No. 17-3857

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANE DOE, Appellee, v. OHIO ATTORNEY GENERAL, ET AL., Appellants.	:	On Appeal from the United States District Court for the Southern District of Ohio Western Division
	:	District Court Case No. 1:12-cv-00846

BRIEF OF APPELLANTS MICHAEL DEWINE, OHIO ATTORNEY GENERAL, AND TOM STICKRATH, SUPERINTENDENT OF THE OHIO BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION, IN THEIR OFFICIAL CAPACITIES

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STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important constitutional issues, Appellants Michael DeWine, Ohio Attorney General, and Thomas Stickrath, Superintendent of the Ohio Bureau of Criminal Identification and Investigation, request oral argument.

JURISDICTIONAL STATEMENT

The district court had jurisdiction in this 42 U.S.C. § 1983 suit under 28 U.S.C. § 1331. It entered a final judgment on August 8, 2017. Judgment, R.85, PageID#769. Michael DeWine, Ohio Attorney General, and Thomas Stickrath, Superintendent of the Ohio Bureau of Criminal Identification and Investigation, appealed on August 18, 2017. Notice, R.86, PageID#770. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This case is about Ohio's sex-offender registry. In 2006, when Jane Doe was adjudicated a sexual predator, Ohio law made that designation *permanent*. In *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court held that the Due Process Clause does not require States to give sex offenders the right to a hearing to challenge their classification if state law automatically required that classification. *Id.* at 4. Here, by contrast, the district court held that, even though the relevant Ohio law made Doe's classification permanent, she did have a procedural due process right to a hearing in which to prove that she was not a sexual predator. The questions presented are:

1. Does Jane Doe have Article III standing because no order against the State Defendants can redress her claimed injury?

2. Are the State Defendants immune from declaratory relief because they do not enforce the restrictions from which Doe seeks relief?

3. Does the Fourteenth Amendment's Due Process Clause give Doe a procedural-due-process right to a hearing?

INTRODUCTION

Jane Doe is under a lifetime duty to register as a sexual predator in Ohio. Her duty stems from a 2006 conviction for having sex with a minor. The specific contours of Doe's predator designation and registration duty are detailed in a pre-2008 statute that no longer applies to current offenses. Contrary to the district court's reading, the previous law required the sentencing judge to make a "permanent," one-time finding of whether the offender was a sexual predator as shown by clear and convincing evidence to be "likely to engage in the future in one or more sexually-oriented offenses." Ohio Rev. Code § 2950.01(E)(1). The state trial court determined that Doe fit into that category. Now, years later, Doe has sued asking for a declaration that the Constitution requires a new state-court hearing affording her another chance to prove that she is not dangerous. The district court held that Doe has no substantive due-process right to a new hearing, but also declared that Doe has a procedural due-process right to one. The district court's declaratory judgment is flawed both jurisdictionally and substantively.

The court had no jurisdiction to enter a declaratory judgment against the Ohio Attorney General and the Superintendent of Ohio's Bureau of Criminal Investigations because neither official has the power to give Doe her requested hearing, or to order other state officials to do so. Neither the Attorney General nor the Superintendent can change Doe's registration obligations. Indeed, the Ohio

Supreme Court has held that an Ohio executive official cannot change judicially imposed registration duties without violating the Ohio Constitution's separation of powers. For similar reasons, neither the Attorney General nor the Superintendent can order a state court to hold a hearing about Doe's status.

Because neither state official can afford Doe the relief that she requests, a federal-court order cannot redress her injury. Doe therefore has no standing to sue the Attorney General or the Superintendent. That jurisdictional shortcoming can be seen through a different lens that shows the same picture: the Attorney General and the Superintendent are shielded by sovereign immunity from any federal-court order because they are not connected to the levers of state power that either cause Doe's harm or that could relieve her of it.

Even putting to one side the jurisdictional flaw, the district court's order fails substantively. For starters, the order rests on a misreading of Ohio law. The district court said: "If Jane Doe can prove that she no longer is likely to re-offend, then she would not be classified as a sexual predator under Ohio law and would not be subject to the lifetime registration requirement." Order, R.83, PageID#755. The district court, that is, viewed Doe's "current" likelihood to re-offend as a "material fact under Ohio law." *Id.* at PageID#748. That view miscomprehends the statute: Ohio law then and now contains no provision for revoking the duty to register as a sexual predator, even if a registrant proves today a lower risk of re-

offense compared to the risk at the time of designation. To the district court, the only problem for Doe is that there is no *mechanism* in Ohio law to prove the fact of reduced recidivism risk. But the real barrier is that proving the fact of reduced risk is *irrelevant* under Ohio law. The district court's misreading is the linchpin of all that follows in its opinion. Reading Ohio law for what it says shows that Doe's registration obligations comply with the Constitution.

Unpacking the district court's order declaring a procedural-due-process problem underlines the same flaw apparent in the misconstruction of Ohio law. Procedural due process protects only interests that enjoy substantive protection elsewhere. Doe cannot point to any substantive right of a convicted sex offender to be relieved of registration duties that accompany the conviction. Indeed, the district court rejected Doe's substantive-due-process claim. Nor can Doe point to a substantive right of such offenders to be considered for federally subsidized housing (a second basis that Doe alleges for her claim). Without any substantive foundation, Doe has nothing upon which to request a hearing to protect some substantive interest.

Equally fatal to Doe's due-process claim is the Supreme Court's holding in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003). The Court held there that a sex-offender had no right to a hearing about his future dangerousness because that fact was irrelevant to his designation. The same is true

for Doe today. Although an Ohio judge had to assess her dangerousness *as of 2006*, it is irrelevant under Ohio law what any court might think of Doe's dangerousness *today*. Instead, Ohio's legislature made a judgment that any sex-offender judged a predator at the time of sentencing posed some risk for life.

STATEMENT OF THE CASE

Jane Doe brings a constitutional challenge to former Ohio laws regulating sex offenders. The district court granted declaratory relief under the procedural component of the Fourteenth Amendment's Due Process Clause, but denied relief under the Due Process Clause's substantive component.

A. The 2006 Version Of Ohio's Sex-Offender Law—Not 2007 Amendments—Govern This Appeal

Like most States, Ohio has passed several versions of its sex-offender registry laws. As relevant here, in 2006 Ohio had in place a version of "Megan's Law." That law required most sex offenders to register "with the county sheriff within seven days of entering a county," and to provide the sheriff "a current home address, the name and address of the offender's employer, a photograph, and any other information required by the Federal Bureau of Investigation." *State v. Williams*, 728 N.E.2d 342, 351 (Ohio 2000); *see* 150 Ohio Laws IV 6558 (2003). Beyond these initial disclosure obligations, sex offenders had to "verify" a current home address yearly. *Williams*, 728 N.E.2d at 351; Ohio Rev. Code

§ 2950.06(B)(2) (2006). That law also prohibited sex offenders from living within 1,000 feet of a school. Ohio Rev. Code § 2950.031(A) (2006).

Some sex offenders were adjudged sexual predators after a hearing where the offenders were "entitled to representation by counsel, to testify on [their] own behalf, and to call and cross-examine witnesses." *Williams*, 728 N.E.2d at 350. Those adjudicated sexual predators had duties beyond the duties of sex offenders. Predators, for example, had to "provide the license plate number of all motor vehicles either owned by the offender or registered in the offender's name." *Id*. at 351. They also needed to follow a 90-day notification schedule, not the yearly schedule for sex offenders. *Id.* Finally, sexual predators were subject to "community notification," which required the sheriff to notify, among others, "certain law enforcement officials, adjacent neighbors, . . . superintendents of the board of education, appointing or hiring officers of each chartered non-public school, preschool programs, child day-care centers, . . . institutions of higher learning within the specified notification area[,]" and "certain victims" who requested notice when a predator changed address. *Id*. at 351-52.

