In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2015-0677
Appellee,	:	On Appeal from the Montgomery County
v.	:	Court of Appeals, Second Appellate District
MATTHEW AALIM,	:	
Appellant.	:	Court of Appeals Case No. 26249

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO

AMANDA J. POWELL* (0076418)
Assistant State Public Defender
**Counsel of Record*
Office of the Ohio Public Defender
250 East Broad St., Suite 1400
Columbus, Ohio 43215
614-466-5394
614-752-5167 fax
amanda.powell@opd.ohio.gov

Counsel for Appellant
Matthew Aalim

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

MATHIAS H. HECK (0069384)
Montgomery County Prosecutor
ANDREW T. FRENCH* (0014171)
Assistant Prosecutor
**Counsel of Record*
301 West Third Street
5th Floor Courts Building
Dayton, Ohio 45402
937-225-5757; 937-225-3470 fax
frencha@mcohio.org

Counsel for Appellee
State of Ohio

MARSHA L. LEVICK (PHV 1729-2016)
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
215-625-0551; 215-625-2808 fax
mlevick@jlc.org

Counsel for *Amicus Curiae*
Juvenile Law Center

NADIA N. SEERATAN (PHV 1749-2016)
National Juvenile Defense Center
1350 Connecticut Ave., N.W., Suite 304
Washington, D.C. 20036
202-452-0010; 202-452-1205 fax
nseeratan@njdc.info

Counsel for *Amicus Curiae*
National Juvenile Defense Center

RICKELL L. HOWARD (0081982)
Ohio Director of Litigation and Policy
Children's Law Center, Inc.
1002 Russell Street
Covington, KY 41011
859-431-3313; 859-655-7553 fax
rhoward@childrenslawky.org

Counsel for *Amicus Curiae*
Children's Law Center, Inc.

MARITZA S. NELSON (0084610)
Law Office of Maritza S. Nelson, LLC
81 Mill Street, Suite 300
Gahanna, Ohio 43230
614-416-8146; 614-416-8153 fax
mnelson@msnlawoffice.com

Counsel for *Amicus Curiae*
Juvenile Justice Coalition, League of Women Voters and Ohio Association of Child Caring Agencies

KIMBERLY P. JORDAN (0078655)
Director, Justice for Children Project
Moritz College of Law Clinical Programs
Drinko Hall, 55 W. 12th Avenue
Columbus, Ohio 43210
614-688-3657; 614-292-5511 fax
jordan.723@osu.edu

Counsel for *Amicus Curiae*
Justice for Children Project

D.K. (RUDY) WEHNER (0016080)
Montgomery County Public Defender's Office
117 S. Main Street, Suite 400
Dayton, Ohio 45422
937-225-4652; 937-225-3449 fax
WehnerR@mcohio.org

Counsel for *Amicus Curiae*
Montgomery County Public Defender's Office

DAVID L. STRAIT (0024103)
Assistant Franklin County Public Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215
614-525-3194; 614-461-6470 fax
dlstrait@franklincountyohio.gov

Counsel for *Amicus Curiae*
Franklin County Public Defender

MELISSA LINDSAY (0085605)
Staff Attorney, Family and Youth Law Center
Capital University Law School
303 East Broad Street
Columbus, Ohio 43215
614-236-7312; 614-236-6580 fax
mlindsay@law.capital.edu

Counsel for *Amicus Curiae*
Family and Youth Law Center

DORIANNE MASON (0093176)
Ohio Justice and Policy Center
215 East Ninth Street, Suite 601
Cincinnati, Ohio 45202
513-421-1108 ext. 34; 513-562-3200 fax
damson@ohiojpc.org

Counsel for *Amicus Curiae*
Ohio Justice and Policy Center

MICHELE TEMMEL (0077606)
Hamilton County Public Defender's Office
125 E. Court Street, 9th Floor
Cincinnati, Ohio 45202
513-946-8241; 513-946-8242 fax
mtemmel@cms.hamilton-co.org

Counsel for *Amicus Curiae*
Hamilton County Public Defender's Office

BEATRICE JESSIE HILL (0074770)
Associate Dean for Academic Affairs
Judge Ben C. Green Professor of Law
Case Western Reserve University
School of Law
11075 East Blvd.
Cleveland, Ohio 44106
216-368-0553; 216-368-2086 fax
jessie.hill@case.edu

Counsel for *Amicus Curiae*
Schubert Center for Child Studies

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

INTRODUCTION

Matthew Aalim robbed two women at gunpoint when he was sixteen. Under Ohio's mandatory bindover statutes, the juvenile court transferred Aalim to the court of common pleas, where he pleaded guilty and received a four-year sentence. Aalim initially challenged his sentence on due process, equal protection, and Eight Amendment grounds. In this Court, Aalim has dropped his Eight Amendment claim and argues only that his mandatory transfer to the court of common pleas violated due process and equal protection.

Aalim's constitutional claim is difficult to pin down. It is not about punishment; he has dropped that claim and concedes that he may have received a *greater* punishment in juvenile court. It is not about process; juvenile courts afford *fewer* procedural protections than courts of common pleas. It is not about a statutory right to juvenile proceedings; this case arose because Ohio law *denies* him that right. It is not about a constitutional right to those proceedings; juvenile courts are legislative creations that post-date the Constitution by more than a century and the Fourteenth Amendment by more than 30 years.

At bottom, then, this appeal dresses a policy argument in ill-fitting constitutional clothes. Under Aalim's formulation, treating a 13-year-old differently than a 16-year-old and a 16-year-old differently than an 18-year-old is constitutional, but *not* treating a 16-year-old differently than an 18-year-old in limited situations is unconstitutional. In other words, Aalim's favored classifications warrant rational-basis review, while his disfavored classifications require strict scrutiny; expanding the juvenile system is a legislative prerogative, while restricting it is a constitutional violation.

Consider the implications. If the Due Process Clause includes a blanket right to an amenability hearing, every State has violated that right for most of this country's history and most States continue to do so today. But the rabbit hole goes deeper. If age-based classifications

require strict scrutiny under the Equal Protection Clause, countless laws will be under a searching judicial eye. Laws governing drinking, driving, mandatory schooling, political-office eligibility, tobacco use, and voting are all constitutionally dubious in Aalim's world. More importantly, the juvenile system, itself an age-based classification, might be on the chopping block. After all, what compelling interest justifies always trying those under 14 in juvenile court, applying certain transfer standards to 14- and 15-year-olds and others to 16- and 17-year-olds, and always trying those over 17 in common pleas court? *See* R.C. 2152.10.

Unsurprisingly, every State to address similar claims has rejected them. That is perhaps why Aalim and his *amici* lean so heavily on policy arguments. But those arguments are not the stuff of jurisprudence. Even if "some may question whether the [statute is] the best way to further public safety, questions concerning the wisdom of legislation are for the legislature." *State v. Blankenship*, ___ Ohio St. 3d ___, 2015-Ohio-4624 ¶ 37 (pl. op.) (mandatory classification of a 21-year-old constitutional). The judge "is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." Benjamin Cardozo, *The Nature of the Judicial Process* 141 (1921). Judges must apply the law, not make it. Applying the law here means affirming the judgment below.

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. Aalim challenges an Ohio statutory scheme on constitutional grounds. 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 according to state law in an effort to protect the community and rehabilitate youth. *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 CASE AND FACTS

A. The juvenile court system has long been regarded as a statutory innovation subject to change by state legislatures.

"The juvenile justice system is grounded in the legal doctrine of *parens patriae*, meaning the state has the power to act as a provider of protection to those unable to care for themselves." *State v. Hanning*, 89 Ohio St. 3d 86, 88 (2000); *see also In re Gault*, 387 U.S. 1, 16-17 (1967); *In re Spence*, 41 Eng. Rep. 937, 938 (Ch. 1847) ("This court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae* . . . ."). The *parens patriae* doctrine "has ancient origins," finding expression in early Roman law and later in the English common law. *State v. Monahan*, 104 A.2d 21, 22 (N.J. 1954); Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. Pa. L. Rev. 426, 435 (1939). Traditionally, the doctrine insulated children under the age of seven from criminal culpability, applied a rebuttable presumption of incapacity to children of ages seven through 14, and considered those above age 14 adults. *See* 4 William Blackstone, *Commentaries on the Laws of England* 23-24 (1769); 1 Sir Matthew Hale, *The History of the Pleas of the Crown* 19-27 (1736); *see also Gault*, 387 U.S. at 16.

