *State v. Bunch*, 7th Dist. No. 06 MA 106 (August 8, 2013). Bunch once again did not challenge the mandatory bindover provision of R.C. 2152.12. The Seventh District denied Bunch's motion, *id.* at 5, and this Court denied review, *State v. Bunch*, 137 Ohio St. 3d 1425, 2013-Ohio-5285. Bunch unsuccessfully moved to reconsider that decision. *State v. Bunch*, 138 Ohio St. 3d 1419, 2014-Ohio-566.

3. In addition to his repeated appeals, Bunch also sought postconviction relief. He filed a *pro se* petition for postconviction relief in 2003. The common pleas court took no action on the petition, and the prosecutor did not respond to it. *See* App.Op.¶5. Bunch's *pro se* petition was therefore still pending in 2017, when Bunch sought to amend his petition as a matter of right. *See id.* ¶10. In the time between 2003 and 2017, the Court had held in *Moore* that "a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender." *Moore*, 149 Ohio St. 3d

557, ¶1. Bunch, in his amended petition for postconviction relief, sought to take advantage of that decision. *See* App.Op.¶10. Relying on this Court's initial decision in *State v. Aalim*, 150 Ohio St. 3d 463, 2016-Ohio-8278 ("*Aalim I*,"), Bunch also asserted, for the very first time, that his case was improperly transferred from juvenile court to adult criminal court. App.Op.¶10. Shortly after Bunch amended his petition, the Court reconsidered its *Aalim I* decision and held that the mandatory bindover of certain juveniles who commit serious felonies does not violate the Ohio or United States Constitutions. *Aalim II*, 150 Ohio St. 3d 489, ¶4.

The common pleas court granted Bunch's petition in part and denied it in part. Determining that Bunch's sentence was invalid in light of *Moore*, the common pleas court granted relief and resentenced Bunch. App.Op.¶1. It reduced Bunch's sentence by 40 years. Rather than the 89-year sentence he had received when he was resentenced following *Foster*, *id.* ¶3, the common pleas court resentenced Bunch to 49 years, *id.* ¶1. It also classified him as a sexual predator. *Id.* The common pleas court denied relief on Bunch's remaining claims. *Id.* ¶12.

Bunch appealed. The Seventh District affirmed Bunch's new sentence, as well as the denial of his remaining claims in support of his request for postconviction relief. *Id.* ¶2. The court of appeals noted that Bunch acknowledged that his challenge to the constitutionality of mandatory bindover was precluded by this Court's decision in *Aalim II*, but that he sought to preserve that issue for further review. *See id.* ¶¶10, 30. Bunch ap-

pealed to this Court, raising four Propositions of Law, one of which asked the Court to revisit its decision in *Aalim II.* The Court accepted all four propositions. *See State v. Bunch*, 163 Ohio St. 3d 1501, 2021-Ohio-2307.

ARGUMENT

Bunch has raised, and the Court has accepted, four Propositions of Law. One of the propositions challenges the denial of his petition for postconviction relief. Two of the propositions challenge the sentence that he received after the trial court resentenced him in light of this Court's decision in *State v. Moore*, 149 Ohio St. 3d 557, 557, 2016-Ohio-8288. The fourth asks the Court to revisit its decision in *Aalim II*. That last Proposition of Law is the only one that this brief addresses. The decision to focus on the proposition challenging the Court's decision in *Aalim II* should not be read as agreement with the arguments that Bunch makes in support of his remaining Propositions of Law, however. The decision below should be affirmed on those other issues for the reasons discussed by the Mahoning County Prosecutor. But the Attorney General focuses on the question whether to overrule *Aalim II*, because a decision doing so will confuse the doctrine of *res judicata*, abrogate a valid law that the General Assembly enacted, and cause disastrous consequences for Ohio's legal system.

***Amicus Curiae* Ohio Attorney General's Proposition of Law:**

> *The General Assembly's decision to require mandatory bindover to common pleas court for some youth charged with serious felonies does not violate the Due Process Clauses of the United States or Ohio Constitutions.*

In Ohio, juvenile courts have exclusive initial jurisdiction over minors charged with crimes. R.C. 2152.02(C)(1); R.C. 2152.03; *see also Johnson v. Sloan*, 154 Ohio St. 3d 476, 2018-Ohio-2120, ¶5 (*per curiam*). That jurisdiction, however, is not always permanent. Responding to concerns about "a rise in rates and severity of juvenile crime," the General Assembly "enacted a statutory scheme that provides for some juveniles to be removed from the juvenile courts' authority" and transferred to adult criminal court. *State v. D.W.*, 133 Ohio St. 3d 434, 2012-Ohio-4544, ¶9.