In 2007, Ohio amended its sex-offender registration laws, but those changes do not affect Jane Doe. In 2010, the Ohio Supreme Court held that applying the new sex-offender laws to criminal defendants with final judgments breached the separation of powers by commanding the executive to reopen those judgments and

reclassify judicially classified offenders. *State v. Bodyke*, 933 N.E.2d 753, 765-67 (Ohio 2010). If Doe had committed her offense after 2007, these new laws would have governed her duties. That law classifies offenders "based solely on the offense . . . without regard to the circumstances of the crime or [the] likelihood to reoffend." *State v. Williams*, 952 N.E.2d 1108, 1112 (Ohio 2011).

As far as the *duration* of these requirements, the statutes have also changed over time. The provisions governing Doe's case made *permanent* a sexual-predator classification ordered at the required hearing after a finding that the offender "is likely to engage in the future in one or more sexually-oriented offenses." Ohio Rev. Code § 2950.01(E)(1) (2006). That mandate amended previous law that permitted offenders to petition every five years for reclassification based on recalibrated risk. 150 Ohio Laws IV 6,558, 6,696-98 (2003) (deleting former Ohio Rev. Code § 2950.09(D)(1)). After that 2003 amendment, the "permanent" sexual-predator classification was not to be "removed or terminated." Ohio Rev. Code § 2950.09(D)(2) (2006). That version of law, under which Doe was classified, was in effect from 2003 to 2007. After amendment in 2007, Ohio moved to *automatic* classification based on the crime committed and without regard to a determination about a likelihood to reoffend. *See* Ohio Rev. Code § 2950.01(E)-(G).

B. Doe Is Convicted In 2006 For Having Sex With A Child

In 2006, Jane Doe pleaded guilty to unlawful sexual conduct with a minor, Compl., R.1, PageID#3, which means that she had "intercourse" with (or "[p]enetrat[ed]" the "opening" of), Ohio Rev. Code § 2907.01(A) (2006), a child aged 15 or younger, *id*., § 2907.04(A) (2006). As required by Ohio law at the time, Doe had a hearing to determine whether she would be classified as a sexual predator. Ohio Rev. Code § 2950.09(A) (2006). The statute charged the judge presiding over that hearing to consider, for example, whether Doe used drugs or alcohol to carry out the offense, whether Doe's offense was part of a "pattern of abuse," and whether Doe "displayed cruelty" during the offense. *Id*. § 2950.09(B)(3)(e), (h), (i) (2006). By the time of Doe's hearing, the Ohio Supreme Court had held that predator designations could not be based on "scant" evidence, and might require an expert witness "at state expense." *State v. Eppinger*, 743 N.E.2d 881, 889 (Ohio 2001).

Evaluating the statutory factors through that demanding lens, the common pleas judge had to decide whether Doe was, at that moment, "likely to engage in future sex offenses." *Williams*, 728 N.E.2d at 351. In Doe's case, the judge determined that she did pose such a risk. Compl., R.1, PageID#3. Doe had the right to appeal her conviction, sentence, and sexual-predator classification. Ohio Rev. Code § 2950.09(B)(4) (2006). But outside of appeals and post-conviction

petitions, the statute provided no mechanism to reevaluate—years down the road—the court's judgment that Doe posed a risk of committing future sex crimes. *See* Ohio Rev. Code § 2950.09(D)(2) (2006) ("adjudication . . . as a sexual predator is permanent and continues in effect until the offender's death and in no case shall the . . . adjudication be removed or terminated").

C. Doe Sues In 2012 For Relief From Her Registration Obligations

In 2012, Doe brought a civil complaint against Ohio Attorney General Mike DeWine, Superintendent Tom Stickrath of Ohio's Bureau of Identification and Investigation (together the "State Defendants"), and the Hamilton County Sheriff (now Jim Neil). The complaint focused on Doe's view that her designation as a sexual predator is a "false" statement about her current likelihood of committing another sex offense. Compl., R.1., PageID#2. As relief, the complaint sought an order requiring "the State to conduct a hearing" to decide whether Doe is "currently a sexual predator." Compl., R.1, PageID#2, 9. As Doe saw it, the absence of some hearing to revisit her classification violated both the procedural and substantive components of the Fourteenth Amendment's Due Process Clause. *Id*., PageID#6-8; *see also* Doe's Mot. Sum. Jud., R.37, PageID#228-37.

All defendants moved to dismiss on a host of procedural and substantive grounds, but the district court denied their motions. Order, R.22, PageID#125-143. Addressing the State Defendants' sovereign-immunity argument, the district court

reasoned that these actors' "duties" in "operating a sex offender database" were enough to satisfy the *Ex Parte Young* "exception" to state actors' sovereign immunity. *Id*., PageID#136. As for the State Defendants' standing argument, the district court reasoned that a declaratory judgment would satisfy Article III's redressability requirement because "an order directing the sentencing court to provide her with a hearing" would relieve Doe's injury. *Id*., PageID#141.

All parties then filed a series of cross motions for summary judgment. Ultimately, the district court granted Doe's motion in part by issuing a declaratory judgment that the relevant statutes violate the procedural component of the Due Process Clause, but do not violate its substantive component. Order, R.83, PageID#735-767. The court framed the case as challenging the "implicit finding that [Doe] currently remains likely to reoffend," not "whether [she] was properly adjudicated a sexual predator in 2006." *Id*., PageID#736.

On the merits, the district court started with procedural due process. Addressing the underlying liberty interest, the court distinguished the Tennessee law that this Court upheld in *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), because, unlike the Tennessee law, Ohio's law restricted where Doe could live (not within 1,000 feet of a school) and required Doe to report "all changes in housing and schooling." *Id*., PageID#752. The court further held that Doe has a property interest in federally subsidized housing, which pursuant to federal regulation she

cannot claim while under a lifetime registration duty. *Id*., PageID#754-55 (citing 24 C.F.R. § 960.204(a)(4); 24 C.F.R. § 982.553(a)(2)(i)). Turning to the procedure question, the district court reasoned that "the failure to provide Jane Doe with any opportunity during her lifetime to challenge her classification as a sexual predator who currently is likely to reoffend" violates Doe's right to due process. *Id*., PageID#756.

As for substantive due process, the district court drew on this Court's precedents in *Does v. Munoz*, 507 F.3d 961 (6th Cir. 2007), and *Doe v. Mich. Dep't of State Police*, 490 F.3d 491 (6th Cir. 2007), to reject the claim. At bottom, held the court, Doe could not show that "being subject to Ohio's sex offender registration and notification provisions violates a fundamental right regardless of the procedural protections provided." Order, R.83, PageID#758.

The district court also reiterated its motion-to-dismiss holdings rejecting the State Defendants' defenses. And it rejected other defenses, such as the failure to join a party with respect to the claim about Doe's inability to live in federally subsidized housing. *Id*., PageID#759-64.

As for the remedy, the district court acknowledged that Doe had offered no theory "by which the Court could order a state trial court to hold a hearing." *Id*., PageID#765. The court thus set a status conference to discuss possible remedies. After that conference, and without further briefing, the court ultimately issued an

order that "str[uck] down as unconstitutional" the provision of Ohio's 2006 statute that prohibited a hearing to revisit the question of Doe's sex-offender status. Order, R.85, PageID#769.

The State Defendants appealed.

SUMMARY OF ARGUMENT

The district court's order is jurisdictionally and substantively defective. Either flaw is an independent reason to reverse.

I. Jurisdictionally, the district court's order targets state officials who cannot grant Doe any effective relief.

A. Both Article III and the State's sovereign immunity limit the federal courts' power to order state officials to take action. Article III limits federal courts to deciding cases or controversies. Only plaintiffs with standing may initiate a valid case or controversy. And only plaintiffs whose injuries would be redressed by a court order have that required standing.

Separately, the States' sovereign immunity prohibits federal courts from enjoining a State qua State. An exception allows federal courts to enjoin a state *official* who acts ultra vires. But a federal court may only enjoin a state official whose conduct is the source of the plaintiff's injury. Otherwise an order against a state official is nothing more than a prohibited order against the State itself.