The common-law approach "was, in effect, incorporated into American law." Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227, 1230 (1966). Eventually, States began expanding the traditional doctrine via

statute. *See In re Agler*, 19 Ohio St. 2d 70, 72 (1969) ("the nature of a juvenile proceeding . . . 'is purely statutory'" (quoting *Prescott v. State*, 19 Ohio St. 184, 188 (1869)); *Woodward v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977) ("the right to juvenile treatment is a legislative gift"). "[I]f the common law could fix the age of criminal responsibility at seven," States reasoned, "the legislature could advance that age to ten or twelve" or even "sixteen or seventeen or eighteen." Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 109 (1909). Illinois spurred the "Juvenile Court movement" when it passed the first juvenile-court statute in 1899. *Gault*, 387 U.S. at 14; Mack, *supra*, at 107. That law established juvenile courts and outlined proceedings for children under the age of 16. *See* 1899 Ill. Laws 131 (April 21, 1899). By 1925, all but two States had passed similar laws with varying delinquency ages. Paul C. Giannelli & Patricia Yeomans Salvador, *Ohio Juvenile Law* § 1.2 (2013).

In Ohio, like certain other States, statutes affording special treatment to children predated juvenile courts. The General Assembly passed a law in 1857 allowing courts to commit to "houses of refuge" or "reform farms" children under the age of 16 who had been accused of crimes. *See Prescott*, 19 Ohio St. at 184-85. In 1902, the State established the first juvenile court in Cuyahoga County; in 1906, it created a statewide system. *See Agler*, 19 Ohio St. 2d at 73. Initially, the jurisdiction of those courts did not extend to felonies. *See Gerak v. State*, 22 Ohio App. 357, 358-59 (8th Dist. 1920) ("The Juvenile Court Act provides that the juvenile court shall have 'jurisdiction of all misdemeanors against minors' but does not attempt to confer jurisdiction of felonies committed by minors." (citation omitted)). The Juvenile Code of 1937 changed that by affording juvenile courts exclusive jurisdiction over all proceedings involving minors. *Agler*, 19 Ohio St. 2d at 72.

In Ohio and elsewhere, the juvenile court system was intended to be distinct from criminal proceedings, and thus did not afford the same procedural protections. *See Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults"). Over time, children in juvenile proceedings gained certain protections, such as the right to notice, counsel, and confrontation. *Id.* at 634-35. Other rights, such as the right to a jury trial and certain pretrial-detention rights, were deemed inapplicable. *See Schall v. Martin*, 467 U.S. 253, 265 (1984) (pretrial-detention rights not equal to those of adults); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (no right to jury trial). Even today, juvenile courts continue to offer fewer procedural protections than common pleas courts.

B. Aalim was transferred to common pleas court pursuant to Ohio's mandatory transfer provisions and convicted, and his conviction was affirmed on appeal.

In November 2013, 16-year-old Matthew Aalim robbed two women by threatening them with a loaded gun and demanding their money and cell phones. *State v. Aalim*, 2015-Ohio-892 ¶ 3 (2d Dist.) ("App. Op."). The State filed a complaint against him in juvenile court and later moved to transfer the case to common pleas court. *Id.* The juvenile court granted the State's motion, finding that: (1) Aalim was 16 years old at the time of the offense, (2) the alleged act would be a felony if committed by an adult, and (3) there was probable cause to believe that Aalim committed the offense. *Id.*; *see* R.C. 2152.10(A)(2)(b), 2152.12(A)(1)(b).

In common pleas court, Aalim was indicted on two counts of aggravated robbery with firearm specifications. App. Op. ¶ 4. Aalim moved to dismiss, arguing that the mandatory transfer statutes for juvenile offenders accused of certain serious felonies were unconstitutional. *Id.* After the court denied the motion, Aalim pleaded no contest to both counts and the State

dismissed the firearm specifications. *Id.* The court sentenced Aalim to four years imprisonment for each offense, to be served concurrently. *Id.*

Aalim appealed, reiterating his claims that the mandatory transfer provisions violated his rights to due process and equal protection and his right against cruel and unusual punishment. *Id.* ¶¶ 5, 11, 18. The Second District denied each claim and affirmed the trial court's judgment. *Id.* ¶¶ 2, 22. The court noted that "this court along with other appellate districts have already determined that the statutory provisions requiring mandatory transfer do not violate due process and equal protection rights under the Fourteenth Amendment." *Id.* ¶ 8 (citations and quotation marks omitted). It also relied on its prior precedent to deny Aalim's Eight Amendment claim. *Id.* ¶ 20. Judge Donovan concurred, acknowledging that precedent permitted the General Assembly to require mandatory bindover but expressing a preference for case-by-case determinations. *Id.* ¶¶ 23-24 (Donovan, J., concurring).

Aalim appealed to this court, reasserting his due-process and equal-protection claims but dropping his cruel-and-unusual-punishment claim, and this Court granted review. *See State v. Aalim*, 143 Ohio St. 3d 1498 (2015).

ARGUMENT

<u>*Amicus Curiae* Ohio Attorney General's Proposition of Law:</u>

> *The State's decision to require mandatory bindover to common pleas court for youth charged with serious felonies does not violate due process or equal protection.*

Aalim and his *amici* facially attack the mandatory bindover statute, arguing that due process and equal protection require juvenile courts to hold amenability hearings before transferring any juvenile to common pleas court. *See, e.g.*, Br. 7 (question here is whether hearing is required in "every child's case"); Br. 22 (arguing that line between 15- and 16-year-olds is not justified without mentioning law as applied to Aalim). Aalim's burden, therefore, is

to show that the mandatory bindover statute is unconstitutional in all circumstances, not merely that it "'might operate unconstitutionally under some plausible set of circumstances.'" *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d 280, 2010-Ohio-1029 ¶ 33 (quoting *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶ 26); *cf. United States v. Salerno*, 481 U.S. 739, 751 (1987) ("we cannot categorically state that pretrial detention offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (citation and quotation marks omitted)). Aalim cannot meet this standard.

The due-process and equal-protection analyses are the same under the U.S. and Ohio constitutions. *See, e.g., In re Adoption of H.N.R.*, ___ Ohio St. 3d ___, 2015-Ohio-5476 ¶ 24 (U.S. and Ohio due process clauses provide the "same guarantee"); *Pickaway Cnty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908 ¶ 17 ("The federal and Ohio equal-protection provisions are functionally equivalent and are to be construed and analyzed identically." (citations and quotation marks omitted)).

Aalim and his *amici* have failed to show a due-process or equal-protection violation. Their claims have no foundation in precedent and depend mostly on policy considerations reserved for the General Assembly. The Constitution does not provide a right to juvenile proceedings or an amenability hearing before transfer to common pleas court, and the statutory right to those proceedings does not extend to juveniles who commit serious felonies. Moreover, age is not a suspect class implicating heightened scrutiny, and the bindover provisions satisfy rational-basis review. Accordingly, this Court should affirm the Second District's decision.

A. The bindover provisions do not violate due process because the Due Process Clause does not afford a right to juvenile proceedings or amenability hearings and the statutory right to those proceedings does not extend to serious felonies.

To demonstrate a due-process violation, a plaintiff must first show that he was deprived of a "protected right." *Albrecht v. Treon*, 118 Ohio St. 3d 348, 2008-Ohio-2617 ¶ 14. The

plaintiff must then show that the deprivation occurred without adequate process, including an opportunity to be heard "at a meaningful time and in a meaningful manner." *State v. Cowan*, 103 Ohio St. 3d 144, 2004-Ohio-4777 ¶ 8.