Under this scheme, juveniles may be transferred, or "bound over," to adult court in two circumstances. "Mandatory bindover" occurs when the juvenile commits a crime that *requires* transfer to adult criminal court. *See* R.C. 2152.12(A); *see State v. D.B.*, 150 Ohio St. 3d 452, 2017-Ohio-6952, ¶11. For example, juveniles charged with murder are subject to mandatory bindover, R.C. 2152.12(A)(1), as are juveniles who are at least sixteen years of age and who commit certain offenses with a firearm, R.C. 2152.10(A)(2)(b). In contrast, the process known as "discretionary bindover" *allows* transfer to adult court based on a juvenile's characteristics. *See* R.C. 2152.12(B). A juvenile court has the option of transferring a case when the juvenile in question is at least fourteen years of age and when the court determines that the juvenile "is not amenable

to care or rehabilitation within the juvenile system, and the safety of the community may require … adult sanctions." R.C. 2152.12(B)(1) & (3).

The General Assembly has determined that rapists like Chaz Bunch, who use a gun when they rape their victims, must be tried as adults. *See* R.C. 2152.10(A)(2)(b); R.C. 2152.12(A)(1)(b); R.C. 2152.02(BB). Bunch nevertheless alleges that he was constitutionally entitled to an amenability hearing. He is wrong. Just as there is no statutory right to an amenability hearing, there is no constitutional right either. Neither the United States Constitution nor the Ohio Constitution guarantees a right to an amenability hearing in juvenile court. The Court should never reach that question, however, as Bunch's constitutional claim is not properly before the Court. Because Bunch did not raise his challenge to the constitutionality of mandatory bindover in the direct appeal that he filed in 2002, his claim is now barred by *res judicata*.

A. Bunch's challenge to the mandatory bindover provision found in R.C. 2152.12(A) is barred by *res judicata*.

The doctrine of *res judicata* prevents convicted defendants from raising in a petition for postconviction relief "any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in [a] judgment of conviction, *or on an appeal* from that judgment." *State v. Perry*, 10 Ohio St. 2d 175, syl.¶¶7–9 (1967) (emphasis in original), *superseded on other grounds by statute as noted in State v. Call*, No.15280, 1996 WL 27830 *1 (2d Dist. Jan. 24, 1996); *see also State v. Roberts*, 1 Ohio St. 3d 36, 39 (1982). *Res judicata* applies even when a postconviction petitioner seeks relief

based on an intervening decision from this Court. As the Court has explained, *res judicata* applies in all postconviction proceedings and "[t]here is no merit" to a claim that "*res judicata* has no application when there is a change in the law due to a judicial decision of this court." *State v. Szefcyk*, 77 Ohio St. 3d 93, 95, 1996-Ohio-337.

Res judicata applies with equal force to juvenile proceedings. Specifically, *res judicata* bars untimely challenges to bindover proceedings or procedures. The Court in *Smith* clarified that if defendants wish to challenge their bindover to adult court, they must do so on direct appeal. *See* 159 Ohio St. 3d 106, ¶¶31, 35. In doing so, it distinguished its earlier decision in *State v. Wilson*, 73 Ohio St. 3d 40 (1995), noting that the error in that case was jurisdictional only because the relevant statute declared it to be so. *Smith*, 159 Ohio St. 3d 106, ¶21. And it overruled decisions like *Johnson v. Timmerman-Cooper*, 93 Ohio St. 3d 614, 2001-Ohio-1803, which had extended *Wilson*'s rule and had suggested that challenges to bindover can be raised at any time. *See Smith*, 159 Ohio St. 3d 106, ¶¶20, 28–29. Errors in the bindover process, it made clear, do not deprive a juvenile court of subject-matter jurisdiction, and do not make any subsequent proceedings void *ab initio*. *Id.* at ¶¶28–29; *cf. also Ostanek v. Ostanek*, ___ Ohio St. 3d ___, 2021-Ohio-2319, ¶¶32–33, 36 (distinguishing between the absence of jurisdiction and errors in the exercise of jurisdiction).

Res judicata therefore bars Bunch's challenge to the mandatory bindover provisions found in R.C. 2152.12(A). Had he wanted to assert that the mandatory transfer of

certain juveniles who commit serious felonies violates the Ohio or United States Constitutions, Bunch was required to do so in 2002 when he filed his direct appeal. *See Smith*, 159 Ohio St. 3d 106, ¶¶31, 35. He did not. But because he *could have* raised that claim, Bunch's second Proposition of Law comes almost twenty years too late.

Having just clarified that challenges to bindover proceedings must be raised on direct appeal, *see id.*, the Court should not create a new exception to *res judicata* for the purpose of hearing Bunch's claim. The U.S. Supreme Court long ago warned of "the mischief which would follow" if courts were to make exceptions to the *res judicata* doctrine. *Reed v. Allen*, 286 U.S. 191, 199 (1932). That mischief "would be greater than the benefit which would result from relieving some case of individual hardship." *Id.* After all, if this particular issue requires adoption of an *ad hoc* exception to the otherwise universally applicable doctrine, what other issues will? What could possibly guide the inquiry? There is, in short, no principled way of carving out an exception good for one day and one day only—the line will not hold.

