No. 03-245

In The Supreme Court Of The United States

DALE R. DEROLPH, et al.,
Petitioners,

v.

STATE EX REL. STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT STATE OF OHIO IN OPPOSITION TO THE PETITION FOR CERTIORARI

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INTRODUCTION

After litigating their state law claim for twelve years in state courts, Petitioners now attempt to make it a federal case—but their effort fails. Indeed, this case lies squarely at the crossroads of two core areas of state law concern: (1) how a State will implement its state constitutional guarantee to a thorough and efficient educational system, and (2) the scope of a state supreme court's supervisory authority over the State's lower courts. While it surprising enough that Petitioners belatedly claim a federal issue here at all, what is more surprising is the specific federal claim that they try: after successfully litigating their state constitutional claim for over a decade, including four separate trips to the Ohio Supreme Court, Petitioners now claim that are being denied access to the courts in violation of the federal constitution. But for several reasons, Petitioners fail to properly invoke this Court's federal jurisdiction at all, and in any case, they do not present any questions worthy of this Court's review.

First, the petition does not present any legitimate questions of federal law at all, let alone any that justify certiorari. This petition was not filed as an appeal from the decade-long Ohio school funding case, *DeRolph v. State,* but was filed as an appeal from an independent state-law case, *State ex rel. State v. Lewis*, that arose as satellite litigation after the school-funding case ended. As detailed below, Petitioners sought to revive the closed *DeRolph* case by filing new papers in the trial court that originally heard the case. The State responded with an original action in Ohio Supreme Court, in which the State sought—and obtained—a "writ of prohibition," which instructed the lower court not to entertain further proceedings in *DeRolph*, as that case was closed. The *Lewis* decision, then, involved the quintessentially state-law questions involved in issuing such state-law writs, and ultimately is about a state supreme court's power to oversee lower state courts, decidedly not an area of federal concern.

Moreover, in granting prohibition, the Ohio Supreme Court was merely applying and enforcing its own mandate from *DeRolph*, which had ended months earlier. In litigating the prohibition question in *Lewis*, no party even suggested that federal law was implicated, nor did the court below consider or rely upon federal law in reaching its result. This is unsurprising, as the underlying *DeRolph* case itself did not involve federal issues. In *DeRolph*, Petitioners successfully argued that Ohio's school funding system did not comply with the standard prescribed by the *Ohio* constitution. That is, the state supreme court construed the state constitution and declared rights and obligations under it, a classic matter of state law. In short, neither the *Lewis* case below, nor the underlying *DeRolph* case, involved any genuine questions of federal law, and that leaves nothing for this Court to review. The petition should thus be denied.

In seeking to transmute their state-law claims into questions of federal law, Petitioners dutifully intone the incantations well-known to hopeful legal alchemists: they assert vaguely-defined "due process" and "equal protection" claims predicated on alleged denial of access to state courts. But as noted above, Petitioners successfully litigated their state-law claims in the state courts. They had their day in court; indeed, they had their decade in court. Nor can they complain that their claims were not fairly heard during that process, as they *won repeatedly*. Indeed, in the last of four separate Ohio Supreme Court decisions in their favor, the plurality opinion reiterated that "the current school-funding system is unconstitutional," and specifically stated that "we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences." *DeRolph v. State*, 780 N.E.2d 529, 530 (2002);. Pet. App. 19a (opinion per Pfeiffer, J.). The last thing they can now plausibly complain of is a denial of due

process, or a denial of equal protection in their access to Ohio courts. In short, the *DeRolph* plaintiffs received a hearing, a favorable decision, and a remedial directive. Federal due process and equal protection impose no requirements beyond the hearing and remedy the Ohio Supreme Court has already afforded.

Moreover, even if the U.S. Constitution did require the State to provide specific remedies when state courts declare rights under state constitutions, all such federal questions should have been timely presented to the Ohio Supreme Court—but they were not. This Court's precedents call for denial of certiorari where independent state-law grounds support a state court decision, where the state court made no ruling on the federal question, and where the federal question was not properly presented to the state court for consideration. All of those conditions apply here, and the petition should thus be denied.

Finally, even if Petitioners could somehow clear all of the above jurisdictional and prudential obstacles to granting certiorari, the Petition should still be denied, as the merits of the question presented do not raise any issue worthy of the Court's review. First, the question framed by Petitioners is not even presented in this case, because nothing in the decision below broadly denies access to Ohio courts. That is, the decision below expressly acknowledges that additional litigation regarding school funding would likely arise; it merely holds that *the DeRolph case* is over. Second, the expansive view of due process and equal protection articulated in the Petition asks this Court to federalize the remedies any time a state court recognizes a state constitutional law right. This theory so radically undermines the Court's traditional approach to such state-law cases—which confirm the federal constitutional principle that States retain an inviolable realm of sovereignty to the States—that

even reviewing the case would draw the Court far deeper into state sovereign territory than it has ever trod. For all of these reasons, the petition should be denied.