The possible sources of the right to transfer proceedings are the Due Process Clause itself or Ohio's juvenile-court laws. *See, e.g., Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). But there is no due-process right to juvenile proceedings or an amenability hearing, and the statutory right to those proceedings does not extend to serious felonies. Accordingly, Aalim has failed to demonstrate a due-process violation.

1. The Due Process Clause does not recognize a right to juvenile proceedings or amenability hearings.

The right to juvenile proceedings cannot derive from procedural due process because that doctrine merely ensures that procedural safeguards adequately protect substantive rights. And there is no substantive right to juvenile proceedings since they are neither deeply rooted in our nation's history nor implicit in the concept of ordered liberty. A wealth of precedent confirms these points.

No procedural right. The procedural guarantees in the Due Process Clause are not *sources* of rights; they are commands that certain process attach to deprivations of life, liberty, or property. "The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.'" *Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Instead, it protects interests "'defined by existing rules or understandings that stem from an independent source such as state law.'" *Id.* (quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976)). These interests are, "'of course, . . . not created by the Constitution.'" *Gonzales*, 545 U.S. at 756 (quoting *Paul*, 424 U.S. at 709). "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim*

v. Wakinekona, 461 U.S. 238, 250 (1983). There is no protected interest in "nothing but procedure." *Gonzales*, 545 U.S. at 764. Rather, the liberty or property that the Due Process Clause protects must be something other than process itself. *See, e.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (property interest in public-utility service); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (liberty interest in avoiding involuntary civil confinement).

Aalim therefore has no liberty interest in the juvenile-court process. The cases line up against Aalim's claim. There is simply "no support for the proposition that a citizen has a . . . liberty interest" in process apart from whether the "citizen has a separate . . . liberty interest at stake." *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 860 (6th Cir. 2012). There is thus no liberty or property interest in the procedures that the federal or state governments erect to administer the law. *See, e.g.*, *Redondo-Borges v. U.S. Dept. of Hous. & Urban Dev.*, 421 F.3d 1, 9 (1st Cir. 2005) (no "property interest in" federal "determination procedure alone"); *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 773 (7th Cir. 2013) ("a plaintiff does not have a federal constitutional right to state-mandated process"). To take but one example from the criminal-justice context, a prisoner has no liberty interest in the parole process if he has no liberty interest in the *result* of that process. *See, e.g.*, *Koch v. Daniels*, 296 F. App'x 621, 627-28 (10th Cir. 2008). Likewise, Aalim's argument conflates process itself with the interest that the process is designed to protect. The criminal-justice process is designed to protect liberty from wrongful convictions. The juvenile process has similar aims. But neither is an end in itself. To hold otherwise would "work a sea change in the scope of federal due process." *Gonzales*, 545 U.S. at 772 (Souter, J., concurring). Accepting Aalim's claim would go beyond any "recognized theory of Fourteenth Amendment due process, by collapsing the distinction between" what is

protected "and the process that protects it." *Id.* (Souter, J., concurring). Procedural due process, by its own force, cannot secure a right to a hearing.

In sum, Aalim has a liberty interest against wrongful adjudications or convictions, but not a liberty interest in which system makes those decisions. Aalim has not asserted the former interest, perhaps because it was fully protected by the process he received in the court of common pleas. Indeed, juvenile courts and courts of common pleas alike must afford procedural safeguards against wrongful convictions. Thus, Aalim's claim necessarily depends on the existence of a right to juvenile proceedings unmoored from his liberty interest against wrongful convictions. Absent this relationship, however, procedural due process cannot be the source of the right Aalim asserts.

No substantive right. Substantive due process is equally barren as a source of the right to a transfer hearing. Substantive due process protects only "fundamental" rights, which are, "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and quotation marks omitted); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 122-23 (1989) (Scalia, J., op.) (determining whether rights are fundamental requires "'respect for the teachings of history'" (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment))).

Juvenile proceedings are not deeply rooted in this nation's history. In fact, they have *not existed* for most of the nation's history. *See Gault*, 387 U.S. at 16 (noting that Illinois established the first juvenile court in 1899). If a right to juvenile proceedings were deeply rooted in history, it would have appeared before the last year of the nineteenth century. *Compare McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (right deeply rooted because, among

other things, it could be traced to English Bill of Rights, Blackstone's *Commentaries*, and pre-constitutional colonial practice), *with Glucksberg*, 521 U.S. at 723 (no right where "tradition" had "long rejected" it). The only plausible deeply rooted right relevant here is the common-law tradition of treating children under the age of seven as incapable of committing crime and applying a rebuttable presumption of incapacity to children between ages seven and 14. *See* Blackstone, *supra*, at 23-24; Hale, *supra*, at 19-27; *see also Gault*, 387 U.S. at 16. This doctrine does not afford a right to juvenile proceedings, and, critically, it treats 16-year-olds as *adults*. Moreover, even that circumscribed doctrine has been limited in Ohio in some contexts. *See, e.g.*, *In re Washington*, 75 Ohio St. 3d 390, 394 (1996) (statute "abolish[ed] the common law that held a child under the age of fourteen is rebuttably presumed incapable of committing rape").

Far from deeply rooted, the right to juvenile proceedings is not even uniformly recognized *today*. In 2014, eight States treated *all* 17-year-olds as adults, and two treated 16-year-olds as adults. *See* Statistical Briefing Book, Juvenile Justice System Structure and Process, www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp. These age ranges change often. The alterations include lowering the age limit. New Hampshire and Wisconsin, for example, lowered their upper age of juvenile jurisdiction from 18 to 17 in 1996. *See* 1995 Wisc. Sess. Laws 27 (July 26, 1995); 1995 N.H. Laws 629, 635 (July 3, 1995). Moreover, when States have raised the age limit, the change is often accompanied by mandatory transfer laws similar to Ohio's, which roughly two thirds of all States now have. *See* Wayne R. LaFave, 2 *Substantive Criminal Law* § 9.6(d) (2d ed. 2015). All of this shows that no deeply rooted tradition dictates that States treat all persons under 18 as juveniles.

Additionally, juvenile proceedings are not implicit in the concept of ordered liberty, because they afford *fewer* procedural rights than adult proceedings. *See Hanning*, 89 Ohio St. 3d

at 89 ("In the early juvenile justice system, although the child was accused of a criminal offense, many of the formal criminal procedures in adult court were omitted."). Although various protections have been extended to juvenile proceedings over the years, it remains the case that "juvenile offenders constitutionally may be treated differently from adults" and that "hearings in juvenile delinquency cases need not necessarily conform with all of the requirements of a criminal trial or even of the usual administrative hearing." *Bellotti*, 443 U.S. at 635 (citation and quotation marks omitted). For example, juveniles enjoy no right to a jury trial and fewer pretrial-detention rights. *McKeiver*, 403 U.S. at 545 (no right to jury trial); *see Schall*, 467 U.S. at 265 (pretrial-detention rights of juveniles not equal to those of adults). The right to *less* procedure is not key to the concept of liberty.

Perhaps unsurprisingly, then, the advent of the juvenile court system led to frequent *attacks* on its constitutionality. *See Gault*, 387 U.S. at 14-15 & n.15; *Monahan*, 104 A.2d at 22-23 (collecting cases). Although these attacks were ultimately unsuccessful, "[t]he constitutional and theoretical basis for this peculiar system is—to say the least—debatable." *Gault*, 387 U.S. at 17; *see also* Janet Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1120 (1991) ("divergences from procedural justice norms strongly suggest that, in the eyes of juvenile respondents, the legitimacy of juvenile court is suspect"). By contrast, no court questioned the constitutionality of trying children in common pleas court for more than a century leading up to the advent of juvenile courts. *See Gault*, 387 U.S. at 16. A right not invoked for hundreds of years, subject to change depending on the litigation strategy of the person deploying it, and frequently questioned by those it is designed to serve is hardly essential to the concept of ordered liberty. Indeed, the

"mere novelty" of Aalim's claim is "reason enough to doubt that 'substantive due process'" protects it. *Reno v. Flores*, 507 U.S. 292, 303 (1993).