In cases like this one, these two jurisdictional limits are two sides of the same coin.

B. Because the State Defendants cannot give Doe a hearing about her registration duties, they cannot redress the injury that she asserts—her lack of a hearing to reassess her sex-offender status. Indeed, the Ohio Supreme Court has held that state constitutional law *prohibits* the State Defendants from giving Doe a new hearing. *State v. Bodyke*, 933 N.E.2d 753, 765-67 (Ohio 2010). Doe therefore lacks standing to sue the State Defendants for an order to compel a hearing about her sex-offender status.

The State Defendants' inability to give Doe the relief that she seeks is equally a problem under Ohio's sovereign immunity. The exception to state immunity for orders against state officers only extends to those officers who have "some *connection* with the enforcement of the act" challenged in federal court. *Ex Parte Young*, 209 U.S. 123, 157 (1908). For the same reasons that Doe lacks standing to sue the State Defendants, those defendants are immune from a federal court order telling them to take actions that they cannot perform under state law.

C. The district court initially recognized these problems, noting that Doe offered no authority that would permit the court to order the State Defendants to give her a hearing. Order, R.83, PageID#765. Even so, the court ruled against the State Defendants and declared their actions unconstitutional. The district court

drew largely on this court's holding in a 1996 case against Ohio's Attorney General. But that case is a reason to reverse, not affirm. The panel there ultimately held the Attorney General immune because Ohio law "delegate[d] the enforcement of the challenged statutes to local prosecutors, not the Attorney General." *Children's Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996). The district court's other citations likewise lack support for its order against the State Defendants.

II. The district court's order is no more supportable on the merits of procedural due process because Doe lacks protected liberty or property interests and no amount of process would change her status under state law.

A. Procedural-due-process analysis starts with the relevant life, liberty, or property interest. Doe cannot show one in either her claimed liberty interest in reputation or property interest in federally subsidized housing.

She cannot show a liberty interest under the substantive component of the Due Process Clause: the district court properly rejected that argument and Doe did not cross-appeal. Nor can Doe show a liberty interest protected by state law because it is state law that she wants altered through this lawsuit.

Doe likewise cannot show a property interest in federally subsidized housing. The Supreme Court recognizes a difference between avoiding a restriction and being freed of one. *Greenholtz v. Inmates of Neb. Penal & Corr.*

Complex, 442 U.S. 1, 9 (1979). Doe is therefore not similarly situated to a person claiming a right to process before losing an *existing* right to subsidized housing. The process Doe received when she was designated a sexual predator put her on different footing than a citizen seeking to avoid that classification initially (and the associated restraint on housing subsidies).

B. Independent of the failure to show a protected interest, Doe's claim also falters on the question of what process might be due. Any process due must be in service of proving some fact that is relevant under the substantive law. *See Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003). But Doe's *current* likelihood of re-offense is irrelevant under Ohio law (both the law that governs her status and current Ohio law). No amount of process could prove a fact that would change Doe's obligations to register as a sex offender. Ohio's statute is thus just like those upheld in many other States.

C. The district court's judgment declaring Ohio law unconstitutional does not square with these precedents. As to the requirement of a protectable interest, the district court distinguished unfavorable cases, but nowhere located a source for such an interest. As for the process that might be due, the district court wrongly analogized to a Seventh Circuit case about *mistakes* on a sex-offender registry. This appeal is about the constitutionality of Ohio's *deliberate* choice to

make registration a lifetime duty for those adjudicated as sexual predators after a full hearing near the time of their original convictions.

STANDARD OF REVIEW

This Court reviews de novo the district court's order granting summary judgment to Doe. *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000) (en banc).

ARGUMENT

I. ARTICLE III STANDING AND SOVEREIGN IMMUNITY BOTH BLOCK THE RELIEF THAT THE DISTRICT COURT ORDERED

The district court's order faces two jurisdictional barriers that flow from the same core problem: Neither State Defendant is sufficiently connected to the harm that Doe alleges, and neither could provide the relief that Doe seeks. That shortcoming is either an Article III standing problem or a misfit for the *Ex Parte Young* exception to sovereign immunity. Either way, the district court lacked jurisdiction to issue a declaratory judgment against the State Defendants.

A. Standing's Requirements And Sovereign Immunity Both Require States Defendants To Have A Sufficient Connection To The Plaintiff's Alleged Injury

Article III prohibits a federal court from adjudicating a dispute unless the dispute presents a case or controversy. No "principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted).

One aspect of the case-or-controversy limit is the requirement that a plaintiff have standing. *Id*. And one element of standing is that a plaintiff show that the alleged harm "is likely to be redressed by a favorable judicial decision." *Id*. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998); *see Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973).

The States' sovereign immunity is another limit on federal judicial power. The Constitution's "structure" and "history," and "authoritative interpretations" of the Supreme Court, "make clear" that the States' immunity from suit is a "fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Even so, the Court has "long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). Those circumstances include when a state officer "threaten[s] and [is] about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." *Ex Parte Young*, 209 U.S. 123, 156 (1908). One requirement for such an injunction is that the officer "must have some *connection*

with the enforcement of the act." *Id.* at 157 (emphasis added). Otherwise, the injunction "merely mak[es]" the officer "a party as a representative of the State," which improperly makes "the State a party." *Id.*; *see Children's Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996) ("Courts have not read *Young* expansively.").

These two limits on federal-court power converge here. "In a case like this one, the questions of Article III jurisdiction and Eleventh Amendment immunity are related." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015); *see also id.* at 958 ("same reasons" may show both that an injury is not redressable and that it is not traceable to defendants); *Okpalobi v. Foster*, 244 F.3d 405, 410 & 411-21, 424-29 (5th Cir. 2001) (en banc) (plurality op.) (addressing both immunity and standing); *id*. at 431 (Higginbotham, J., concurring) (the two inquires "appear[ed] to be the same" in that case).

B. Article III Standing And Sovereign Immunity Both Block The Relief Ordered Below Because The State Defendants Lack A Sufficient Connection To Doe's Asserted Injury

Whether viewed as a matter of standing or of sovereign immunity, the district court did not have the power to issue a declaratory judgment against the State Defendants. *See, e.g.*, *Digital Recognition Network*, 803 F.3d at 958-59. Either way, the district court lacked power to issue a declaratory judgment against the State Defendants. Either way, the order cannot stand.

1. *Article III Standing*. The district court had no power to declare Ohio's statute unconstitutional because Doe does not have standing. For starters, the declaratory nature of the relief makes no difference. "There was a time when [the Supreme] Court harbored doubts about the compatibility of declaratory-judgment actions with Article III's case-or-controversy requirement." *MedImmune v. Genetech, Inc.*, 549 U.S. 118, 126 (2007). But the Court resolved it by holding that such actions still must meet Article III's requirements. *Id.*; *see Green v. Mansour*, 474 U.S. 64, 73 (1985) (declining to issue declaratory judgment where there was "no occasion to issue an injunction"); *see also Digital Recognition Network*, 803 F.3d 952 at 958-59 (holding that, because the defendants did not enforce the statute, plaintiffs had no standing; declaratory judgment, therefore, "would not meet the requirement of redressability").

The requested declaration is a non-starter because the State Defendants did not cause Doe's injury (her sex-offender classification), and they also cannot give Doe the remedy that she requests—a hearing in an Ohio court of common pleas. Indeed, state law would otherwise bar them from reclassifying Doe at all. As the Ohio Supreme Court held in 2010, a law requiring executive-branch officials to reclassify offenders "already classified by judges under" prior law "violate[s] the separation-of-powers doctrine for two related reasons: the reclassification scheme vests the executive branch with authority to review judicial decisions, and it

interferes with the judicial power by requiring the reopening of final judgments." *State v. Bodyke*, 933 N.E.2d 753, 765-67 (Ohio 2010). Ohio law definitively answers the question whether the State Defendants can redress Doe's harm: no.