This Court has experience in this area. It only recently resolved the confusion that resulted when it created an exception to *res judicata* for sentences that did not include a statutorily required term of post-release supervision. *See State v. Harper*, 160 Ohio St. 3d 480, 2020-Ohio-2913; *State v. Hudson*, 161 Ohio St. 3d 166, 2020-Ohio-3849. Creating a new exception to *res judicata* in this case would be even more unworkable than the Court's now-abandoned void/voidable jurisprudence. Such an exception

would allow *all* offenders who were transferred to adult criminal court under R.C. 2152.12(A) to challenge their convictions, no matter how long ago those conviction occurred. And it would call into question convictions for only the most serious of crimes. The Revised Code's mandatory bindover provisions, remember, apply only to murderers, R.C. 2151.12(A)(1)(a), repeat offenders who go on to commit serious felonies, *see* R.C. 2152.10(A)(2)(a), and offenders like Bunch, who use a firearm to commit serious felonies, like rape, R.C. 2152.10(A)(2)(b). It is therefore only those most-serious offenders who would benefit from any newly created exception.

B. The General Assembly may constitutionally require that some juveniles who commit serious felonies be tried as adults.

Even if the Court creates an exception to *res judicata* in this case, it should still reject Bunch's constitutional claim. The Fourteenth Amendment to United States Constitution does not create a right to an amenability hearing before a juvenile is bound over to adult criminal court.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution declares that no State shall "deprive any person of life, liberty, or property, without due process of law." That amendment has been interpreted as protecting both substantive and procedural rights. *See Ferguson v. State*, 151 Ohio St. 3d 265, 2017-Ohio-7844, ¶42. Bunch, however, brings only a procedural-due-process claim. *See* Bunch Br.28 (arguing that "the deprivation of an individualized determination is a procedural due process violation"). That is confirmed by his heavy reliance on decisions that con-

cerned only *procedural* due process. *Id.* 25–35 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Kent v. United States*, 383 U.S. 541 (1966)). Even if Bunch had made a substantive-due-process claim, it would not matter. He has neither a substantive nor a procedural right to an amenability hearing.

No substantive right. Substantive due process "protects those fundamental rights and liberties that are "objectively, deeply rooted in this Nation's history and tradition" and, without which, "neither liberty nor justice would exist if they were sacrificed." *Wash. v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quotations and citations omitted). But to avoid "overextending the Due Process Clause," it requires that a claimed right be "deeply woven into this Nation's historical fabric." *State v. Burnett*, 93 Ohio St. 3d 419, 427 (2001). Substantive due process therefore requires "a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). That description must be supported by "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Id.* at 722.

Juvenile proceedings are not deeply rooted in that tradition; they are a relatively recent innovation. At common law, children under the age of seven were considered infants and generally viewed as immune from criminal liability, while children above the age of fourteen were considered adults. (No bright-line rule applied to children between the ages of seven and fourteen. For them, liability depended on their age and a

variety of other factors. *See* 4 William Blackstone, *Commentaries on the Laws of England* 22-24 (1769); 1 Sir Matthew Hale, *The History of the Pleas of the Crown* 24-27 (1736); *see also In re Gault*, 387 U.S. 1, 16–17 (1967).) Thus, at the time the Fourteenth Amendment was ratified in 1868, most juveniles were treated no differently from other offenders.

That continued to be true for over thirty years following the ratification of the Fourteenth Amendment and its Due Process Clause. Although some States (Ohio included) created "reform farms" as sentencing options for juveniles convicted in adult courts, *see Prescott v. State*, 19 Ohio St. 184, 187–88 (1869), separate juvenile courts did not exist until 1899, when Illinois created the first court dedicated to juvenile offenders, *see Gault*, 387 U.S. at 14. Ohio's juvenile court system took longer to develop. Cuyahoga County established the first juvenile court system in the State in 1902, but the General Assembly did not establish a statewide system until a few years later. *See In re Agler*, 19 Ohio St. 2d 70, 72–73 (1969); *In re T.R.*, 52 Ohio St. 3d 6, 15 (1990). And, even then, it was not until 1937 that the State's juvenile court system was given authority over juvenile offenders who commit felonies. *Agler*, 19 Ohio St. 2d at 72–73.

From the very beginning, the scope of the new juvenile courts' authority was limited. There remained a "widely shared agreement that not all juveniles can benefit from the special features and programs of the juvenile-court system and that a procedure for transfer to an adult court should be available." *Breed v. Jones*, 421 U.S. 519, 535 (1975). At least some juveniles remained subject to the jurisdiction of adult criminal courts.