Precedent. Specific precedent confirms what these general principles reveal. This Court noted in 1869 that juvenile proceedings are "purely statutory." *Prescott v. State*, 19 Ohio St. 184, 188 (1869). It has reiterated that conclusion many times. *See In re Agler*, 19 Ohio St. 2d 70, 72 (1969); *In re Darnell*, 173 Ohio St. 335, 337 (1962); *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197, 203 (1881). Consistent with this position, other courts have explicitly held that there is no constitutional right to juvenile proceedings; indeed, such authorities are legion. *See, e.g., State v. Angel C.*, 715 A.2d 652, 669 (Conn. 1998) ("Any [special treatment] accorded to a juvenile because of his [or her] age with respect to proceedings relative to a criminal offense *results from statutory authority, rather than any inherent or constitutional right*." (citation and quotation marks omitted)); *State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997) ("no person, regardless of age, has a fundamental right to juvenile adjudication"); *People v. Hana*, 504 N.W.2d 166, 175 (Mich. 1993) ("[W]e are unaware of a constitutional right to be treated as a juvenile. . . . [J]uvenile justice procedures are governed by statutes . . . ."); *Jahnke v. State*, 692 P.2d 911, 928-29 (Wyo. 1984) (collecting cases).

* * *

At bottom, Aalim's claim that due process confers a right to be tried in a statutorily created court that affords *less* procedure and did not exist for most of our country's history is without foundation. No court has accepted this argument, and many have rejected it. This Court should do the same.

2. Ohio law does not extend the right to juvenile proceedings to those who commit serious felonies.

Because juvenile proceedings are purely statutory, this Court must look to Ohio law to determine the rights afforded. While the legislature "may not constitutionally authorize the deprivation of a [protected] interest, once conferred, without the appropriate procedural safeguards," it "may elect not to confer a particular [protected] right" in the first place. *Cowan*, 2004-Ohio-4777 ¶ 8. Here, Ohio has elected not to afford a right to juvenile proceedings when there is probable cause to believe that a child committed a serious felony. Thus, state law cannot be the source of the right Aalim seeks because he is challenging the very statute that directs his case to common pleas court.

Juvenile courts are empowered to hear various matters concerning those under the age of 18. *See* R.C. 2151.23; R.C. 2152.02(C)(1) (defining "child" as "a person who is under eighteen years of age"). When, however, there is probable cause to believe that a child who is 16 or older used a firearm to carry out certain dangerous and violent crimes—rape, manslaughter, aggravated robbery, and aggravated burglary—the juvenile court must transfer the offender to adult criminal court. *See* R.C. 2152.10(A)(2)(b), 2152.12(A)(1)(b); *see also* R.C. 2151.23(H). Thus, the statute as written at the time Aalim entered the juvenile system affords no right to juvenile proceedings to those who commit one of the enumerated felonies. The only question, then, is whether the statute affords adequate process in determining whether there is probable cause to believe that the child committed the offense. It plainly does so.

Before any transfer can occur, the juvenile court must conduct a hearing at which the State must prove that the alleged offender was 16 or older at the time of the offense and that probable cause exists to believe the juvenile committed the offense. *See* R.C. 2152.12(A)(1)(b). The juvenile has a right to counsel at the transfer hearing, and that right cannot be waived. *See*

Ohio R. Juv. P. 3, 30. Additionally, the probable-cause hearing includes a number of procedural safeguards, including the right to remain silent, present evidence, cross-examine witnesses, inspect exhibits prior to their introduction, and receive proper notice and service prior to the hearing. Ohio R. Juv. P. 29. In effect, Ohio law provides most of the procedural safeguards afforded in criminal trials, despite the fact that juveniles are constitutionally entitled to fewer procedural protections. *See Bellotti*, 443 U.S. at 635. Aalim received all of these safeguards in this case, and he does not argue that this process was inadequate to effectuate his right to a probable-cause determination. Instead, his inadequate-procedure claim relies on the notion that he has a right to juvenile proceedings (and thus an amenability hearing prior to transfer) *despite* his commission of a serious felony, a right the statute explicitly denies.

This statutory analysis is in good company; numerous courts considering similar transfer statutes have upheld those laws against due-process challenges. *See, e.g.*, *Angel C.*, 715 A.2d at 663; *Behl*, 564 N.W.2d at 566-67; *People v. P.H.*, 582 N.E.2d 700, 712 (Ill. 1991); *Jahnke*, 692 P.2d at 927-29 (collecting cases). Ohio appellate courts, like the Second District here, have done the same. *See, e.g.*, *State v. Kelly*, No. 14-98-26, 1998 WL 812238, at *7-8 (3d Dist. Nov. 18, 1998); *State v. Lee*, No. 97-L-091, 1998 WL 637583, at *5 (11th Dist. Sept. 11, 1998); *State v. Collins*, No. 97CA006845, 1998 WL 289390, at *2 (9th Dist. June 3, 1998).

B. The mandatory bindover provisions do not violate equal protection because age is not a suspect class and the provisions satisfy rational-basis review.

The constitutional guarantee of equal protection holds that "all persons similarly situated should be treated alike." *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (citation and quotation marks omitted). Generally, courts presume a legislative classification is valid unless it "lack[s] a rational relationship to a legitimate governmental purpose." *Id*; *see Wargetz v. Villa Sancta Anna Home for the Aged*, 11 Ohio St. 3d 15, 17 (1984). Heightened scrutiny applies only where

a statute classifies individuals in violation of a fundamental right or based on a suspect class. In this case, heightened scrutiny is not warranted because there is no fundamental right to juvenile proceedings and juveniles are not a suspect class. Thus, because the bindover provisions are rationally related to Ohio's legitimate interests in protecting the public and redressing serious crimes, the statute is consistent with equal protection.

1. Heightened scrutiny is not required because the bindover provisions do not classify individuals in violation of a fundamental right and juveniles are not a suspect class.

The bindover provisions implicate only rational-basis review. *First*, as explained above, juveniles do not have a fundamental right to juvenile proceedings. *See Agler*, 19 Ohio St. 2d at 72 (noting that juvenile proceedings are "'purely statutory'" (quoting *Prescott*, 19 Ohio St. at 188)); *Jahnke*, 692 P.2d at 928-29 (concluding that "[t]here is no constitutional right to be tried as a juvenile" and collecting cases).

Second, "Ohio courts have consistently held that juveniles do not constitute a suspect class in the context of equal protection law." *State v. Fortson*, 2012-Ohio-3118 ¶ 41 (11th Dist.); *see also In re Vaughn*, No. CA89-11-162, 1990 WL 116936, at *5 (12th Dist. Aug. 13, 1990) ("juveniles have never been treated as a suspect class and legislation aimed at juveniles has never been subjected to the test of strict scrutiny"). Nor have juveniles been treated as a suspect class elsewhere. *See, e.g.*, *Behl*, 564 N.W.2d at 568 ("Facial distinctions based on age and charged offenses do not create suspect classifications."); *Marine v. State*, 607 A.2d 1185, 1207 (Del. 1992) ("The distinction drawn by the statutory scheme, based on the crime with which a defendant is charged, is not a suspect classification, nor does it involve a fundamental right."). This conclusion comports with the Supreme Court's clarification that "juvenile offenders constitutionally may be treated differently from adults." *Bellotti*, 443 U.S. at 635. Indeed, while explicitly denying this conclusion, *see* Br. 22, Aalim implicitly concedes it. He applauds the

juvenile system for treating 13-year-olds differently than 19-year-olds; he simply disagrees with where the line has been drawn in this case. But if juveniles were truly a suspect class, then *not* treating them like adults—the very purpose of juvenile courts, not to mention the Eighth Amendment cases Aalim cites—would implicate strict-scrutiny review. As discussed below, Aalim's attempts to circumvent this logic and the precedent applying it are unavailing.