Nor would the State Defendants enforce Doe's compliance with her registration duties or prosecute her for non-compliance. *See* Ohio Rev. Code § 2950.04(A)(1) (2006) (duty to register with the "sheriff"); *id*. § 309.08 (local prosecutors charged with enforcing criminal law). While the State Defendants do "maintain" an offender registry, Ohio Rev. Code § 2950.13(A)(1), they do not enforce registration duties and cannot reclassify registrants. The State Defendants' non-involvement in judicial hearings regarding, or executive enforcement of, these registration obligations means that the declaratory judgment cannot give Doe the *relief* she requests.

2. *Sovereign Immunity*. The jurisdictional flaw in the district court's order is just as apparent when viewed under the *Ex Parte Young* exception. Here again, the declaratory-judgment statute cannot trump basic sovereign-immunity principles. *Okpalobi*, 244 F.3d at 432 (Higginbotham, J., concurring) (sovereign immunity barred declaratory relief where it would not remedy harm because "Congress did not and could not have created a generic exception to the Eleventh Amendment for declaratory relief"); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d

1326, 1336 (11th Cir. 1999) (parties "agree[d]" that declaratory judgment must satisfy *Young* exception).

As a result, this Court has held that it lacked "subject matter jurisdiction" over a suit against a Kentucky official because the named official was not the specific state actor whose conduct, if changed, could secure the relief that the plaintiff sought. *Angel v. Kentucky*, 314 F.3d 262, 265 (6th Cir. 2002) (noting that the plaintiff was "free to file a new suit against the appropriate" official). And in *Children's Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996), the court held the Ohio Attorney General immune because Ohio law "delegate[d] the enforcement of the challenged statutes to local prosecutors, not the Attorney General."

Cases from other circuits are in accord. The Tenth Circuit, for example, held that a state official who could not enforce a law could not be the target of a federal *Ex Parte Young* order. Even though that state official "maintain[ed] a database," it was local, not state, officials who enforced rules about awarding concealed-carry licenses related to that database. *Peterson v. Martinez*, 707 F.3d 1197, 1206 (10th Cir. 2013). The state official was therefore "entitled" to immunity because the official's actions did not satisfy the connectedness requirement of *Ex Parte Young*. *Id*. at 1207.

The Ninth Circuit has likewise held that members of a Nevada commission dealing with judicial misconduct were immune because only the Nevada Supreme Court, not the commission, could relieve the alleged First Amendment violation. *Snoeck v. Brussa*, 153 F.3d 984, 987 (9th Cir. 1998). The panel reasoned that "any pressure which the district court might seek to apply on the Commission" would not have "alleviated" the alleged chill of expressive activity. *Id*. Again, the mismatch between the officials' duties and the requested relief did not fit *Ex Parte Young's* connectedness requirement.

The Fourth Circuit has similarly refused to squeeze a claim through the *Ex Parte Young* needle-eye. *Hutto v. S. C. Ret. Sys.*, 773 F.3d 536, 550-551 (4th Cir. 2014) (citation omitted). Even though the named officials had "'general . . . responsibility for the proper operation'" of a retirement system, they did not have control over the specific mechanism that could provide the plaintiffs' requested relief of monitoring and policing paycheck deductions. *Id.* (citation omitted). The lawsuits, reasoned the panel, improperly sought "to enjoin" state actors "from participating in a process in which they actually have no role." *Id.* at 551.

Angel and the decisions of sister circuits show that the district court here had no power to issue a declaratory judgment against the State Defendants. Doe's request for an order to compel a "hearing" in the "sentencing court" to determine whether she is "currently dangerous," Compl., R.1, PageID#9, is a request not

properly directed against Ohio's Attorney General or the Superintendent of the State Bureau of Criminal Identification and Investigation. The State Defendants cannot change Doe's judicially imposed offender status. Nor can they order another state actor to do so. *Cf. Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir. 1988). Indeed, they would violate state law if they tried. *See Bodyke*, 933 N.E.2d at 765-67.

C. The District Court's Reasoning Does Not Withstand Scrutiny

Despite the jurisdictional problems with this suit, the district court reached its conclusion largely by distinguishing this Court's decision in *Children's Healthcare* and citing a few off-point cases. Order R.83, PageID#759 (incorporating Order, R.22, PageID#134-35). To be sure, *Children's Healthcare* is distinguishable *factually* because the plaintiffs there sought an injunction to "*permit* a broader enforcement of certain statutes by striking down those provisions of the statutes which prevent their enforcement with respect to persons against whom the plaintiffs believe enforcement is proper." 92 F.3d at 1416. But that was only half of the reason for finding the Attorney General immune. This Court went on to hold that—"[m]oreover"—the Attorney General enjoyed immunity because "Ohio law delegate[d] the enforcement of the challenged statutes to local prosecutors, not the Attorney General." *Id.* The same is true here. Prosecutors have the responsibility for indicting and prosecuting those who fail to register as

sex offenders. Ohio Rev. Code § 309.08 (general duties); *id.* § 2950.99 (failure to register is a crime). *Children's Healthcare* is a reason to reverse, not affirm.

The other cases that the district court cited offer no more support. Order, R.22, PageID#136-37. One case, *Zielasko v. Ohio*, 873 F.2d 957 (6th Cir. 1989), discussed only the jurisdictional objection of "Ohio" rather than any particular state official. *Id*. at 959. And although the Court did not discuss it, the Secretary of State was a party to that lawsuit. The Secretary arguably had the power to enforce the candidate qualifications challenged there. *See* Ohio Rev. Code §§ 3513.05; 3501.05(B), (M). So the holding that the plaintiffs were "properly before the court" was right, even if the reasoning was opaque. *Zielasko*, 871 F.2d at 959.

Nor do the other cited cases support the district court's holding. The Eastern District of New York case dismissed the complaint, noting that the plaintiffs had not sued the relevant state officials, even though they could have. *Wallace v. N.Y.*, 40 F. Supp. 3d 278, 305 (E.D.N.Y. 2014). The court described the relevant inquiry in line with *Angel* and other cases, but out of line with the court's holding here: "even if Plaintiffs cannot challenge the State's sex offender regime by asserting claims against the State itself, they can bring the same challenge by asserting claims against State officials who *enforce the regime*." *Id*. (emphasis added). The cited decision from the Middle District of Alabama followed the same course, as it

involved state officials to whom Alabama law "delegated the interstitial policy-making function" of the sex-offender law and who could therefore "enforce an allegedly ex post facto law." *McGuire v. Strange*, 83 F. Supp. 3d 1231, 1243 (M.D. Ala. 2015). Finally, the U.S. Supreme Court's holding in *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003), offers no reason to affirm. Not only did the Court reject the exact claim brought here, but it did not discuss the propriety of suing the particular state officials named as defendants. *Id*. at 6.

As for standing, the District court did not incorporate its analysis of the State Defendant's objections to Doe's standing in its summary-judgment order, but the district court's reasons for rejecting the argument in an earlier order are flawed. Order, R.22, PageID#140-41. The district court relied on a Fourth Circuit case and this Court's *Cutshall* decision. Neither supports the district court's holding. *Doe v. Virginia Dep't of State Police*, 713 F.3d 745 (4th Cir. 2013), affirmed a judgment against a sex-offender who raised substantive and procedural due process challenges to her registration obligations. Along the way, the Fourth Circuit held that the plaintiff had standing as to claims against a state actor because that actor had "reclassif[ied] her" as a sex offender. *Id*. at 755; *see also id.* at 759 (affirming 12(b)(6)) dismissal on the merits because U.S. Supreme Court had "foreclosed" the procedural due-process claim). By contrast, the State Defendants here did not classify Doe. Nor could they reclassify her. *Cutshall* does not aid the district

court's analysis because the parties there did "not dispute" that "the relief sought [would] redress [the] alleged injuries." *Cutshall v. Sundquist*, 193 F.3d 466, 471 (6th Cir. 1999). The State Defendants here do dispute that they could give Doe a hearing as she requested in her complaint.