STATEMENT

Petitioners' procedural history of the case is largely correct in what it does say, but it is more notable for what it omits. Consequently, Respondents' Statement does not restate the entire case history, but focuses on Petitioners' omissions. While the Statement is presented chronologically, four points emerge from the history of the *DeRolph* and *Lewis* cases. First, the Ohio Supreme Court has repeatedly held that it would not order injunctive relief dictating to the political branches the precise formulation for school funding. Rather, the Court limited itself to declaratory relief, issuing statements at each stage indicating which aspects of the educational system met, or failed to meet, Ohio's constitutional standard, an approach that left the specifics of any school-funding system to be decided, in the first instance, by the Ohio legislature. Second, as a corollary of the first, the court has consistently instructed the trial court that it, too, should not order specific injunctive relief, but should limit itself to declaring the validity, or invalidity, of Ohio's educational statutes and programs. Third, the court's last *DeRolph* decision, called "*DeRolph IV*," left no doubt that the *DeRolph* case itself was over, and that any further school-funding litigation would occur in a new case, if any. Finally, the court repeatedly credited the State for its massive efforts to improve education in Ohio, even as it repeatedly said that more work should be done; the court never adopted Petitioners' view that nothing has been done.

These four principles are interwoven in the court's five main opinions—four in *DeRolph* and one in *Lewis*—and in ancillary orders, as follows:

DeRolph I. In *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) ("*DeRolph I*"), the Ohio Supreme Court held that the then-existing system of school funding violated the "thorough and efficient clause." However, striking a theme that would continue throughout the remainder of the litigation, the Ohio Supreme Court refused to impose any specific injunctive relief against the State. "Although we have found the school financing system unconstitutional, we do not instruct the General Assembly as to the specifics of the legislation it should enact." *Id.* at 747. The Court recognized that "the proper scope of our review is limited to determining whether the current system meets constitutional muster. We refuse to encroach upon the purely legislative function of what the new legislation will be." *Id.* at 747 n.9. *See also DeRolph v. State*, 728 N.E.2d 993, 1002 (Ohio 2000) ("*DeRolph II*") ("[T]his court in *DeRolph I* did not require a specific funding scheme, and did not instruct the General Assembly as to what legislation should be enacted, leaving it to the General Assembly to determine the specifics of the remedial legislation.").

Several procedural steps between *DeRolph I* and *DeRolph II* not only confirmed that the court refused to order specific injunctive relief, but also established that the trial court was not to do so, either. First, the court stayed the effect of *DeRolph I*, giving the General Assembly time to develop a constitutional school-funding system. Second, the court then sent the case back to the trial court to await that legislative action and review the validity of the new system, specifically providing that the case was "*remanded to the trial court* with directions to enter judgment consistent with" the Ohio Supreme Court's opinion. Judgment Entry, March 24, 1997 (emphasis added). The remand further provided that the trial court was "to retain jurisdiction until legislation is enacted . . . taking such action as may be necessary to ensure conformity" with *DeRolph I*. When the State asked the court to reconsider the decision to remand,

seeking closer supervision directly by the Ohio Supreme Court, the court said no, stating that its role, and that of the trial court, would be limited to later reviewing the State's efforts:

> Given the separate powers entrusted to the three coordinate branches of government, both this court and the trial court recognize that *it is not the function of the judiciary to supervise or participate* in the legislative and executive process.

DeRolph v. State, 678 N.E.2d 886, 887 (Ohio 1997) (emphasis added).

The court soon confirmed the restraints on the trial court in two ways. First, while the case was pending before the trial court on remand, the *DeRolph* Plaintiffs, in May 1997, asked the trial court to impose a compliance schedule, including monthly compliance conferences. The trial court asked the Ohio Supreme Court for guidance, and that court rejected the idea of any such compliance oversight, and ordered the trial court to deny Plaintiffs' motion. *DeRolph v. State*, 681 N.E.2d 424, 424 (Ohio 1997).

Second, two years later, when the trial court eventually did order specific compliance, the Ohio Supreme Court said no. The trial court found that, even with certain newly-enacted legislation, the school funding system remained unconstitutional. *DeRolph v. State*, 712 N.E.2d 125 (Ohio C.P. 1999). Seeking to enforce that declaration with injunctive relief, the trial court ordered the Superintendent of Public Instruction and the State Board of Education to "forthwith prepare a report setting forth proposals complying with the Order of this Court and the directives of the Ohio Supreme Court," and it mandated yearly reports, contemplating ongoing close oversight of educational policy.