2. The bindover provisions satisfy rational-basis review.

Because juveniles are not a suspect class, any classification in the bindover provisions need only bear a rational relationship to a legitimate government interest. Two goals of the juvenile system are to "protect the public interest and safety" and "hold the offender accountable for the offender's actions." R.C. 2152.01(A). The statute is rationally related to those interests because it only transfers juveniles who commit serious offenses when they are nearly adults. Such circumstances implicate serious public safety risks, as older juvenile offenders are more likely to possess the violent capabilities of adults. And transfer of these juveniles rationally relates to the legitimate goal of holding juvenile offenders accountable for their crimes because bindover applies only to the most serious crimes juveniles can commit, which the General Assembly could reasonably have believed would warrant adjudication in common pleas court. Accordingly, it is not irrational to have sentences that exceed the time needed to rehabilitate (another goal of juvenile system). *See Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 109 (2003) ("not every provision in a law must share a single objective"); *see also In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919 ¶ 74 ("the General Assembly has adhered to the core tenets of the juvenile system even as it has made substantive changes to the Juvenile Code in a get-tough response to increasing juvenile caseloads, recidivism, and the realization that the harms suffered by victims are not dependent upon the age of the perpetrator"). The bindover statute is carefully tailored and entirely rational.

C. Aalim's claim conflates the possibility of receiving a different punishment in common pleas court with a constitutional right to juvenile proceedings.

Aalim does not attempt to argue that, by being tried in common pleas court, he was deprived of procedural rights he would have received in juvenile court. As discussed, such a claim is not plausible because juvenile proceedings involve fewer rights. *See Schall*, 467 U.S. at 265; *McKeiver*, 403 U.S. at 545. Instead, his claim is based on the potential differences in *outcomes* between common pleas and juvenile adjudications. Accordingly, his argument sounds in punishment, not process. It is therefore an argument under the Eighth Amendment (and Article I, § 9), an argument Aalim has abandoned in this Court. *See* Jur. Mem (omitting Eighth Amendment proposition); *State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034 ¶ 17 (appellant "abandoned" an "argument by failing to even mention it as a basis for reversal in his initial brief on the merits"). For two reasons, this Court should reject Aalim's effort to smuggle his abandoned claim about possible punishments into his due-process or equal-protection claim.

First, the Supreme Court has distinguished between process and punishment, noting that "the State does not acquire the power to punish . . . until after it has secured a formal adjudication of guilt." *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (collecting cases). This distinction is evident here, because transferring a juvenile to common pleas court does not guarantee a conviction, let alone a particular sentence. Plus, as Aalim concedes, common pleas courts must consider youth as a mitigating factor in sentencing, and those transferred to common pleas court remain free to attack their sentences on that basis. *See* Br. 18 (citing *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010)). Accordingly, claims about punishment and process cannot be blended at will. Aalim chose not to attack his punishment under the Eighth Amendment, perhaps due to the difficulty in showing that a four-year sentence for armed robbery constitutes cruel and unusual punishment, or perhaps because he

has conceded that his punishment may have been *longer* if issued in juvenile court. *See* Br. 14. Whatever the reason, Aalim cannot use that abandoned claim about punishment in an attempt to justify his due-process and equal-protection claims relating to his transfer to common pleas court in light of the Supreme Court's precedent distinguishing punishment from procedure.

Second, the Supreme Court has repeatedly held, in the context of substantive due process, that when specific constitutional provisions address the claims at issue, courts should avoid looking to more open-ended concepts like fundamental rights. "We have 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); *see Graham v. Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). That is especially true when a defendant points to the "fundamental fairness" of the Due Process Clause instead of a specific guarantee in the Bill of Rights. "In the field of criminal law, we have 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 v. California*, 505 U.S. 437, 443 (1992) (citation and quotation marks omitted). Because the texts of the U.S. and Ohio constitutions directly address punishment, the Eighth Amendment is the right yardstick here.

That point is further reinforced by the textually unbounded character of the fundamental-rights analysis. Its open-endedness makes it ill-suited for novel claims. Therefore, "[a]s a

general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (citation omitted); *cf. State ex rel. King v. Sherman*, 104 Ohio St. 317, 322-23 (1922) ("It has been repeatedly declared that before a statute can be declared to be unconstitutional it must be violative of some specific provision of the written Constitution, and that it is not sufficient that it shall be contrary to natural justice or public policy or other latent spirit pervading or underlying the Constitution without either expressly or impliedly violating its terms."). Throughout his brief, Aalim makes claims about the consequences of common pleas adjudication. That is a task for the Eighth Amendment.

D. Neither Aalim nor his *amici* offer a sound reason to reverse.

Aalim and his *amici* make three central claims, one procedural and two substantive. First, regarding process, they claim the bindover decision "demands" judicial discretion, and that its absence is unconstitutional. Br. 5-16. Second, they claim the bindover statute creates an unconstitutional presumption. Br. 16-19. Finally, they claim the statute violates equal protection by distinguishing between 15- and 16-year-olds. Br. 20-25. Each claim fails to convince. Equally unconvincing are the appeals to policy used to support these claims.

1. The statute affords all process due because the General Assembly has decided that certain crimes by certain offenders under 18 should be tried in common pleas court.

Much of Aalim's due-process claim is based on vague notions of fundamental rights. *See* Br. 8-13, 19-20. For the reasons discussed above, those claims have no basis in constitutional law. In a slight variation on that argument, Aalim says that youth must be a mitigating factor, not an aggravating factor. Br. 14. That point reveals more than it may intend. It shows, for

example, that his argument is really an attack on *punishment*, not *process*. Aggravating and mitigating factors are, after all, the language of sentencing, not adjudication. *See, e.g.*, R.C. 2929.04 (aggravating and mitigating factors for death penalty); *State v. Watts*, No. CA 10274, 1987 WL 12639, at *2 (2d Dist. June 10, 1987) (noting age of 19 as mitigating factor for sentence). This argument about mitigating factors is beside the point because, as noted, Aalim explicitly abandoned any punishment-based challenge here. *See* Jur. Mem (omitting Eighth Amendment proposition). Moreover, as Aalim notes, his punishment may well have been longer in juvenile court (five years) than in common pleas court (four years). *See* Br. 14.

Regardless, Aalim's claim fails on its own terms. Being 16 in Ohio remains a significant mitigating factor in two distinct senses. For one, outside of certain crimes, it entitles the offender to the juvenile-court process. That is not true in all States, and certainly has not been true over the arc of history. Additionally, when considering Aalim's punishment, not the process for determining guilt, his age *can* be a mitigating factor. *See, e.g.*, *State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849 ¶ 18 ("youth and the attendant circumstances of youth may be considered under [the sentencing-factor statutes] . . . before the court imposes a sentence on a juvenile"); *id.* at ¶ 31 (O'Connor, C.J., concurring) ("a trial court must consider youth as a mitigating factor when formulating a sentence for a crime committed by a juvenile"). And this Court has held that statutes *barring* youth as a mitigating factor raise no due-process problem. *State v. Warren*, 118 Ohio St. 3d 200, 2008-Ohio-2011 ¶¶ 51-52. If the General Assembly may make youth irrelevant in some cases, the Constitution cannot make it relevant in all cases.