Many still are. As recently as 2018, eight States treated *all* seventeen-year-olds as adults, and one did the same with respect to all sixteen-year-olds. *See Upper Age of Juvenile Court Delinquency Jurisdiction, 2018*, United States Department of Justice, Statistical Briefing Book, Juvenile Justice System Structure and Process, https://perma.cc/2MGP-PRG4/. Many more States treat *some* offenders differently, with their status depending on their age and the crimes with which they are charged. New York, for example, treats offenders between the ages of thirteen and fifteen as adults if they are charged with certain types of murder. *See* N.Y. Penal Law §30.00. So do Connecticut and the District of Columbia. *See* Conn. Gen.State.Ann 46b-127(a); D.C.Code 16-2301(3). Other States do not involve the juvenile courts at all when certain juveniles commit serious crimes. Massachusetts and Florida, for example, allow prosecutors to bypass the juvenile court system altogether for such cases and file charges directly in adult criminal court. *See* Mass. Gen.Laws, Ch. 119, §54; Fla. Stat. §985.557.

The recent history of juvenile-specific courts, and the varying scope of their jurisdiction, has led courts to consistently reject due-process claims like the one that Bunch makes in this case. *See People v. Hana*, 443 Mich. 202, 209–14, 221 (1993). As far as the Attorney General is aware, *every* court to have considered the issue has held that juvenile offenders have "no constitutional right to be tried in a juvenile court." *W.M.F. v. State*, 723 P.2d 1298, 1300 (Alaska 1986). *See also State v. Rudy B.*, 149 N.M. 22, 36 (2010) ("[S]tates have the authority … to do away with the amenability determination alto-

gether and to prosecute and sentence juveniles as adults."); *Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978) ("[T]here is no constitutional right to any preferred treatment as a juvenile offender[.]"); *see also, e.g., State v. Orozco*, 483 P.3d 331, 337–39 (Idaho 2021); *Commonwealth v. Concepcion*, 487 Mass. 77, 84–86 (2021); *State v. Watkins*, 191 Wn.2d 530, 543–46 (2018); *State v. Angel C.*, 245 Conn. 93, 124 (1998); *State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997); *State v. Cain*, 381 So. 3d 1361, 1363 (Fla. 1980); *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977). So even if some may consider it "highly desirable to commit to the judge of a specialized juvenile court the determination of whether or not a particular juvenile is to be prosecuted criminally," courts from around the country uniformly agree that there is "no constitutional requirement that a State must do so." *People v. Jiles*, 43 Ill. 2d 145, 148–49 (1969). This Court has already reached the same conclusion. It long ago held that "the nature of a juvenile proceeding … 'is purely statutory.'" *Agler*, 19 Ohio St. 2d at 72 (quoting *Prescott*, 19 Ohio St. at 188).

The consistency with which courts have rejected claims like the one that Bunch makes here repudiates any suggestion that juveniles have a deeply-rooted right to an amenability hearing. If a right to such a hearing before being transferred to adult court is deeply rooted in the country's legal traditions, then Bunch would have been able to cite at least one controlling decision adopting his argument. He has not done so. That raises the question: How deeply rooted can a liberty interest be if not a single court has recognized it?

In sum, the Fourteenth Amendment does not entitle *anyone* to be tried in juvenile courts—every State could abolish its juvenile system tomorrow without creating a constitutional problem (as opposed to a public-policy problem). Because there is no right to be tried in juvenile court, there is necessarily no right to an amenability hearing governing the question whether one's case should be tried in juvenile court.

No procedural right. Unlike substantive due process, procedural due process is not the source of any rights. It is concerned only with "the adequacy of the procedures employed in a government action that deprives a person of life, liberty, or property," *Ferguson v. State*, 151 Ohio St. 3d 265, 2017-Ohio-7844, ¶42, and protects only those rights "that stem from an independent source such as state law," *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976)). Process, in other words, "is not an end in itself." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983); *see also Gonzales*, 545 U.S. at 764.

Bunch has no substantive right to protect; he seeks process for process's sake. As discussed above, pp.16–20, Bunch does not have a *constitutional* right under the Due Process Clause to be tried in juvenile court. The only other possible source of a right to be tried in juvenile court is statutory. But Bunch does not have a statutory right either. The General Assembly defines the jurisdiction of juvenile courts. Ohio Const., Art. IV, §4(B); *see also Ohio High Sch. Athletic. Ass'n v. Ruehlman*, 157 Ohio St. 3d 296, 2019-Ohio-2845, ¶7 ("[T]he general subject matter jurisdiction of Ohio courts of common pleas is

defined *entirely by statute*." (emphasis in original) (quotation and citation omitted)). And it has explicitly deprived juvenile courts of jurisdiction over offenders like Bunch who commit serious felonies with a firearm, *see* R.C. 2152.10(A); R.C. 2152.12(A); R.C. 2152.13(H). The existence of this case confirms that there is no such statutory right. It is, after all, the General Assembly's determination that offenders like Bunch must be tried as adults that provides the basis for Bunch's challenge.

C. None of Bunch's arguments provide a reason for the Court to reject the national consensus that juveniles do not have a federal constitutional right to an amenability hearing before being tried in criminal court.

Bunch asserts that he had a right to an amenability hearing before being transferred to criminal court. But that is not the bindover process that the General Assembly created. R.C. 2152.10(A) and 2152.12(A) state that certain juveniles must be transferred to adult criminal court *without* an amenability hearing. Bunch's challenge to the lack of an amenability hearing is therefore best understood as a facial challenge to the statutes that govern Ohio's bindover process.