Id. at 297. But the Ohio Supreme Court stayed this order pending appeal, with three justices questioning whether the trial court had any authority to enter it. *DeRolph v. State*, 709 N.E.2d 1215 (Ohio 1999).

DeRolph II. In its second major opinion, the Ohio Supreme Court again found the funding system unconstitutional, but it again completely rejected the injunctive elements of Plaintiffs' proposed remedy. As the court noted, Plaintiffs asked the court to "specify what programs and services must be provided to children at every level, in order to define what level of educational opportunities must be made available," and to "issue an interim funding order that, among other things, requires the state to fund the foundation level at $5,051 per pupil, updated for inflation from FY99, and also requires the state to fund school facilities at a minimum level of $1 billion for each fiscal year." *DeRolph v. State*, 728 N.E.2d 993, 998 (Ohio 2000) ("*DeRolph II*"). But the court would not dictate such results, again leaving it to the legislature to craft the specifics of a remedy. "[W]e conceivably could simply order, as plaintiffs request, that the foundation amount be set in excess of $5,000 per pupil for FY00, and order the General Assembly to fund that amount.... That degree of involvement in fashioning a remedy in this case is not, nor should ever be, how we perceive our role. Our role, as we have declared in past cases, is to decide issues of constitutionality—not to legislate, as some may believe." *Id.* at 1003.

The Ohio Supreme Court then continued the matter until June 15, 2001, giving the State another year to complete its remedy. *Id.* And when Plaintiffs tried, just six months later, to get the court to order more specific relief immediately, the court again said no. *See DeRolph v. State*, 741 N.E.2d 533, 533 (Ohio 2000) (rejecting request for court oversight of the State's efforts, including a request for a

compliance schedule and "for an order requiring [the State] to pay the costs of the unfunded mandates, to file a master plan, and to file subsequent progress reports.").

Notably, in *DeRolph II*, the court not only rejected pleas for injunctive relief, but it also rejected the Plaintiffs' continued claim that the State's efforts so far amounted to nothing. The court expressly recognized the State's "past and present efforts," as a "good faith attempt to comply with the constitutional requirements." 728 N.E.2d 993 at 1020.

DeRolph III. In *DeRolph III*, the Ohio Supreme Court finally took tentative steps toward ordering specific relief, but it soon stepped back from that approach. The court again found that the school funding system fell short of the mark, and it ordered the State to implement specific changes that would, in its view, "make the new plan constitutional." *DeRolph v. State*, 754 N.E.2d 1184, 1200 (Ohio 2001) ("*DeRolph III*"). But the court did not plan to oversee that implementation within the *DeRolph* litigation. Rather, it intended to issue those instructions as parting words and to close the case, noting that it had "no reason to doubt [the State's] good faith," and concluding that there was "no reason to retain jurisdiction" over the case. *Id.*

But even those parting instructions were put on hold, as the State immediately sought reconsideration of certain aspects of that decision, pointing to problems with the court's directives—and the court put its *DeRolph III* order on hold. Instead, the court ordered the parties to engage in mediation, *DeRolph v. State*, 758 N.E.2d 1113 (Ohio 2001), and when that effort proved unsuccessful, the court did not reinstate its *DeRolph III* order, but it instead returned the case to the court's active docket for a decision on the State's reconsideration motion.

DeRolph IV. In this context—reconsideration of a *DeRolph III* decision that had already indicated an intent to close the case—the court issued its *DeRolph IV* decision on December 11, 2002. *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) ("*DeRolph IV*"); Pet. App. 17a. The court expressly vacated its *DeRolph III* decision, thus repealing its sole attempt to order specific relief. Pet. App. at 19a. But the court, although declaring that Ohio's school-funding system remained unconstitutional, *id.*, did not order any other specific relief instead.