2. The bindover statute creates no unconstitutional presumption because it is a routine legislative classification.

Aalim fares no better when he frames his challenge in terms of an irrebuttable presumption. Br. 16-19. According to Aalim, the statute breaches a prohibition on irrebuttable

presumptions because all 16- and 17-year-olds who commit certain crimes are tried in common pleas court, not juvenile court. That argument has multiple problems. For one thing, the irrebuttable-presumption doctrine is essentially a dead letter. *See Weinberger v. Salfi*, 422 U.S. 749 (1975); *cf. Michael H.*, 491 U.S. at 120-21 (1989) (Scalia, J., op.) (irrebuttable presumption doctrine is just a species of substantive due process). "The irrebuttable presumption doctrine, never consistently applied during its brief life, was soon rejected by the Supreme Court." *Cozart v. Winfield*, 687 F.2d 1058, 1061 (7th Cir. 1982) (upholding categorical limit on public assistance); *see Malmed v. Thornburgh*, 621 F.2d 565, 576 (3d Cir. 1980) ("we do not read the irrebuttable presumption decisions as deviating substantially from the traditional tests for violations of the due process clause") (upholding age classification); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534, 1556 (1974) ("There appears to be no justification for the irrebuttable presumption doctrine. . . . [I]rrebuttable presumptions are nothing more than statutory classifications."); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 Mich. L. Rev. 800, 827 (1974) (doctrine "rests upon a disingenuous, misleading analysis" because it confuses evidentiary rules and legislative classifications).

Additionally, the "presumption" here does not fit the mold, because the irrebuttable presumption doctrine is properly understood as applying specifically to evidentiary rules created by statute, not generally to legislatures' policy decisions. When the Court has struck down presumptions, those presumptions were not universally true (e.g., the presumption that a college applicant from Michigan could not establish residence in Ohio) *and* an alternative means of deciding the question was available (e.g. evidence of where the applicant really "resides"). *Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973); *see, e.g.*, *Catlin v. Sobol*, 93 F.3d 1112, 1117 (2d

Cir. 1996) (doctrine involves "presumptions that, although no universally true, cannot be rebutted"). Neither feature is true here. It is *universally true* that 16- and 17-year-olds who commit certain crimes will be tried in common pleas court because the General Assembly said so. And there is no *alternate* means to sort the offenders because the entire point is to place all people who fit the criteria in common pleas court. The statute defines a universal category *regardless* of external evidence.

Consider the doctrine's lack of fit another way. The doctrine applies only to statutes that "purport" to be about a given fact, but then "make plainly irrelevant" evidence of that fact. *Weinberger*, 422 U.S. at 772. A statute cannot claim to award benefits if a hearing reveals that the applicant is injured, but then presume that all applicants who waited more than a week to seek medical treatment are not injured. But a law could say categorically that the hearing (and benefits) are not available to any applicant who waited more than a week to seek medical treatment. Any other view of the doctrine would create an unstoppable "engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the . . . Constitution." *Id.* A view like the one Aalim embraces would invalidate as "irrebuttable presumptions" all kinds of legislative judgments. Speed limit at 65? Illegal. Speed is only prima facie evidence of unsafe driving; the driver can rebut that presumption. *See Conclusive Presumption Doctrine*, *supra*, at 832-33. Mandatory retirement at 70? Prohibited. Some judges certainly retain the ability to serve after that age. Drinking age at 21? No dice. Some 20-year-olds are mature enough to handle the responsibility (and vice versa, alas). Tax-exempt non-profit entities? Unconstitutional. Make them prove that their social good outweighs the forgone taxes. The game can go on and on. What Aalim attacks as an illegal presumption is just a legislative classification. Like thousands of others, it is constitutional.

Finally, in a slight variation on the illegal-presumption argument, Aalim offers an argument that proves too much by insisting that the disposition of a child's case "demands" the use of juvenile judges. Br. 5 (citation omitted); *see also* Br. 6 (lack of "individualized determination" makes statute unconstitutional). Aalim's rule of law would strike down as unconstitutional a statute that placed in the common pleas courts 17-year-olds facing first-degree murder charges (and left all other sub-18-year-olds in juvenile court). It would prohibit the General Assembly from ever concluding that the cut-off for juvenile court should be 16 rather than 17. Like other arguments that prove too much, the consequences of Aalim's claim show its weakness. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 102 (2003) (claim that any law aimed at deterring crime is punitive proved too much); *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979) (claim that right to public trial extended to civil cases proved too much because it conflicted with text and structure of the Constitution).

3. Classifications based on age are not suspect classifications.

Aalim next makes the unsupported claim that age-based classifications are suspect and thus warrant strict scrutiny. Br. 21. As noted above, courts have rejected this claim. And Aalim has implicitly conceded its implausibility because he seeks to be placed in juvenile court, itself and age-based classification. A closer looks demonstrates additional flaws in his argument.

Age plainly fails the "discrete and insular minorities" test defining classifications that trigger strict scrutiny. *See United States v. Carolene Products*, 304 U.S. 144, 151 n.4 (1938). "Old age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). The case for youth is even weaker. While most will reach old age, all who can vote have been children. And many in the political process have or have had children. More cynically, adults will one day rely on the young to support various public retirement benefits. The incentive to

discriminate against children is nonexistent. That is why courts have consistently rejected the idea that youth is a suspect class. *See, e.g.*, *Schmidt v. Superior Court*, 769 P.2d 932, 944 (Cal. 1989) (collecting cases); *Matter of C.H.*, 683 P.2d 931, 938 (Mont. 1984); *In re Chappell*, 2005-Ohio-6451 ¶ 38 (7th Dist.).

Consider, too, the wide-ranging consequences of Aalim's suggestion. If youth were a suspect class, thousands of laws would fall, including those relating to restricted driving privileges, voting ages, drinking ages, mandatory schooling, and minimum ages for political office. *See., e.g.*, *Oregon v. Mitchell*, 400 U.S. 112, 135 (1970) (op. of Black, J.) ("generalities of the Equal Protection Clause" did not give Congress the power to lower state voting age from 21 to 18); *Gary v. City of Warner Robins*, 311 F.3d 1334, 1336 (11th Cir. 2002) (upholding statute banning those under 21 from entering business that sold alcohol even though those who are 20, but not 21, can usually "draft a will, consent to sexual intercourse, and refuse medical treatment"); *McClafferty v. Portage Cnty. Bd. of Elections*, 661 F. Supp. 2d 826 (N.D. Ohio 2009) (minimum age of 23 for mayoral candidate constitutional); *Arvia v. Madigan*, 809 N.E.2d 88, 101 (Ill. 2004) (upholding summary license-suspension process applicable only to those under 21); *Mason v. State*, 781 So.2d 99 (Miss. 2000) (age differential for drunk-driving blood-alcohol threshold constitutional) (collecting similar cases). The list is endless. There is no serious argument that youth is a suspect class.

The case for youth as a suspect class is even weaker when one focuses on the relevant category here—16- and 17-year-olds whom a court has found probable cause to believe committed a serious crime. *See* R.C. 2152.12(A)(1)(b)(ii). Those who commit crime are not a suspect class. Indeed, "[h]undreds of statutes and administrative regulations, both state and federal, deal comprehensively and in detail with persons who are incarcerated, and, in the main,

they are deemed to be as presumptively constitutional as other legislative and administrative directives." *Myrie v. Comm'r, N.J. Dept. of Corr.*, 267 F.3d 251, 263 (3d Cir. 2001); *Matter of C.H.*, 683 P.2d at 938 (those "deemed delinquent youths do not constitute a suspect class for purposes of equal protection"). The argument that youth accused of a crime are a suspect class simply "reaches too far." *Myrie*, 267 F.3d at 263.

Finally, Aalim oddly focuses on the "many stakeholders" who agree with him, including, apparently, most citizens. Br. 11. If that is so, it *undermines* his equal-protection argument. Doctrinally, a class that possesses political power is not an insular minority. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (no suspect class because children were not in "position of political powerlessness"). Practically, courts should not mutilate the Constitution to reach a result supported by most citizens. After all, the Supreme Court has "[t]ime and again . . . made clear . . . that the 'Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" *Nordlinger v. Hahn*, 505 U.S. 1, 17 (1992) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)) (upholding age distinction against equal-protection challenge). The presumption of a future democratic fix holds even when the "ordinary democratic processes may be *unlikely* to prompt its reconsideration or repeal." *Id.* at 18.

Because age is not a suspect class, any age classification in the bindover provisions need only satisfy rational-basis review. As explained above, the bindover provisions are rationally related to the legitimate goals of protecting public safety and holding offenders accountable for their actions. *See* R.C. 2152.01(A).