Statutes, however, are presumed to be constitutional. *State v. Hoover*, 123 Ohio St. 3d 418, 2009-Ohio-4993, ¶8; R.C. 1.47(A). And Bunch bears the burden of rebutting that presumption by demonstrating that "the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, syl. ¶1 (1955). Because his is a facial challenge, Bunch must carry an even higher burden; he must show that R.C. 2152.10(A) and 2152.12(A) are unconstitutional in all instances.

Wymsylo v. Bartec, Inc., 132 Ohio St. 3d 167, 2012-Ohio-2187, ¶21. Bunch has not carried his burden. He has not shown that the statutes he challenges are unconstitutional in *any* instance, let alone in *all* instances.

As noted above, Bunch has preserved only one constitutional claim: a procedural-due-process challenge to R.C. 2152.10(A) and 2152.12(A) based on the Fourteenth Amendment's Due Process Clause. He has failed to carry his burden with respect to that claim.

Bunch asserts that the standard that governs his procedural-due-process claim is the "fundamental fairness" standard. *See* Bunch Br.25 (quoting *McKeiver v. Pennsylania*, 403 U.S. 528, 543 (1971)). He separately argues that the Court should apply the three-part balancing test set forth in *Mathews*. Bunch Br.28. It cannot be both; the two tests are incompatible. The fundamental fairness test is "far less intrusive than that approved in *Mathews*" and requires "substantial deference to legislative judgments." *Medina v. California*, 505 U.S. 437, 446 (1992). It does not matter. Bunch's claim fails under either test.

1. "[T]he category of infractions that violate 'fundamental fairness'" is very narrow. *Dowling v. United States*, 493 U.S. 342, 352 (1990). The so-called fundamental-fairness test protects only those "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id.* at 353 (quotation and citation omitted). Under that test, a violation of the Due Process Clause occurs only when a challenged

procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202. The fundamental-fairness test does not permit courts, "in defining due process, to impose on law enforcement officials their personal and private notions of fairness and to disregard the limits that bind judges in their judicial function." *Dowling*, 493 U.S. at 353 (alteration accepted, quotation and citation omitted). When it comes to the "more subtle balancing of society's interests against those of the accused," questions about what type and amount of process are required have traditionally "been left to the legislative branch." *Patterson*, 432 U.S. at 210.

As discussed above, pp.16–18, juvenile courts and amenability hearings are relatively new developments and, as such, they are not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 202 (quotation and citation omitted). Juvenile courts did not exist in Ohio until decades after the Fourteenth Amendment was ratified. *See Agler*, 19 Ohio St. 2d at 73. And, while "[c]ontemporary practice" is of "limited relevance to the due process inquiry," *Medina*, 505 U.S at 447, many States *still* do not require amenability hearings. In those States, prosecutors may file charges against certain juveniles directly in adult criminal court. *See* Mass. Gen.Laws, Ch. 119, §54. If, as Bunch argues, the fundamental fairness test requires amenability hearings before a juvenile may be transferred to criminal court, then the

States that have chosen not to require them are all violating the Fourteenth Amendment's Due Process Clause—and have been since 1868 when it was ratified.

2. When the fundamental fairness test does not apply, the requirements of procedural due process are dictated by the test set forth in *Mathews*. That test requires the consideration of three factors: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. *Mathews* "does not provide the appropriate framework for assessing" the structure of a State's criminal justice system. *Medina*, 505 U.S. at 443. Because "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, … the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Id.* But even if *Mathews* did provide the appropriate test, Bunch's challenge would still fail; none of the three *Mathews* factors supports his due-process claim.

No right to treatment as a juvenile. Bunch's due-process claim fails at *Mathews*'s first step: he does not have a protected interest in being tried in juvenile court. *See*

pp.16-20. Bunch has not proved otherwise. He has not shown that he has either a constitutional or a statutory right to an amenability hearing.

As a constitutional matter, Bunch has not identified a single controlling decision from a state or federal court that has held that trying juveniles as adults, without first conducting an amenability hearing, runs afoul of the Fourteenth Amendment's Due Process Clause. Bunch relies heavily for this claim on *Kent v. United States*, 383 U.S. 541 (1966), but *Kent* does no such thing. *Kent* rested on statutory, not constitutional, grounds. *See id.* at 556 (declining to address what constitutional rights apply to juvenile proceedings because "[t]he [D.C.] Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide[d] an adequate basis for the decision of [the] case.").