While the Court's plurality opinion neither retained jurisdiction, nor remanded the matter back to the trial court as it had in *DeRolph I*, several Justices, in both concurrences and dissents, left no doubt that the majority of the court agreed that the *DeRolph* case was over, and that any future school-funding litigation would be in a new case. First, in her concurring opinion, Justice Resnick predicted, "further litigation will be forthcoming in the area of school funding, even though it apparently will be under a name other than *DeRolph*." Pet. App. at 25a (Resnick, J., concurring). Second, Justice Stratton, in that portion of her opinion in which she concurred with the majority, explained her view that the case was over:

> While I do not agree with [the majority's] conclusion, I do believe that it is proper for the *majority to dismiss the case* once it has reached a finding of unconstitutionality .... In no case other than *DeRolph* have we retained jurisdiction once we have made a finding of unconstitutionality. We are not charged by the Constitution with fashioning new legislation that we believe meets the constitutional mandate. *That role is assigned only to the legislature, and to the legislature has that role now been properly returned.*

Pet. App. at 29a (emphasis added) (Stratton, J., concurring in part and dissenting in part). Third, Chief Justice Moyer, in his dissent, also expressed the view that "[the majority] implicitly declares this case concluded . . . ." Pet. App. at 32a (Moyer, C.J., dissenting). Chief Justice Moyer also predicted, as Justice Resnick did, that although *DeRolph* was over, future school-funding cases were likely. Pet. App. at 31a ("The issues will almost certainly again come before this, or another, Ohio court."). Finally, then-Justice Cook reiterated her view, expressed throughout the *DeRolph* litigation, that the case should be dismissed without any further proceedings. Pet. App. at 46a (Cook, J., dissenting).

These opinions should have left no doubt that the case was over, but if any doubt somehow remained, then it was eliminated by the court's final mandate in *DeRolph IV*, which did not contain any remand language—in sharp contrast to the *DeRolph I* judgment entry quoted above. The *DeRolph IV* mandate merely said, "IT IS ORDERED by the court that, consistent with the opinion rendered herein [780 N.E.2d 529], the decision entered in this case on September 6, 2001, be, and hereby is, vacated an that this court's decisions in [*DeRolph I* and *DeRolph II*] are the law of the case and that the current school-funding system is unconstitutional." *DeRolph v. State*, 780 N.E.2d 282 (Ohio 2002); Pet. App. at 49a-50a. The mandate ordered the trial court to carry the *DeRolph IV* judgment "into execution," but again, the mandate did not issue remand instructions, as in *DeRolph I*. *Id.*; Judgment Entry, Dec. 11, 2002; Pet. App. at 47a-48a.

State ex rel. State v. Lewis. About three months after the December 2002 decision in *DeRolph IV*—on March 4, 2003—the *DeRolph* Plaintiffs filed a "Motion to Schedule Compliance Conference" in the trial court. Pet. App. at 61a *et seq.* Because the *DeRolph IV* decision had not remanded the case back to the trial court, the State acted immediately, and on March 7, 2003, it filed an original action in the Ohio

Supreme Court, seeking a writ of prohibition against the trial judge, Linton D. Lewis, Jr., and the trial court, on the ground that the trial court had "a patent and unambiguous lack of jurisdiction." *See State ex rel. Goldberg v. Mahoning Cty. Probate Court*, 753 N.E.2d 192 (Ohio 2001). The *DeRolph* Plaintiffs were allowed to intervene as respondents in the prohibition case. They argued, as they did in their "Motion for Compliance Conference" in the trial court, that the trial court's 1999 remedial order was somehow reactivated by the *DeRolph IV* decision, or, alternatively, that the trial court had jurisdiction based upon the *DeRolph IV* mandate.

On May 16, 2003, the Ohio Supreme Court rejected the idea that *DeRolph* was still an open case, so it granted the writ of prohibition and ordered the trial court to deny the *DeRolph* Plaintiffs' attempt to revive the case. *State ex rel. State v. Lewis*, 789 N.E.2d 195 (Ohio 2003); Pet. App. at 1a *et seq.* Justice Stratton, writing for herself and Justice Pfeifer, again noted the court's unwavering view that "supervision of the legislative process by the courts" would be rejected. Pet. App. at 3a.

The court not only rejected the *DeRolph* Plaintiffs' particular arguments for continuing *DeRolph*—that the trial court's 1999 remedial order was somehow revived, or that the *DeRolph IV* mandate authorized more litigation—but it more broadly reminded the parties that it had repeatedly rejected the option of specific injunctive relief. The court noted that "by repeatedly denying the *DeRolph* plaintiffs' requests for comparable remedial relief throughout this litigation, we intended to preclude this relief." Pet. App. at 9a.

The court also stressed that its prohibition decision in *Lewis* merely confirmed what it had already said in *DeRolph IV*, noting that "a review of the various opinions in *DeRolph IV* supports [the conclusion] that no further jurisdiction over

[*DeRolph*] would be exercised, whether by this *or any other court*." Pet. App. at 12a (emphasis in original). According to the court, "if we had intended a remand for further proceedings in this litigation, we would have expressly provided for that action. *See DeRolph I*, [677 N.E.2d at 747]. By contrast, we did not specify any remand in *DeRolph IV*." Pet. App. at 11a.