4. Aalim's authorities do not support his argument.

The few cases Aalim cites rebut rather than advance his arguments. He cites three categories of cases.

Kent. Aalim turns first (at 6, 11, 12) to a case addressing the rights that attach to statutes, not free-standing rights to process. The U.S. Supreme Court's 1966 decision held that due process required certain procedures when a D.C. law gave juveniles a "statutory right[]" to juvenile-court jurisdiction. *Kent v. United States*, 383 U.S. 541, 556 (1966). This statutory right, the Court held, triggered certain process under the Due Process Clause. That is not a holding that 16- and 17-year-olds have a constitutional right to a hearing before having a case heard in a common pleas court, but a holding that the statutory "right" could not be revoked absent procedure adequate to avoid "infirm[] proceedings" or "arbitrary" action by the juvenile judge. *Id*. at 552, 553. The holding speaks to the process the Constitution demands to effectuate a statutorily granted right, not to the rights statutes must grant.

Notably, Aalim cites not a single case that reads *Kent* as prohibiting the *legislative judgment* that certain offenders under 18 who commit certain offenses should be tried in common pleas court. That is because the courts have routinely agreed that *Kent* does not say what Aalim wants it to say. Start with the Supreme Court itself. In a later case addressing double-jeopardy issues, the Court said its precedents "require only that, whatever the relevant criteria, and whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile-court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law." *Breed v. Jones*, 421 U.S. 519, 537-38 (1975).

This Court has viewed *Kent* similarly. In a 2002 case, it rejected the argument that *Kent* "mandate[ed] . . . a bindover hearing," *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059 ¶ 48, because that hearing was not a substantive right, *id*. ¶ 19. *Walls* considered a change from a

prior statute, which "required a bindover proceeding in juvenile court as a prerequisite to criminal proceedings in the court of common pleas," to a new statute, which mandated trial in common pleas court "without any necessity of a bindover proceeding." *Id.* ¶ 16. The legislative choice not to require a hearing was constitutional because, "under either . . . law," an offender was "on notice that the offense he allegedly committed could subject him to criminal prosecution as an adult in the general division of the court of common pleas." *Id.* ¶ 17.

Numerous other decisions offer the same lesson. Take, for example, the Illinois Supreme Court's decisions in *People v. J.S*, 469 N.E.2d 1090 (Ill. 1984). That court distinguished *Kent* because the Illinois statute directed that "[a]ll 15- and 16-year-olds who have committed the enumerated offenses . . . [were] to be prosecuted in the adult criminal court system." *Id.* at 1095. *Kent* was therefore not "dispositive" because the juvenile court had no "discretion[]" to decide whether those juveniles could be tried in common pleas court or not. *Id.* Cases across the country have read *Kent* the same way. *See, e.g.*, *Angel C.*, 715 A.2d at 661 ("*Kent* simply stands for the proposition that *if* a statute vests a juvenile with the right to juvenile status, then that right constitutes a liberty interest, of which the juvenile may not be deprived without due process, i.e., notice and a hearing." (emphasis added)); *In re Wood*, 768 P.2d 1370, 1372-73 (Mont. 1989); *Jahnke*, 692 P.2d 927-29 (collecting cases); *Kelly*, 1998 WL 812238, at *7-8; *Lee*, 1998 WL 637583, at *5; *Collins*, 1998 WL 289390, at *2.

Miller, et al. Aalim also points to a quartet of U.S. Supreme Court cases that involved either Eighth or Fifth/Sixth Amendment claims, not due process or equal protection. *Roper*, *Graham*, and *Miller* involved mandatory *punishment*, not mandatory *procedure* for deciding guilt. *See Miller*, 132 S. Ct. at 2464 ("mandatory life-without-parole sentences for juveniles violate the Eighth Amendment"); *Graham*, 560 U.S. at 53, 59 (Eighth Amendment prohibits life

without parole for non-homicide offense); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (Eighth Amendment prohibits "imposition of the death penalty on juvenile offenders under 18"). And *J.D.B. v. North Carolina* asked whether age was wholly irrelevant when analyzing whether *Miranda* warnings are required. 131 S. Ct. 2394, 2402 (2011) (rejecting argument that "age has no place" in *Miranda* custody analysis). Not one of those cases asks whether youth erects an impermeable barrier to legislation that distinguishes some 16- and 17-year-olds from others depending on whether they have committed serious crimes. And, quite obviously, none of them requires the State to treat 16- and 17-year-olds in a specific way. But that is exactly what Aalim demands here. He asks not for a rule that prohibits certain punishment. *See Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 53, 59; *Roper*, 543 U.S. at 568. He asks not for a rule about the use of age in a judge-made prophylactic rule. *See J.D.B.*, 131 S. Ct. at 2402. He instead asks this Court to tell the General Assembly that it may not decide that a matrix of age and crime should result in juvenile adjudication for some combinations, but common pleas court trials for others. That principle appears nowhere in this quartet of cases or any other case.

The holdings of these four cases show how removed they are from the proposition Aalim advances here. Indeed, courts everywhere have rejected arguments to extend *Miller* less sweepingly than Aalim requests. The Seventh Circuit, for example, has affirmed life-without-parole convictions for juveniles because *Miller* bans only *mandatory* sentences of that type. *See Martinez v. United States*, 803 F.3d 878, 883 (7th Cir. 2015) ("life sentences were imposed after an individualized sentencing"). The Ninth Circuit has called these cases "inapplicable" when the defendant was "not sentenced to life without parole." *Friedlander v. United States*, 542 F. App'x 576, 577 (9th Cir. 2013). And the Second Circuit brushed aside arguments that a mandatory sentence ran afoul of *Miller* because the sentence did not "deprive [the] defendant of

all hope of release, the only categorical limitation the Supreme Court thought constitutionally necessary." *United States v. Reingold*, 731 F.3d 204, 214-15 (2d Cir. 2013) (reversing because trial court's sentence was *too low*). If *Miller* and its progenitors do not speak to all *life sentences* for juveniles, they certainly have nothing to say about run-of-the-mine sentences (like Aalim's four-year one) merely because they are imposed in a common pleas court.

The same lesson follows from state-court decisions considering *Miller*, et al. The Illinois Supreme Court recently observed that "the United States Supreme Court [has] *closely limited* the application of the rationale expressed in *Roper*, *Graham*, and *Miller*, invoking it only in the context of the most severe of all criminal *penalties*." *People v. Patterson*, 25 N.E.3d 526, 553 (Ill. 2014) (emphasis added); *cf. Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016) ("When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems.") (discussing *Miller*). The West Virginia Supreme Court has held that "*Miller* does not bar a discretionary life sentence without parole for a juvenile but only bars a mandatory life sentence without parole." *State v. Redman*, No. 13-0225, 2014 WL 1272553, at *3 (W. Va. Mar. 28, 2014). The Kansas Supreme Court had likewise held that a life-without-parole sentence was constitutional because it offered a chance of release after 20 years. *State v. Brown*, 331 P.3d 781, 797 (Kan. 2014) (13-year-old tried as adult). Also highly instructive is the Connecticut Supreme Court's recent decision considering *Miller* for a 15-year-old tried in common pleas court after a mandatory transfer. *See State v. Taylor G.*, 110 A.3d 338, 342 & n.5 (Conn. 2015). The Court rejected the argument that a mandatory 10-year sentence violated the principles of *Miller* because the statute left "the court with broad discretion to fashion an appropriate sentence." *Id*. at 346. The argument the

defendant advanced based on *Miller* "overstate[d] the scope of the governing federal law." *Id*. at 343. If it overstates federal law to say that *Miller* speaks to anything other than *mandatory*, life-without-parole sentences, it tests patience to say that *Miller* prohibits a statute that creates the *possibility* of a four-year adult sentence.