Kent involved a transfer process that, unlike R.C. 2152.10 and 2152.12, included a statutory right to be tried as a juvenile. *See Kent*, 383 U.S. at 560. The relevant D.C. statute created a presumption that all juveniles between the ages of sixteen and eighteen were subject to the D.C. Juvenile Court's exclusive jurisdiction. *Id.* at 543, 546–47, 560–61. The statute gave the juvenile court the discretion to create a case-by-case exception to that jurisdiction if it determined, after a "full investigation," that the circumstances warranted one. *Id.* at 547, 561. The question at issue in *Kent* was what sort of process was necessary to guide the juvenile court's exercise of its discretion under the statute. *Id.* at 560–61. Had there been no statutory right to be tried as a juvenile, or had the rele-

vant D.C. statute required that certain juveniles be tried as adults, then there would have been no constitutional violation—a fact that was confirmed when Congress amended the relevant statute to eliminate any statutory requirement that certain juveniles receive a hearing before being tried in adult court. *See Untied States v. Bland*, 472 F.2d 1329, 1335 (1972). The amended statute, unlike the original one, raised no due-process concerns. *Id.* at 1334–37.

Like the D.C. Circuit in *Bland*, every court to have considered the issue has held that *Kent* does not establish a constitutional right to an amenability hearing before a juvenile may be transferred to adult criminal court. *See Angel C.*, 245 Conn. at 110 ("A review of state and federal decisions reveals that statutes providing, under stated circumstances, for mandatory adult adjudication of offenders of otherwise juvenile age, routinely have been upheld against due process challenges based on *Kent*.") (collecting cases). They have reasoned, correctly, that "treatment as a juvenile is not an inherent right but one granted by the state legislature," and that legislatures "may restrict or qualify that right as it sees fit," without running afoul of *Kent*. *See Woodard*, 556 F.2d at 785. Some of Bunch's *amici* have, in fact, seen their arguments rejected in other courts. *See Concepcion*, 487 Mass. at 85 n.11 (2021) (holding that the "heavy reliance" on *Kent* "by one of the amici, the Juvenile Law Center" was "misplaced").

Bunch fares no better as a statutory matter. Juveniles in Ohio do not have a statutory interest in their status as juveniles. Bunch's argument to the contrary, *see* Bunch

Br.29, takes the statutes that established the juvenile justice system out of context. It is true that some juvenile offenders may not be transferred to adult criminal court without an amenability hearing. *See* R.C. 2152.10(B); R.C. 2152.12(B). But offenders like Bunch, who use a firearm to commit a violent rape, are not among them. The General Assembly has specifically instructed that, for offenders who commit certain serious felonies, no amenability hearing is required. R.C. 2152.10(A) (stating that transfer is mandatory and those offenders "shall be transferred"); R.C. 2152.12(A) (same). Thus, as in *Woodard*, Bunch has never "been 'given' the right to juvenile treatment in any realistic sense." *Woodard*, 556 F.2d at 785. It is only by reading parts of R.C. 2152.10 and R.C. 2152.12 in isolation, and taking other parts out of context, that Bunch is able to suggest that all juveniles in Ohio have a protected interest in their juvenile status. The Court, however, has made clear that statutes cannot be read that way; they must be read together as a whole. *Vossman v. AirNet Sys., Inc.*, 159 Ohio St. 3d 529, 2020-Ohio-872, ¶14; *see also Woodard*, 556 F.2d at 785 ("The entire statute, however, must be read as a whole, and … clearly limits [juvenile court] jurisdiction from the start.").

Bunch also attempts to locate a right to be tried as a juvenile in Eighth Amendment decisions from the U.S. Supreme Court. *See, e.g.*, Bunch Br.26–27 (citing *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisana*, 136 S. Ct. 718 (2016). But his is not an Eighth Amendment claim, so those decisions are irrelevant here. If Bunch had wanted to assert that mandatory bindover constitutes a cruel or unusual punishment,

he could have done so on direct appeal. He did not. Thus, for that reason alone, the Court should reject his attempt to surreptitiously raise an Eighth Amendment claim now. *Cf. State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034, ¶20 (refusing to consider an Eighth Amendment challenge to R.C. 2152.10(A) and 2152.12(A) because the challenge was not properly raised or presented). But even if the Court indulges him on this forfeited claim, it fails for at least three reasons.

First, any Eighth Amendment claim would be without merit. The Eighth Amendment prohibits only cruel and unusual *punishments*, and the transfer of a case to adult court is not a punishment. Punishment comes later, if at all. At the time a case is transferred, any possible punishment is speculative and is contingent on a conviction. "[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). For that reason, every court in Ohio that has considered an Eighth Amendment challenge to R.C. 2152.10(A) and 2152.12(A) has rejected it. *See State v. J.T.S.*, 2015-Ohio-1103, ¶¶46–50 (10th Dist.); *see also State v. Anderson*, 2014-Ohio-4245, ¶¶77–81 (2d. Dist.) (affirmed on other grounds by *State v. Anderson*, 151 Ohio St. 3d 212, 2017-Ohio-5656); *State v. Mays*, 2014-Ohio-3815, ¶¶46–47 (8th Dist.). And the U.S. Supreme Court has not disagreed. It was silent and raised no concerns about state laws that allow juveniles to be charged directly in state court—without an amenability hearing—while, at the same time, hold-

ing that the Eighth Amendment *does* limit the sentences that may be imposed *after* they are so charged. *See Graham v. Florida*, 560 U.S. 48, 66–67 (2010).