It is this decision—the Ohio Supreme Court's grant of prohibition in *Lewis*—that the *DeRolph* Plaintiffs, now Petitioners, ask this Court to review.

REASONS FOR DENYING THE WRIT

A. The petition does not present any federal question that warrants the Court's review.

The petition should be denied because it does not raise any federal questions that warrant the Court's review. First, it is important to clarify precisely what the Ohio Supreme Court did that allegedly violated Petitioners' federal rights, as the Petition is vague on that score, and each possible theory of Petitioners' claims yields a different analysis, even though no theory warrants review. Second, Petitioners do not truly demonstrate that any federal issue exists at all, and even if some theory of theirs ekes out a claim to federal jurisdiction, such claims were not pressed or passed upon below. And, even if such claims were preserved, by the thread of a passing reference to "substantive due process" in one paper filed below, those claims do not warrant review under the Court's traditional certiorari standards. Finally, the Petition is, in fact, a poorly disguised attempt to get review of the underlying decision in *DeRolph IV* itself by improperly using the new vehicle of this prohibition action to reset the certiorari clock after the true deadline passed.

1. The petition does not precisely indicate how federal law was allegedly violated here, but such precision is essential to understanding the petition and its flaws.

As an initial matter, it is important to note that Petitioners are not quite clear in stating precisely *what it was that the Ohio Supreme Court did* that triggered the alleged federal constitutional violations here, and the answer to that question affects both the jurisdictional analysis and the standard certworthiness analysis. Petitioners do itemize their claims in terms of the alleged federal issues, citing procedural due process, *see* Pet. at 16, 22, substantive due process, *id.* at 17, and equal protection. *Id.* at 23. But Petitioners do not pin down *what aspect* of the Ohio Supreme Court's action allegedly violated those rights, nor what this Court could or should do to remedy the alleged violations. Thus, before addressing the petition's lack of federal jurisdiction or other barriers to review, it is useful to try to narrow down Petitioners' vague and overlapping complaints, as each theory of Petitioners case implicates a different, and conclusive, barrier to review.

The narrowest form of Petitioners' claim is that they object *only* to the writ of prohibition granted in *Lewis*. Under that view, the harm is rooted solely in the court's use of prohibition as the vehicle to end the *DeRolph* case, as Petitioners protest that this step unfairly—and unconstitutionally—cut off the trial court's ability to grant them further relief. *See id.* at 16.

In contrast to the narrowest *Lewis*/prohibition objection, most parts of the Petition point to a broader quarrel with the Ohio Supreme Court's decision to end the *DeRolph* case, regardless of whether that closure occurred through prohibition or through a final termination of *DeRolph* on direct review. *See id.* at 22 ("the question is whether litigants

may, consistent with procedural and substantive due process, be cut off from *any remedy whatsoever* for ongoing wrongs that have already been judicially declared") (emphasis in original). This view, which might be called the "hollow victory" objection, can be further subdivided into three basic gradations, depending on what, exactly, Petitioners believe that the federal constitution required (or still requires) the Ohio Supreme Court to do here.

At a minimum, Petitioners insist that the federal Constitution required the Ohio Supreme Court to keep the *DeRolph* case open as long as the court continued to find that the school-funding system violated the Ohio Constitution. *See id.* at 10 n.7 (acknowledging that "Petitioners could commence a *new* lawsuit aimed at vindicating educational rights," but arguing that such a suit would not satisfy the right to enforce such rights in *DeRolph* itself). Under a minimal "keep *DeRolph* open" view, Petitioners would argue that federal law requires that the case be kept open, but does not require the Ohio courts to grant *any* affirmative injunctive relief beyond the restrained type of remedial orders that the Ohio Supreme Court has already issued.

While some parts of the Petition appear to stop with the "keep *DeRolph* open" argument, other parts seem to go a subtle, but perhaps important, step further. In particular, the petition suggests that federal law entitles Petitioners not only to a continuation of *DeRolph,* and to remedial orders that declare the State's duty to do more, but also entitles them to *some* unspecified "affirmative relief." In this view, federal law does not require anything specific about the *content* of that affirmative relief, but it does require that some "enforcement" accompany a remedial order. This view is suggested by the question presented, which speaks of "enforcement of a final judgment, including remedial orders, entitling Petitioners to affirmative relief," and by the Petition's many references to *enforcement* of a remedial

decree. *See, e.g.*, Pet. at 20 (referring to "expectation of an enforceable remedy"); *id.* at 20 n. 17 (urging that state courts are required to "act to enforce their own remedial decrees").