C.P. Finally, Aalim points to this Court's *In re C.P.* decision, another case about punishment, not procedure. Citing *C.P.* makes the State's case, not Aalim's. *C.P.* faulted "mandatory, lifetime" "punishment." *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446 ¶¶ 1, 79. The process mandated there arose because of mandatory *punishment*, not legislative choice about *process*. *C.P.* simply has nothing to say about where the General Assembly draws the line between juvenile and common pleas court. That is especially true because Aalim has abandoned all claims that the statute transgresses constitutional limits on punishment.

5. The other scattered policy arguments of Aalim's amici do not show that the bindover statute is unconstitutional.

The *amici* offer numerous policy arguments in support of Aalim's position. None gives reason to doubt the statute's constitutionality.

One *amicus* wrongly paints these laws as relics, harkening to a time when fear of juvenile crime was, according to them, overblown. Juvenile Law Center Brief ("JLC Br.") at 16. That claim fails to look at the history of this specific provision. The statute under attack here was amended twice since 2000. *See* 149 Ohio Laws (IV) 7386, 7398; 148 Ohio Laws (IV) 9447, 9543. Besides, as the same *amicus* says elsewhere, the "public overwhelmingly opposes" these laws. JLC Br. 20. If that is true, the General Assembly will soon correct, through democratic means, what Aalim asks this Court to correct by inventing a new constitutional right.

That *amicus* also rails against the inability to expunge records of adult convictions without accounting for Ohio's rules permitting that relief. *Id.* The brief does not elaborate, but

as a facial attack, the point falls flat. Ohio statutes *do* permit expungement. *See State v. Boykin*, 138 Ohio St.3d 97, 2013-Ohio-4582 ¶ 12. And further expansion of this right is already on the horizon. *See* Proposed H.B. 164 (introduced April 22, 2015); Oral Arg. in No. 2014-990, *State v. V.M.D.* at 35:30-38:35.

Another *amicus* invents what it terms a "widely accepted constitutional premise" without citing any sources. Children's Law Center Brief ("CLC Br.") 7. According to the amicus, "mandatory bindover . . . should be eliminated" because of the accepted premise that a court must conduct "an individualized analysis before transferring a teen to regular criminal court." *Id.* 8. The brief cites no authority for this premise. Nor could it. What *is* widely recognized is that States routinely *mandate* that some of those under 18 be tried in common pleas court for certain crimes. *See, e.g.*, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Programs, *Juvenile Offenders and Victims*, at 6 (Sept. 2011) ("A total of 29 states have statutes that simply exclude some juvenile-age offenders from the jurisdiction of their juvenile courts . . . ."). States have wide latitude to define which ages and offenses belong in juvenile court and which do not.

That *amicus* also erects several supposed "myths" about bindover and then knocks them down. These strawmen are themselves premised on myths. Each takes as a starting point an erroneous premise. "Myths" one and two—that mandatory bindover reduces recidivism and deters future crime, CLC Br. 9-11—are based on an incomplete description of the goals of imprisonment. The goals include "protect[ing] the public" and "punish[ing] the offender." *See* R.C. 2929.11(A); *cf.* 2152.01(A) (goals of juvenile court include "protect[ing] the public" and "hold[ing] the offender accountable"). Imprisonment undoubtedly reduces crime *while the offender is in prison*. That effect is no myth. Imprisonment also serves the recognized goal of

punishing those who disregard the law, and it is not a myth that the General Assembly intended to imprison criminals to hold them accountable for their actions rather than *solely* to rehabilitate them. "Myth" three—that mandatory bindover is more fair, CLC Br. 11-12—aims at the wrong target. The *amicus* points to prosecutorial discretion as the source of mandatory bindover's unfairness. If that is so, Aalim or any other juvenile subjected to illegal discretion should attack that problem, not a statute that *reduces discretion. See, e.g., Cleveland v. Trzebuckowski*, 85 Ohio St. 3d 524, 533-34 (1999) (holding that city's selective enforcement of ordinance against private but not public billiards rooms violated equal protection and rejecting city's characterization of policy as "protective of minors"). "Myth" four—that mandatory bindover will produce longer sentences than discretionary bindover, CLC Br. 12-15—is contradicted by its own logic. Discretionary bindover occurs only when a court concludes that a juvenile not subject to mandatory bindover must be tried in common pleas court because the crime is more serious than others. It applies, for example, when the victim "suffered harm," the defendant acted as part of a "gang," the defendant "had a firearm," or the defendant had prior juvenile adjudications. R.C. 2152.12(D). These same factors would increase a sentence. *See* R.C. 2929.12(B). Of course discretionary transfer leads to longer sentences. The only surprise would be the opposite.

A final argument along the lines of the myths is the chart the *amicus* supplies about the race of those bound over through mandatory statutes. CLC Br. 15. It is unclear what purpose the chart serves. Indeed, for most of this country's history, the fight against bias has been a fight *against* discretion, including judicial discretion. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 292, (1987) (alleging bias by "every actor" in criminal justice system); *Mistretta v. United States*, 488 U.S. 361 (1989) (rejecting constitutional challenge to sentencing reform, which was

designed to limit discretionary sentencing and the abuses that it allowed); *Powell v. Alabama*, 287 U.S. 45, 56 (1932) (criticizing actions of trial judge). And, of course, any disparate impact of statutes *designed to reduce discretion* is not unconstitutional. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 234-35, 239 (1976).

* * *

Aalim and his *amici* end where they should have started: by asking this Court to act legislatively. Both point to the overwhelming support for change, noting that the "vast majority of Ohioans" support doing away with mandatory bindover. JLC Br. 20; CLC Br. 22-28; *see* Br. 11. If it is true, then there is no need to invent new constitutional rights, because their favored policies will be recognized by the legislature in the near future. The stronger the democratic support for a position, the weaker the request to invent a constitutional right. Aalim's argument is a bold request to tear down the wall separating the judiciary from the legislature.

Nothing threatens the separation of powers more than naked appeals for judges to act as legislators. Legislators should legislate; judges should adjudicate. Neither should do the other. It is "the province and duty of the judicial department to say what the law is," not what it should be. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *cf. Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799 ¶¶ 114, 116 ("the constitutional diffusion of power" among the three branches is the "essential feature" of separation of powers (citation and quotation marks omitted)). "[L]iberty . . . cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe." 1 William Blackstone, *Commentaries on the Laws of England* 259 (1765).

Concerns about separation are why "policy arguments" like Aalim's "are more properly addressed to legislators or administrators, not to judges." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984). Courts "must heed the plain language of [an] unambiguous statute, and any claim of injustice or inequity must be resolved through the legislative process rather than judicial redress." *State v. Vanzandt*, 142 Ohio St. 3d 223, 2015-Ohio-236 ¶ 16.

At best, this Court can, like any other citizen (though with an admittedly larger pulpit), express its views about the policy so that the General Assembly may consider them. That is exactly what the Illinois Supreme Court did recently in the course of upholding an "automatic" transfer provision. The Court expressed concern about the statute, but affirmed its constitutionality. *Patterson*, 25 N.E.3d at 553.

Aalim's argument is a broadsword. It would prohibit practices in nearly every State that treat *some* juveniles as adults when they commit certain crimes. And it would say that 10 states violate the Constitution daily because they do not define juveniles as those under 18. To rule for Aalim is to declare that nearly every State has been violating the U.S. Constitution since the passage of the Fourteenth Amendment.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Second District.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

/s Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee State of Ohio was served this 1st day of March, 2016, by U.S. mail and e-mail on the following:

Amanda J. Powell
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad St., Suite 1400
Columbus, Ohio 43215
amanda.powell@opd.ohio.gov

Counsel for Appellant
Matthew Aalim

Mathias H. Heck, Jr.
Montgomery County Prosecutor
Andrew T. French
Assistant Prosecutor
301 West Third Street
5th Floor Courts Building
Dayton, Ohio 45402
frencha@mcohio.org

Counsel for Appellee
State of Ohio

/s Eric E. Murphy
Eric E. Murphy
State Solicitor