At bottom, Doe wants an Ohio common pleas court to reconsider its 2006 judgment classifying her as a sexual predator. No federal court declaration and no federal court injunction can compel the Attorney General or the Superintendent of Ohio's crime-investigating body to make that happen. The district court's order should be reversed.

II. DOE HAS NO DUE PROCESS RIGHT TO HAVE HER SEXUAL-PREDATOR CLASSIFICATION REEVALUATED

If jurisdictional barriers are not enough, Doe's claim fails on the merits. Her claim is foreclosed by U.S. Supreme Court precedent.

Doe's framing of the case matters as a prelude to the procedural-due-process analysis. The district court explained that Doe's suit "is not about" her 2006 classification as a sexual predator, but about whether she should remain classified as a sexual predator today. Order, R.83, PageID#736; *see* Doe's Resp. to Mot. Sum. Jud., R.49., PageID#348. If Doe were challenging her original classification, her suit would face a host of procedural bars. To name only a few, that challenge would be an impermissible collateral attack, *see, e.g.*, *Ruip v. Kentucky*, 400 F.2d 871, 872 (6th Cir. 1968); *Dover v. United States*, 367 F. App'x 651, 654 (6th Cir.

2010), would run afoul of the bar in *Heck v. Humphrey*, 512 U.S. 477 (1994), *see, e.g.*, *LaFountain v. Harry*, 716 F.3d 944, 950 (6th Cir. 2013), and would be blocked by the Rooker-Feldman doctrine, *see, e.g.*, *McCormick v. Braverman*, 451 F. 3d 382, 396 (6th Cir. 2006).

As a challenge to the absence of an available hearing *today* to disprove her continued sexual-predator designation, though, the question is a straightforward one of procedural due process. That inquiry asks: (1) Does Doe have a protected liberty or property interest? and (2) Do the available state processes adequately protect those interests? *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221, 224 (2005). Doe's claim fails both steps.

A. Doe Lacks Any Constitutional Liberty Interest In Avoiding Registration Or Any Property Interest In Federally Subsidized Housing

Doe posits two interests that she believes require more process before she may continue to be deprived of them—injury to her reputation, and a barrier to federally subsidized housing. Compl., R.1, PageID#6-7. Neither is a liberty or property interest of constitutional dimension.

"The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.'" *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Protectable interests "are created and their dimensions are defined by existing rules or understandings that stem from an

independent source such as state law," *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989), or the substantive aspects of the Due Process Clause itself, *Thompson*, 490 U.S. at 460; *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 8-12 (1979). Doe cannot locate a protectable interest in either source.

1. Doe cannot point to the Due Process Clause's substantive component as a source of some liberty interest. The district court ruled that she has no substantive-due-process right to a hearing, and Doe did not cross-appeal that holding. *See* Order, R.83, PageID#757-59; *e.g.*, *Haskell v. Washington Twp.*, 864 F.2d 1266, 1278 (6th Cir. 1988) (issues not cross-appealed are forfeited). Since both aspects of the Due Process Clause textually protect the same "liberty," Doe cannot claim a liberty interest for procedural due process that is lacking for substantive due process. If that liberty is not protected by the Constitution for one aspect, it is not protected for the other. *See Kerry v. Din*, 135 S. Ct. 2128, 2137 (2015) (plurality op.) (rejecting idea that "the term 'liberty' in the Due Process Clause includes implied rights that, although not so fundamental as to deserve substantive-due-process protection, are important enough to deserve procedural-due-process protection"); *Richardson v. Twp. of Brady*, 218 F.3d 508, 519 (6th Cir. 2000) (Ryan, J., concurring) ("the text of the Due Process Clause certainly makes no . . . distinction" between rights protected under the

substantive and procedural aspects of that clause); *see EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 855-60 (6th Cir. 2012) (exhaustively exploring state-law and constitutional sources for alleged liberty or property interest for both components of due process); *Souza v. Pina*, 53 F.3d 423, 425 n.5 (1st Cir. 1995) ("as our discussion regarding substantive due process establishes, no state action led to [a] deprivation [of life], and therefore, [the] procedural due process claims fails").

Beyond her failure to cross-appeal, Doe has no basis to claim a substantive interest in her reputation. Doe's reputational interest must be viewed through the lens of her current status, not that of a person without a sex-offender conviction. That is because there "is a crucial distinction between being deprived of a liberty one has . . . and being denied a conditional liberty that one desires." *Greenholtz*, 442 U.S. at 1, 9; *see* Henry Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1296 (1975) ("[T]here is a human difference between losing what one has and not getting what one wants.").

Doe is simply not situated the same as a citizen who has not been convicted of a crime. Her liberty has been restricted as a consequence of that conviction, and so the constitutional liberty question asks whether she should be *released* from that consequence, not whether a consequence should be *imposed*. That is why the Supreme Court in *Greenholtz* distinguished granting parole from revoking it by holding that a prisoner has no liberty interest in whether it is granted. 442 U.S. at

11 (inmate had no more than "a mere hope" of parole); *see Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 & n.3 (1998) (plurality op.) (prisoner could not use life interest in avoiding execution to require certain clemency process because that interest already been "adjudicated in the inmate's conviction and sentence").

Consistent with these precedents, this Court has held that a sex offender's interest in keeping her status private is not a liberty interest under the Fourteenth Amendment. *Cutshall*, 193 F.3d at 482. Doe has an even weaker claim to a protected interest because, unlike the offender in *Cutshall*, she did not suffer any harm to her reputation retroactively. *Id*. at 469. *Greenholtz* thus applies with full force to Doe's claim in a way that it—arguably—did not apply to the offender's claim in *Cutshall* because the registry restrictions there were imposed anew on offenders who—until that moment—were living free of them. *See Greenholtz*, 442 U.S. at 9 (relieving a condition distinct from imposing one); *cf. Lange v. Caruso*, No. 1:06-cv-139, 2006 U.S. Dist. LEXIS 20752, at *10 (W.D. Mich. Apr. 18, 2006) (applying *Greenholtz* to hold that parole denial deprived offender of no "constitutionally protected right or interest" even though it was based on his sex-offender status).

Doe's failure to show a substantive-due-process right to remove her sex-offender classification dooms her claim because the other potential source of a

liberty interest—state law—is exactly what she is attacking here. *See, e.g.*, *Batterton v. Tex. Gen. Land Office*, 783 F.2d 1220, 1224 (5th Cir. 1986) (claiming a protected interest "entirely contrary to" a state statute "would defy reason"). Her attack on the state statute shows that she cannot ground her liberty interest in state law itself.

2. Doe's interest in federally subsidized housing fares no better. As with her reputational claim, Doe cannot point to the substantive strands of the Fourteenth Amendment as the source of any protected interest. Again, the district court found—and Doe did not appeal—that Doe has no substantive-due-process right to be free from her registration obligations.

Nor can Doe draw on some non-constitutional source as the basis for a protectable interest in shedding her registration obligations. *Greenholtz* is again instructive. If an offender seeking release on parole has no liberty interest, but a free man aiming to avoid parole restrictions does, so too does a sex offender designated by an admittedly fair process lack a protectable interest in removing that designation, even if a presumably innocent defendant has an interest in avoiding initial classification. *Cf. Perry v. Royal Arms Apartments*, 729 F.2d 1081, 1082 (6th Cir. 1984) (no due-process problem with loss of housing subsidy when state procedures preceded the loss); *Simmons v. Drew*, 716 F.2d 1160, 1163 (7th Cir. 1983) (same). Indeed, if Doe has any protectable interest in her eligibility for

federal housing assistance, it should be the federal government, not Ohio, that must afford Doe some kind of process.

B. The Constitution does not require any more process for Doe, where Ohio's statute required a "permanent" classification following a hearing

Doe's challenge also founders on the process aspect of the procedural-due-process inquiry. Her claim is foreclosed by U.S. Supreme Court and circuit precedent holding that no process right attaches where the process would simply prove an irrelevant fact (relating to additional, future calculations of recidivism). Doe's claim also fails because any hearing would be practically irrelevant. An Ohio court evaluating Doe's sex-offender status today would be required to impose *greater* restrictions than those Doe currently must abide.