Finally, the strongest possible view of Petitioners' claim—a view that they expressly disclaim—would be that federal law not only requires state courts to grant some "affirmative relief" to enforce their orders (when an underlying state-law violation or liability is found), but that federal law actually says something about the content of that affirmative relief, perhaps to ensure that the affirmative relief is not token, but is meaningful.

The above analysis of Petitioners' claims, by focusing on the precise "harm" that Petitioners seek to remedy through the Court's review, is a useful addition to the federal-law taxonomy that Petitioners cite—*i.e.*, procedural due process, substantive due process, and equal protection—as it is hard to evaluate whether Petitioners properly raise a federal issue, let alone a certworthy one, without such precise delineation.

Once the precise contours of Petitioners' alleged federal issues is clear, however, it is similarly clear that review is not warranted under any reading of Petitioners' claims. In fact, each different version implicates different barriers to review, both jurisdictional and prudential. For example, as explained below in subsection two, Petitioners simply do not raise a federal issue if their dispute is with Ohio's procedural mechanisms, without regard to any substantive results. Conversely, but to the same effect, Petitioners do not raise a federal issue if their quarrel is with the substantive outcome of *DeRolph*, *i.e.*, with their failure to obtain the type of affirmative injunctive relief that they have always sought, as that is plainly an issue of state law as well. Separately, as explained below in subsection three, because the Petition plainly demonstrates that Petitioners do not merely quarrel with the grant of prohibition in *Lewis*, but that

they truly object to the outcome of *DeRolph IV*, the petition should be denied for the simple reason that Petitioners did not meet the filing deadline for seeking review of *DeRolph IV*.

In short, while Petitioners have demonstrated creativity in spinning a web of claims that are hard to untangle, once the threads are separated, the Petition fails to show a need for review.

2. No federal issues are presented here, nor were any such issues properly raised below.

No one disputes that Petitioners must raise a *federal* issue to invoke the Court's jurisdiction, as no matter how important a state-law issue may be, the Court may not review purely state-law claims. *See* 28 U.S.C. 1257. Separately, even where a legitimate federal issue is presented, this Court consistently refuses to review state-court decisions if the federal issue is first raised in a petition for certiorari, or in other words, if the federal issue was "not pressed or passed upon" in the state court. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997). The complete absence of a federal issue is generally a more conclusive barrier to review, as it is jurisdictional, while the "not pressed or passed upon" rule has been described as either jurisdictional or prudential. *See id.* at 90. But Respondent State of Ohio first addresses Petitioners' failure to raise its alleged federal claims below, as that flaw is perhaps the most clear-cut of the many flaws in the Petition.

The Court has long "adhered to the rule" that, when certiorari is sought from a state court decision, the Court "will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams*, 520 U.S. at 86. This rule, sometimes called the "not

pressed or passed upon" rule, *Illinois v. Gates*, 462 U.S. 213, 219, 221 (1983), serves two main functions. First, it promotes comity with state courts by "declining to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90, citing *Webb v. Webb*, 451 U.S. 493, 500 (1981). Second, "a constellation of practical considerations" animates the rule, "chief among which is our own need for a properly developed record on appeal." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

Here, none of the alleged federal claims were passed upon below; nor were they truly pressed, as Petitioners point to only one item tying federal law to this State case—*i.e.*, a passing mention of "substantive due process" as a defense in Petitioners' answer to the complaint for prohibition—but that slim thread cannot possibly bear the weight of the Petition. Petitioners admit that "the federal constitutional questions were not expressly passed upon by the Supreme Court of Ohio," Pet. at 6, but they insist that they "timely and properly raised federal constitutional questions at their first and only opportunity to respond to the writ of prohibition that is the subject of this petition for writ of certiorari." *Id.* Petitioners cite, as support, the answer that they filed as intervening defendants in *Lewis*. *Id.* That answer did indeed mention substantive due process, as follows:

> Divesting the Trial Court of authority to provide a remedy for the constitutional wrongs declared in [*DeRolph IV*] would violate the *substantive due process* rights of the *DeRolph* Plaintiffs and Ohio's public school children in contravention of the United Sates and Ohio Constitutions.

Pet. App. 58a (emphasis added). Surely that slight reference is not enough.

First, Petitioners do not explain, nor could they, how this mention of "substantive due process" entitles them to now raise theories of procedural due process and equal protection. Indeed, Petitioners do not even candidly acknowledge, or try to overcome, this flaw regarding the equal protection and procedural due process theories. Instead, Petitioners glide over these crucial problems by saying generically that they "raised federal constitutional questions," Pet. at 6, and by paraphrasing the critical line in the answer as having raised "due process," without specifying that they narrowed themselves to only *substantive* due process in their answer in *Lewis*.