Second, the Fourteenth Amendment's Due Process Clause is not a substitute for the more specific protections of the Eighth Amendment. The U.S. Supreme Court has repeatedly held that "where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (citation and quotation marks omitted). And it has "defined the category of infractions that violate fundamental fairness very narrowly based on the recognition that, [b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Medina*, 505 U.S. at 443 (citation and quotation marks omitted). The limited scope of the protections afforded by the Due Process Clause means that if Bunch had wanted to assert a claim based on *Miller* and related cases, he should have raised an Eighth Amendment claim on direct appeal.

Third, adult courts can and do consider a juvenile's age at sentencing where appropriate. This case provides an example: Bunch's age *was* considered as a mitigating factor. The resentencing from which Bunch now appeals occurred because Bunch was resentenced following the Court's decision in *Moore*. The Court held in that case that the Eighth Amendment prohibits sentences that exceed a juvenile nonhomicide offender's life expectancy. 149 Ohio St. 3d 557, ¶1. This case therefore shows that transferring

a case to adult criminal court does not prevent a criminal court from considering a defendant's age when doing so is constitutionally required.

No erroneous deprivation of a protected right. Because Bunch had no right to have his case heard in juvenile court, he cannot satisfy *Mathews*'s second factor. He cannot claim that greater procedural protections are required to protect against an erroneous deprivation of a nonexistent right. *See Board of Regents v. Roth*, 408 U.S. 564, 578–79 (1972) (rejecting procedural due process claim because plaintiff lacked a protected interest).

Burdens on the State. The State's interest in the structure of its criminal justice and juvenile justice systems are significant and requiring additional procedures above and beyond those mandated by the General Assembly would impose significant burdens on the State. Any additional or alternative process that the Court might require under the guise of procedural due process would significantly intrude on the General Assembly's interest in defining the scope of Ohio's criminal justice system. *See Medina*, 505 U.S. at 445–46 (explaining that "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area"); *see also Patterson*, 432 U.S. at 210 (noting that the "balancing of society's interests against those of the accused [has] been left to the legislative branch").

D. Article I, Section 16 of the Ohio Constitution does not guarantee a right to an amenability hearing before a juvenile is transferred to adult criminal court.

Bunch has not made or preserved any argument based on the Ohio Constitution. His brief does not cite Article I, Section 16 of the Ohio Constitution (or any other provision of the Ohio Constitution for that matter), and it does not discuss the Ohio Constitution's history or unique language. *Cf. State v. Weber*, 163 Ohio St. 3d 125, 2020-Ohio-6832, ¶48. That should end the matter. Having failed to raise an Ohio constitutional claim in his opening brief, or in the proceedings below, Bunch has now forfeited any such claim. *See Quarterman*, 140 Ohio St. 3d 464, ¶¶18–20. Even if he had not, the Ohio Constitution does not guarantee a right to an amenability hearing.

Article I, Section 16 of the Ohio Constitution states in relevant part that "[a]ll 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." Since at least 1886, this Court has interpreted the due-course-of-law language in Ohio Constitution's Right to Remedy Clause as coextensive with the Fourteenth Amendment's Due Process Clause. *Adler v. Whitbeck*, 44 Ohio St. 539, 568–69 (1886) ("Due course and due process of law are one and the same thing. We do not feel required to enter upon any extended discussion of this important constitutional guaranty."). That interpretation "has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just read-

justments, but practical real-world dislocations." *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶58. Bunch does not argue otherwise.

If the Court chooses to overlook Bunch's forfeiture of any claim based on the Ohio Constitution, and if it also chooses to depart from its settled precedent, it should not expand the scope of the rights protected by the Ohio Constitution beyond those already protected by the Fourteenth Amendment. The text and history of Article I, Section 16 suggest that it was never intended to provide *any* due-process protections, let alone greater protections than those provided by the United States Constitution.

Start with the text. Article I, Section 16 "does not speak to 'due process' at all but, rather, to an individual's right to access the court system and to seek a remedy." *Stolz v. J&B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088, ¶12. Its language focuses on remedies for harms that have already occurred. *See* Ohio Const., Art. I, §16. Compare that language to the language of the Fourteenth Amendment's Due Process Clause. The Due Process Clause is structured as a restraint on government power; it declares that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV. Its focus is thus on preventing future harms, not providing a remedy for past ones.