1. Supreme Court and circuit precedent foreclose the due-process claim

A claim that a state actor has deprived someone of procedural due process must show that some process could establish a fact that, under substantive law, would be relevant to vindicating a property or liberty interest. The Due Process Clause does not require process for its own sake. *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("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."). The entire point of procedural due process, after all, is to minimize the "risk of erroneous deprivation," *Nelson v. Colorado*, 137 S. Ct. 1249, 1255

(2017); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). If a fact is irrelevant under state law, there is no risk of error, no matter what process is involved.

The Supreme Court has applied these principles in the exact context present here. In overturning a Second Circuit holding that a registered sex offender had a due process right to prove that he was not "currently dangerous," the Court explained that "any hearing on current dangerousness [was] a bootless exercise," *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003), in light of Connecticut law that made the fact of current dangerousness "not relevant," *id*. at 8; *see also Universal City Studios LLLP v. Peters*, 402 F.3d 1238, 1244 (D.C. Cir. 2005) (no process needed to prove an irrelevant fact "regardless of how compelling the proof may be"); *Eidson v. Pierce*, 745 F.2d 453, 459 (7th Cir. 1984) (applying this principle to subsidized housing).

This Court followed *Doe* in rejecting a similar challenge to Michigan's sex-offender law. The Court reversed a district court decision invalidating Michigan's law "given the similarity between Connecticut's and Michigan's statutes." *Fullmer v. Mich. Dep't of State Police*, 360 F.3d 579, 582 (6th Cir. 2004); *see also Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 502 (6th Cir. 2007) ("Procedural due process challenges to state sex-offender registry statutes that mandate the registration of all convicted sex offenders have been foreclosed by the Supreme Court's decision in [*Doe*].").

Ohio's system in place before 2007 did differ in one respect from those in Connecticut and Michigan, but the difference is doctrinally irrelevant. In Connecticut and Michigan, registrant status flowed directly from the conviction itself. In Ohio, registrant status at the most serious tier resulted either from a previous conviction or a hearing about future dangerousness. *See* Ohio Rev. Code § 2950.09(B) (2006). That difference simply made Ohio's old process more selective than Connecticut's or Michigan's, and therefore more fair. It did not change the message conveyed by putting an offender's name on a registry. *See* Ohio Rev. Code § 2950.09(D)(2) (adjudication as sexual predator "permanent"). Indeed, the raison d'être of these registries is that a convicted sex offender poses some threat of committing a similar offense in the future. *See McKune v. Lile*, 536 U.S. 24, 33, (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."); *Smith v. Doe*, 538 U.S. 84, 103 (2003) (the States can legitimately conclude that a "conviction for a sex offense provides evidence of substantial risk of recidivism"); *cf. Hawker v. New York*, 170 U.S. 189, 197 (1898) ("Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made

the absolute test does or does not exist.") (listing examples of collateral consequences of crime without regard to "the lapse of time" after the conviction).

More specifically, the Connecticut statute and the Michigan statute upheld in the U.S. Supreme Court and this Court respectively each included registrants because of a perceived risk of re-offense, measured at the time of the original sentencing. The "intent" of the Connecticut law approved in *Doe* "'was to alert the public by identifying *potential sexual offender recidivists*.'" *State v. Waterman*, 825 A.2d 63, 67 (Conn. 2003) (citation omitted) (emphasis added). Similarly the Michigan law that this Court upheld "was enacted . . . with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of *future criminal sexual acts* by convicted sex offenders," Mich. Comp. Laws § 28.721a, because the Michigan legislature had determined that "a person who ha[d] been convicted of committing an offense covered by this act pose[d] a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state," *id*.

Along the same lines, the Tenth Circuit upheld an Oklahoma law that forecasted future dangerousness. It found no due-process problem in a sex-offender statute even though it said that top-tier registrants "'pose[d] a serious danger to the community and [would] continue to engage in criminal sexual

conduct.'" *Gautier v. Jones*, 364 F. App'x 422, 424 (10th Cir. 2010) (citing statute). That was so, reasoned the panel, because, "even if" the offender "could prove he [was] not currently dangerous, it would not [have] change[d] his risk level" under the statute. *Id*. at 425.

All four laws—Connecticut's, Michigan's, Oklahoma's, and Ohio's—placed sex offenders on a registry based on a prediction of future dangerousness. The statutes simply differ in the process used on the front end to include registrants. But all four shared the feature that *current* dangerousness was based on some evaluation *at the time of sentencing*. Current dangerousness was not tied to any ongoing evaluation. Thus, under all four statutes, current dangerousness was not "relevant," *Conn. Dep't of Public Safety*, 538 U.S. at 8, to registrants' obligations to provide authorities with address and other information.

2. Authorities from other circuits and from state courts further show the flaw in Doe's due-process claim.

Beyond the controlling authorities in *Connecticut Department of Public Safety* and *Fullmer*, and the persuasive authority in *Gautier*, several other courts have rejected due-process claims that hinge on proving an irrelevant fact. For example, the Second Circuit held that, because it was irrelevant under New York law that a registrant may have been "within the subset of convicted sex offenders who are not actually dangerous," *Doe v. Cuomo*, 755 F.3d 105, 113 (2d Cir. 2014), the registrant had no viable due-process claim. That was so even though New

York had "'amended the law to abolish the petition for relief from registration.'" *Id.* (citation omitted).

In several other cases, registrants claimed due-process deprivations because they had no chance to contest a sex-offender designation in one jurisdiction that arose from a conviction in another one. Recently, the Seventh Circuit refused to find constitutional fault in Wisconsin's classification of an offender who wanted to challenge the state's legal conclusion of how his out-of-state conviction translated to Wisconsin's registration system. *Murphy v. Rychlowski*, 868 F.3d 561, 566-67 (7th Cir. 2017). The offender's precise status under another state's law was not a "*fact* relevant to the Wisconsin statute, so no due process right attached to it." *Id*. at 566. In a similar case, the Tenth Circuit rejected a due-process challenge by an offender who claimed that Colorado classified him as a sex offender even though he would not be so classified under Wyoming law (where he committed the sex offense). *Abdullah Kru Amin v. Voigtsberger*, 560 F. App'x 780, 783-784 (10th Cir. 2014). Colorado, the court held, had "no constitutional duty to provide additional procedural safeguards" beyond the original criminal trial. *Id*. at 783. In another similar case, the Ninth Circuit reasoned that such a claim "cannot succeed" when the type of classification in one jurisdiction is "not relevant" to classification in the second. *United States v. Garner*, 586 F. App'x 360, 361 (9th Cir. 2014).

State courts, too, have agreed that registrants have no due-process right to prove facts that are irrelevant to a state's sex-offender system. West Virginia's system, for example, "makes no provision for a lifetime registrant to be removed from the registry." *In re Jimmy M.W.*, No. 13-0762, 2014 W. Va. LEXIS 586, at *4 (W.Va. May 30, 2014). Even so, the West Virginia Supreme Court has held, lifetime registrants have no right to a "mechanism" to "demonstrate that he or she has been rehabilitated and is no longer dangerous to the public." *Haislop v. Edgell*, 593 S.E.2d 839, 847 (W. Va. 2003); *see also Doe v. State*, 2009 Tenn. App. LEXIS 296, at *18 (Tenn. Ct. App. Mar. 10, 2009) (designated as not for publication) (decided under state law, but applying *Connecticut Department of Public Safety*). The Nevada Supreme Court has turned aside a procedural-due-process challenge to a juvenile registration law because no facts beyond a conviction were relevant in the Nevada system. *State v. Eighth Judicial Dist. Ct.*, 306 P.3d 369, 372 (Nev. 2013). Like the laws of many States, the Ohio law that Doe challenges made any proof of her current dangerousness irrelevant. That means her procedural-due-process claim must fail.