Second, while Petitioners lean entirely on the *answer* filed in *Lewis*, which was a five-page paper that mentioned substantive due process only once, they fail to note that they also filed a twenty-eight-page *brief* in the case, in which the magic words "due process" (as well as "equal protection") do not appear at all. That brief, although titled a Motion to Intervene, devotes only four pages to explaining why intervention should be granted, while the remaining twenty-four pages fully explain Petitioners' position on the merits of why prohibition should not be granted, and why the *DeRolph* case is still alive. In that *Lewis* brief, Petitioners' ultimate argument was that it would be wrong to end the *DeRolph* case with a declaration in their favor without a corresponding remedy, enforced by continued judicial oversight and injunctive relief. That is, their argument was already cast, at its analytical core, exactly as it is now, with one crucial, and fatal difference: it was never argued as a matter of federal constitutional law.

Moreover, Petitioners' claim that they raised federal issues at the "earliest opportunity" (Pet. at 6) is surely incorrect if their case centers on the idea that the Ohio Supreme Court may not close the *DeRolph* case on an

"unremedied" note, as opposed to the narrower notion that Petitioners object only to the use of the prohibition device to achieve that end. That is, if federal law somehow prevents that result—though it does not—then the Ohio Supreme Court violated Petitioners' federal rights in *DeRolph IV*, if the claim centers on the closure of the case. And if Petitioners object not only to *DeRolph's* closure, but to the issuance of remedial declarations without any "affirmative relief" to enforce the declarations, that "problem" had occurred years before in *DeRolph II* and in the ancillary litigation between *DeRolph I* and *II*, as the court repeatedly told the Petitioners that it would not order the type of injunctive relief and "compliance" oversight that Petitioners sought. *See* Statement, above, at pp. 5-8.

In sum, Petitioners' federal-law theories of equal protection and procedural due process were not pressed at all, and if "pressed" means anything more than a whispered aside in the *Lewis* answer—as it must—then the substantive due process theory was not pressed, either.

In addition, even if the Court were to completely overlook the fact that the federal claims were not pressed or passed upon below, those claims do not actually raise a federal issue, and in any case, they do not raise a certworthy federal issue. These shortfalls in the Petition are especially highlighted if the claims are analyzed, again, not just in terms of due process or equal protection, but from the standpoint of asking precisely *what aspect* of the Ohio Supreme Court's action allegedly violated Petitioners' federal rights, and asking what, if Petitioners were right, this Court could or should do to remedy the alleged violations.

As noted above (at pp. 14-15), one possibility is that Petitioners' claim centers on the Ohio Supreme Court's use of prohibition as a means of "barring them from access to Ohio's courts," *see* Pet. at i (Question Presented), but if that

is the case, then surely no federal certworthy issue is truly presented. First, whether prohibition was an appropriate remedy here is purely a question of state law, as the Ohio Supreme Court is granted, by the Ohio Constitution, the power to issue such writs to control exercises of jurisdiction by lower courts, such as the trial court here, over which it unquestionably has authority. *See* Ohio Const. Art. IV, Sec. 2(B)(1)(d). No one doubts that the Ohio Supreme Court is the last word in *reviewing* state-law decisions made by Ohio's lower courts. So the question of whether it sometimes *prevents* those decisions, by way of prohibition, when jurisdiction is lacking—rather than waiting to reverse the resulting order on appeal for that same lack of jurisdiction—is purely a state concern.

Second, not only is prohibition a purely state concern as a general matter, but if the issue is viewed in terms of the particular jurisdictional decision that was at the heart of the prohibition decision—whether the *DeRolph* case had been closed by *DeRolph IV* or not—then that, too, is a state-law issue. The question in *Lewis* was what the Ohio Supreme Court meant to do in *DeRolph IV*, and surely this Court could not, as a matter of *federal* law, somehow tell the Ohio Supreme Court that it *misread* its own earlier opinion, and that *DeRolph IV* really meant something other than what *Lewis* said it meant. Thus, if Petitioners' case centers on the fact that prohibition was issued here, it fails to invoke federal law and this Court's federal jurisdiction.

Alternatively, even the Ohio Supreme Court's decision to grant prohibition somehow raises legitimate federal issues, so that this Court has the *power* to review that decision, the issue is still not one that the Court *should* review. The question presented is not one on which the lower courts are split, of course, nor does it conflict with any

precedent of this Court. It does not address a widespread problem, for, even in Petitioners' view, the *Lewis* decision was a "singular aberration." Pet. at 14.