Now consider the history. While both Article I, Section 16 and the Due Process Clause trace their roots to Magna Carta, the original sections of the Great Charter from 1215 that inspired them are different. Right-to-remedy provisions, like the one found in

Article I, Section 16 of the Ohio Constitution, were inspired by Magna Carta, Clause 40. That clause stated that "[w]e will not sell, or deny, or delay right or justice to anyone." Magna Carta: Clause 40, *The Magna Carta Project*, *The Magna Carta Project*, trans. H. Summerson et al., https://perma.cc/S7QP-U8X8; Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev 125, 138 (1970); *cf. Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 290 (1986) (Douglas, J., concurring). Due process clauses, by comparison, were inspired by Magna Carta, Clause 39. That clause stated that no "free man" could be "arrested, or imprisoned, or disseised, or outlawed, or exiled" except "by the law of the land." Magna Carta: Clause 39, *The Magna Carta Project*, *The Magna Carta Project*, trans. H. Summerson et al., https://perma.cc/Z6VR-GWWB. It is that guarantee, that no one would be deprived of liberty or property except by the "law of the land," that eventually evolved into today's due process clauses. *See Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 276 (1856); Linde, *Without "Due Process,"* 49 Or. L. Rev at 137–38. (The two clauses were combined in later versions of Magna Carta. *See* 1 E. Coke, Second Part of the Institutes of the Laws of England 45 (1797).)

In light of their different histories and purposes, many States included both a right-to-remedy clause and a separate due-process clause when drafting their own constitutions. The constitutions of Texas and Utah, for example, contain both types of clauses. *Compare* Tex. Const. Art. I, §13 *with* Tex. Const. Art. I, §19; *and* Utah Const. Art I., §7 *with* Utah Const. Art. I, §11. And the Supreme Courts of both States have held that

the presence of both provisions means that the right to remedy provision cannot be read as a due-process guarantee. *See LeCroy v. Hanlon*, 713 S.W.2d 335, 340 (Tex. 1986) (holding that the Texas Constitution includes "both provisions because they serve different purposes"); *Laney v. Fairview City*, 2002 UT 79, ¶37 (Utah 2002) (explaining that interpreting the Utah Constitution's right-to-remedy clause as guaranteeing due process would make the right-to-remedy clause "redundant and mere surplusage").

Unlike Texas and Utah, Ohio's constitution contains *only* a right-to-remedy clause. It is unlikely that the drafters of the Ohio Constitution ever intended that clause to afford due-process protections. That, at least, is the conclusion that that the Oregon Supreme Court reached. Inspired in part by Ohio's 1802 Constitution, the Oregon Constitution guarantees a right to "remedy by due course of law." Ore. Const., Art. I, §10; *see also* Linde, *Without "Due Process,"* 49 Or. L. Rev at 137. And, like Ohio's constitution, it does not contain a separate due-process clause. The Oregon Supreme Court has held that the omission was intentional and that the Oregon Constitution's guarantee of a right to a remedy "is neither in text nor in historical function the equivalent of a due process clause." *Cole v. State*, 294 Ore. 188, 191 (1982) (Linde, J.); *but see Hudgins v. McAtee*, 596 N.E.2d 286, 289 (Ind. Ct. App. 1992) (interpreting the Indiana Constitution's right-to-remedy clause as coextensive with the Fourteenth Amendment's Due Process Clause).

Again, none of this is to say that the Court should now hold that the Ohio Constitution provides no due-process protections. That ship has long since sailed. *See Adler*, 44 Ohio St. at 568–69. But what the Court *should not do* is create new rights under Article I, Section 16 that have no foundation in either the text or the history of the Ohio Constitution. It should apply existing precedent, which holds both that the Ohio and United States Constitutions provide the same due process protections, *see Stolz*, 155 Ohio St. 3d 567, ¶12, and that any right to treatment as a juvenile is purely statutory, *Agler*, 19 Ohio St. 2d at 72.

One last point. Because Bunch has failed to raise or preserve a claim based on the unique language of Article I, Section 16, he also does not offer any test for when the Court should recognize additional rights under the Ohio Constitution. The Court cannot simply rely on the substantive-due-process test used in connection with the Fourteenth Amendment. As discussed above, that test turns on whether a claimed right is deeply rooted in the nation's legal traditions, and separate juvenile proceedings are not. *See* pp.16-20. Without a clear test, future courts and future litigants will be left guessing about what additional rights the Ohio Constitution might supposedly protect. If the Court believes that Article I, Section 16 of the Ohio Constitution might provide greater due-process protections than the Fourteenth Amendment, it should wait to consider that question until a party has preserved the issue and a case properly presents it. *See Quarterman*, 140 Ohio St. 3d 464, ¶19. This is not that case.

CONCLUSION

The Court should affirm the Seventh District's decision below.

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ *Samuel C. Peterson*
SAMUEL C. PETERSON* (0081432)
Deputy Solicitor General
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
samuel.peterson@OhioAGO.gov

Counsel for Amicus Curiae,
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee was served by email this 16th day of November 2021, upon the following counsel:

Stephen P. Hardwick
Office of the Ohio Public Defender
250 East Broad St., Suite 1400
Columbus, Ohio 43215
stephen.hardwick@opd.ohio.gov

Ralph M. Rivera
Mahoning County Prosecutor's Office
21 W. Boardman St., 6th Floor
Youngstown, Ohio 44503
rrivera@mahoningcountyoh.gov

/s/ Samuel C. Peterson
Samuel C. Peterson
Deputy Solicitor General