To be sure, the Utah Supreme Court's opinion in *State v. Briggs*, 199 P.3d 935 (Utah 2008), has a veneer of support for the proposition that a message of current dangerousness requires more process than the original conviction. But the court's holding there is distinct from what Doe requests here in two ways. First,

Utah's trial process offered registrants no "opportunity to contest the fact of their current dangerousness." *Id*. at 948. By contrast, the Ohio process used in Doe's case included a hearing with the right to present and cross-examine witnesses, and to appeal any unfavorable ruling about dangerousness. Ohio Rev. Code § 2950.09(B)(2)-(4) (2006). Second, the designation that the Utah registrants challenged were *executive* predictions about the registrant's likely "next victim." *Briggs*, 199 P.3d at 945. By contrast, Ohio's listing of Doe's information represented a legislative and judicial judgment about dangerousness derived from a full-scale court hearing. *See* Ohio Rev. Code § 2950.09 (2006).

There is no principled way to distinguish Ohio's law challenged here from those upheld in these many cases. Upholding laws like those in Connecticut and Michigan, but striking Ohio's, would penalize Ohio for giving *more* process to those eventually included on the highest tier of its offender registry. It would make little sense to say that Ohio's *more selective* criteria for placing sex offenders on a registry is unconstitutional when sister States' broad-brush processes pass muster. And affirming the district court's order would skew incentives for state legislatures, who would think twice about including any process on the front end of a registration system if that required them to give more process on the back end. *Cf. Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016) ("states

would have little incentive" to pass more favorable laws if the Constitution might punish that choice).

At bottom, "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Conn. Dep't. of Pub. Safety*, 538 U.S. at 4. It makes no difference that some States (like Ohio) made more facts relevant at the *initial* classification because the logic of the Supreme Court's holding dooms any claim that seeks to prove an irrelevant fact at a *later* time.

3. Doe's requested remedy is also practically irrelevant because any hearing would lead to the same permanent-registration duties.

Consider Doe's claim from another angle. If Doe is afforded a hearing in a common pleas court in Ohio, what would a judge consider? The answer shows yet another reason that the district court erred on the merits (and that the district court did not have the power to issue a declaratory judgment because Doe's stated harms are not redressable). A judge considering today whether Doe is "currently dangerous," Compl., R.1, PageID#7, would start by looking at how Doe would be classified under current law. Doe would end up worse off. Current Ohio law designates those who were previously adjudicated sexual predators as "Tier III" offenders. Ohio Rev. Code § 2950.01(G)(5). That represents a legislative judgment *currently in force* that those previously adjudicated as sexual predators should be automatically classified for life. That judgment is automatic, and does

not depend on any evaluation of current or future dangerousness. Ohio's legislature not only made that judgment in the sex-offender statute itself, but confirmed its view of the need for lifetime registration when it barred those who committed certain sex crimes from moving to have their convictions sealed, a remedy that is available to many first-time offenders. *See* Ohio Rev. Code § 2953.32 (general sealing provision); *id.* § 2953.36 (convictions for unlawful sexual contact with a minor ineligible for record sealing).

Doe's designation as a Tier III offender, like her current designation as a sexual predator, would require lifetime registration, *see id*. § 2950.07(B)(1). And, unlike her current status, Doe also would be excluded from living within 1,000 feet of any preschool or day-care center. *Id*. § 2950.034(A). She would also newly be required to tell the relevant county sheriff of a change to her vehicle information, email addresses, internet identifiers, or telephone numbers. *Id*. § 2950.05(D). She would also have her information broadcast to a wider audience than under her current designation. That audience would now include any "volunteer organizations" that might have contact with minors or any organization, company, or individual who requests notification. *Id*. § 2950.11(A)(10). The Ohio Supreme Court found these changes so significant that it labels current law "punitive," while holding that the law Doe currently registers under merely "remedial." *Compare State v. Williams*, 952 N.E.2d 1108, 1112 (Ohio 2011) and *State v. Blankenship*, 48

N.E.3d 516, 519 (Ohio 2015) (plurality op.), *with State v. Ferguson*, 896 N.E.2d 110, 117 (Ohio 2008). Any new process would classify Doe under a statute that contains no explicit element of whether she is "currently dangerous." Compl., R.1, PageID#9. Any proceeding in an Ohio Court today would not evaluate a fact relevant to reclassifying Doe such that she would be relieved of the obligations she currently has under Ohio law.

Because any hearing would leave Doe worse off than she is today, any lack of process is harmless. Harmless error from lack of state process cannot justify a federal declaration that the state process is unconstitutional. *Cf. Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 303 (2007) (concluding that assumed due-process violation was harmless) (reversing lower court); *cf. NLRB v. Wyman-Gordon*, 394 U.S. 759, 766 n.6 (1969) (plurality op.) (noting that remand should not be for "idle and useless formality" of more process with the same outcome).

4. The lifetime consequence of Doe's criminal conviction is not unusual.

Ultimately, Doe seeks a judgment declaring unconstitutional a lifetime consequence of her criminal act. But such consequences exist outside the sex-offender regimes. For example, a non-citizen convicted of an "'aggravated felony'" is "subject to mandatory deportation," *Lee v. United States*, 137 S. Ct. 1958, 1963 (2017) (citation omitted), even many years after the offense, *Kelava v.*

Gonzales, 434 F.3d 1120, 1122 (9th Cir. 2006) (nearly 20-year gap from conviction to removal proceedings). A conviction will also enhance future sentences forever. *See, e.g.*, *Custis v. United States*, 511 U.S. 485, 493 (1994) (collateral attacks on earlier conviction not allowed in later sentencing); *Lewis v. United States*, 445 U.S. 55, 62 (1980). And a person convicted of a felony may well be forever barred from possessing a firearm. *See United States v. Bean*, 537 U.S. 71, 74 & n.3 (2002) (noting that a program for relief from weapons-possession disabilities was inoperative for many years). Even voting, a right "preservative of all" others, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), may be lost as a consequence of a felony conviction. *See, e.g.*, *Griffin v. Pate*, 884 N.W.2d 182, 194 (Iowa 2016) (felon may only vote after executive restoration process considered on a case-by-case basis); Ky. Const. § 145.1 (2015) ("executive pardon" required to restore voting rights lost after conviction).

It is true that some lifetime consequences of a conviction or adjudication might violate the Constitution, but that is because those consequences invade a *substantive* right, not a *procedural* one. When this Court concluded that a past involuntary commitment that created a lifetime prohibition on possessing a firearm violated the Constitution, it was the Second Amendment, not the Fourteenth, that required that result. *Tyler v. Hillsdale Cty. Sheriff's Dept.*, 837 F.3d 678, 691 (6th Cir. 2016) (en banc); *id*. at 699 (McKeague, J., concurring) (need for process to

relieve disability arose from the Second Amendment); *id.* at 708 (Sutton, J., concurring) (the Second Amendment has been interpreted to confer a right to bear arms to those not under a disability in the "present tense"). But here, the district rejected a substantive constitutional claim. Order, R.83, PageID#75-59. Doe's case rises or falls on the substantive claim that she lost and did not cross appeal.

C. The District Court's Holding Conflated Process To Determine An Irrelevant Fact With Process To Resolve A Relevant One

The district court erred on both prongs of procedural due process.

1. The district court erred in finding a protected liberty or property interest

The district court grounded its protected-interest holding in three mistaken observations. One, that it was not bound by *Cutshall* because Ohio's law is more restrictive. Two, that the Seventh Circuit's *Schepers* case about registry *errors* should inform the inquiry here. Three, that all applicants have a property interest in federally subsidized housing.

Cutshall. The district court acknowledged this Court's precedent in *Cutshall*, but distinguished it as involving a less-restrictive registry law. Order, R.83, PageID#752. The relevant question, though, is whether Doe's interests in being *removed* from the registry is a liberty interest, not how Ohio's registry obligations compare to other states'. As discussed, *supra* at II.A, the Supreme

Court recognizes a difference for purposes of procedural due process between a claim to be freed from a restriction and having a condition newly imposed.

Schepers. The district court next pointed to a Seventh Circuit case as an independent reason to find that Doe has a protected liberty interest. Order, R.83, PageID#751. *Schepers* is unhelpful. Fundamentally, *Schepers* involved a registry recording error, as the State conceded: "There is no dispute that Schepers is not a Sexually Violent Predator under Indiana law." *Schepers v. Comm'r*, 691 F.3d 909, 912 (7th Cir. 2012). Here, by contrast, there is no dispute that Doe was adjudicated a sexual predator under the terms and procedures of Ohio law: as the district court said, "[t]his case … is not about whether Jane Doe was properly adjudicated to be a sexual predator in 2006." Order, R.83, PageID#736. The guiding precedents here are *Greenholtz* and *Cutshall*, not *Schepers*. The district court erred by reasoning otherwise.

Federally Subsidized Housing. The district court was equally wrong to ground its holding in Doe's supposed interest in federally subsidized housing. Order, R.83, PageID#752-54. The district court cited and discussed circuit cases noting that federal housing eligibility may be a property interest, *id*. at PageID#753, but did not confront the distinction between the property interest of those with an existing disabling registration obligation and those without. That approach is not consistent with the teaching of *Greenholtz*, which distinguished a

liberty interest in escaping a restriction from a liberty interest in never having one imposed. 442 U.S. at 9. So too with the claimed property interest here.

Doe's lawful conviction and initial predator designation put her in a different category compared to others seeking subsidized housing. She simply does not have the same kind of property interest in federal housing as an applicant without a conviction. Were the law otherwise, any collateral consequences of crimes would require further due-process proceedings to *maintain*, even if justified when *imposed*. Take for example, Ohio's ban on licensing a pawn broker after certain felony convictions. Ohio Rev. Code § 2961.03. If the property interest of one who has lost a license is on par with one who still holds one, felons could bring due-process challenges every five years (or two? or three?) complaining that the State owed them process to prove that they may not gain a license. *Cf. Wojcik v. City of Romulus*, 257 F.3d 600, 610 (6th Cir. 2001) ("new applicants" for permits "did not have a property interest so as to entitle them to procedural or substantive due process rights in the same way that an existing permit holder might demand"); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 113 (1978) (Marshall, J., concurring) ("abstract expectation of a new franchise does not qualify as a property interest"). Doe does not have a property right in the expectation of securing subsidized housing because her felony conviction removes her from the general pool of applicants. The district court's contrary conclusion was error.

2. The district court deviated from precedent in finding that the State Defendants owe Doe more process

The district court's holding that Doe's registration obligations violate the Due Process Clause rests on a misreading of Ohio law and an inapt comparison to a Seventh Circuit case. The misstep as to Ohio law arises because the district court believed that "[if] Jane Doe can prove that she no longer is likely to re-offend, then she would not be classified as a sexual predator under Ohio law." Order, R.83, PageID#755. As explained above, that is not true. Under the law in effect when Doe was designated a sexual predator, Ohio law did not revisit the original classification, no matter what evidence an offender might offer; it explicitly made classification "permanent" and explicitly barred the revisitation that the district court ordered. Ohio Rev. Code § 2950.09(D)(2) (2006). And under current Ohio law, an offender assigned the most restrictive classification cannot be reclassified based on evidence of reduced recidivism risk. Ohio Rev. Code § 2950.15(A), (B).

The district court made the same error in a slightly different way when it stressed the definition of predator under former Ohio law as an offender who "'*is likely* to engage in the future in one or more sexually-oriented offense.'" Order, R.83, PageID#755 (quoting Ohio law) (emphasis sic). The emphasis does not illuminate. Ohio law did assign predator designations based on a prediction. But it was a prediction made *at that time*—once, and with, as the statute also said, "permanent" effect. Ohio Rev. Code § 2950.09(D)(2) (2006). It was not, as the

district court assumed, a prediction of dangerousness based on an assessment at any (every) moment from the day after the hearing until the offender's death.

The district court elsewhere recognized that Ohio law imposed restrictions on offenders based on a one-time prediction about re-offense, not through a series of re-evaluations of the chance of committing another offense. As the court explained, Ohio law nowhere gives offenders a chance to "challenge *at a later date* the initial determination" of possible re-offense. Order, R.83, PageID#756 (emphasis added). But the court never connects this accurate statement of Ohio law with the Supreme Court's binding pronouncement that process mandated by the Due Process Clause must be process aimed to prove (or disprove) some fact that is "relevant," *Conn. Dep't of Pub. Safety*, 538 U.S. at 8, under state law. Current evidence of dangerousness did not matter under Ohio law when Doe was convicted, and it does not matter now. No amount of *process* can change that *substantive* aspect of Ohio law.

Separate from its error construing Ohio law and its consequence under *Connecticut Department of Public Safety*, the district court grounded its ruling in a Seventh Circuit case about Indiana's sex-offender classification system. *See* Order, R.83, PageID#756 (citing *Schepers*, 691 F.3d 909). The Seventh Circuit ultimately faulted Indiana's system because it "fail[ed] to provide any way for persons not currently incarcerated . . . to correct errors in the registry." 691 F.3d at

915. That neither describes Doe's case, nor Ohio's system. It does not describe Doe's case because she attacks her classification as inconsistent with new evidence she wants to present, not as erroneous in some nunc-pro-tunc sense. It does not describe Ohio's system because Ohio has always provided process for *errors* in entering the information on the database. If Doe were complaining about the kinds of errors involved in *Schepers*, it would not have required a federal lawsuit, but merely a call to the Attorney General. And when the law tasked the Attorney General with reclassifying all Ohio sex offenders (until the Ohio Supreme Court ended the project), the statute specifically gave all offenders the "right" to a court hearing to contest the "manner" in which sex-offender requirements "apply" to the offender. *See* Ohio Rev. Code § 2950.031(E). That is, the right to correct errors.

At the end of the day, the district court opined about what it thought Ohio law should be. And, on the horizon, is a bill that may prove the district court's instincts right. *See* Ohio Civil Justice Reform Committee, Draft Bill, at 97, 1479, 1593-1603 (Legislative Service Commission No. 132-0654) (June 16, 2017) (available at https://goo.gl/nVEjiC) (giving offenders like Doe the chance at a hearing to lower or eliminate offender-classification status). Unless and until Ohio's legislature makes such a determination, however, "it is worth recalling that [courts] are neither a legislature charged with formulating public policy nor an American Bar Association committee charged with drafting a model statute."

Schall v. Martin, 467 U.S. 253, 281 (1984). The Constitution simply does not permit what the district court did here.

CONCLUSION

The Court should reverse the district court, and direct it to issue a final judgment for the State Defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this *Brief of Appellants* complies with the type-volume requirements for a principal brief and contains 11,714 words. *See* Fed. R. App. P. 32(a)(7)(B)(i).

/s/ Eric E. Murphy
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2018, this *Brief of Appellants Michael DeWine, Ohio Attorney General, and Tom Stickrath, Superintendent of the Ohio Bureau of Criminal Identification and Investigation, in their official capacities*, was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Eric E. Murphy
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DESIGNATION OF DISTRICT COURT RECORD

Appellants, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic records:

***Jane Doe v. Mike DeWine, e al.*, 1:12-cv-846**

Date Filed	R.No.; PageID#	Document Description
10/31/12	R.1; 1-9	Complaint
4/15/15	R.22; 125-143	Order Denying Defendants' Motions to Dismiss
10/30/15	R.37; 221-238	Plaintiff's Motion for Summary Judgment
12/4/15	R.49; 347-358	Plaintiff's Memorandum in Response to Defendants' Motions for Summary Judgment
7/20/17	R.83; 735-767	Order Granting in Part and Denying in Part Motions for Summary Judgment
8/8/17	R.85; 769	Amended Order re: Declaratory Judgment
8/18/17	R.86; 770-771	State Defendants' Notice of Appeal