Moreover, if we accept Petitioners' insistence that they seek review only of the *Lewis* prohibition decision, and do not seek to smuggle in review of *DeRolph IV*, then this Court's review would not even offer them meaningful relief, and that reason confirms why review is not warranted. If the Court were somehow to order the *Lewis* decision to be reversed, that would apparently mean only that the writ of prohibition would be lifted, and that the trial court would be free to consider Petitioners' request for compliance oversight, injunctive relief, and the like. Any such requests might be rejected by the trial court, or might be eventually rejected by the Ohio Supreme Court on appeal. Thus, even if a federal jurisdictional hook exists, and even if the Court can overlook that such federal issues were not pressed or passed upon, the Court should not review cases where Petitioners will achieve no meaningful relief. Taking these factors together, the Court surely should not grant a jurisdictionally dubious petition where review would lead to no concrete effect.

To all this, Petitioners might respond that their question presented is not aimed solely at lifting the writ of prohibition, as perhaps they believe that federal law requires the Ohio Supreme Court to keep *DeRolph* open. Further, they might say, the Ohio courts are required by the federal constitution to grant *some* additional remedy, or execution of judgment, in further *DeRolph* proceedings. But either version of this "hollow victory" objection, *i.e.*, that *federal law* demands a further remedy or enforcement in the *DeRolph* case, suffers from the same ultimate flaws as the prohibition-only theory—lack of federal jurisdiction and lack of certworthiness—but for different reasons.

First, if the gravamen of Petitioners' appeal is not that the Ohio Supreme Court used a writ of prohibition as the means to confirm *DeRolph's* finish, but that the Ohio Supreme Court *is not allowed to end the case* with an "unremedied" declaration of victory for Plaintiffs, then that is truly an appeal from *DeRolph IV,* not from *Lewis*. As detailed in subsection three below (at pp. 24-27), that means that Petitioners long ago missed their deadline for seeking review here.

Second, even if the deadline problem is set aside, Petitioners cannot establish that any recognized federal right prevents the Ohio courts from declaring them the winners, but proceeding to (a) close the case, thus requiring them to seek further enforcement under a new case name, or (b) keep the case open while declining to give them the affirmative relief that they seek. Either result, however undesirable to Petitioners, surely does not violate *procedural* due process, as they had a chance to persuade the Court in *Lewis* and in *DeRolph IV* to keep the case going, and they had over a decade's worth of process in trying to convince the Ohio Supreme Court to give them a stronger remedy. Indeed, although they did not get all that they wanted, Petitioners were repeated *winners* in the state court litigation. They persuaded Ohio's highest court to declare that the State's school funding system violated the state constitution, and the court directed the Ohio General Assembly to fix the system. In response, the State spent billions more dollars, building new schools and sending more aid to the neediest school districts. That is not a lack of "process."

Nor does Petitioners' objection to a "hollow victory," whether in the form of *DeRolph's* closure, or in the form of receiving "inadequate" enforcement, implicate any federal right to substantive due process or equal protection. Just as Petitioners received due process in their years of litigating, so, too, were they treated as well as any other litigants in

being allowed to make the case against prohibition in *Lewis*, and to make the case for further relief in *DeRolph I, II, III*, and *IV*. The crux of Petitioners' substantive due process claim is they have a substantive right to seek further remedial relief, Pet. at 17-20, while their equal protection claim is grounded in the notion that they are "selectively excluded" from seeking further relief in Ohio's courts. Pet. at 25. But Petitioners do not dispute that they are free to file any new lawsuit they want, challenging the validity of today's school funding system and asking for whatever relief they desire. Pet. at 10 n.7. To be sure, the Ohio courts might say no, but Petitioners are free to try.

Thus, if Petitioners' claims are not merely about the grant of prohibition, but if they more generally involve their purported federal right to "access to Ohio's courts" to try again, they do not raise a federal claim, or not one worthy of this Court's review. Again, as with the limited prohibition theory, it is hard to see what a victory in this Court would gain them, other than a procedural right to litigate under the *DeRolph* caption rather than under a new case caption. That does not warrant this Court's review.

At the end of the day, only one theory of review would ultimately grant Petitioners some relief, as opposed to academic paper shuffling, but that is the one theory that is most plainly outside the Court's purview—the merits of the school funding debate. To be sure, Petitioners strongly disclaim any attempt to have this Court address the merits of Ohio's school funding debate. Pet. at 9. And of course they must do so, as that issue is undeniably a matter of state law only. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). But only by reaching the merits of that issue, or by achieving relief related to those merits, can Petitioners show any concrete effect of this appeal. If all they achieve is a procedural merry-go-round in Ohio's courts, ending in the same spot, then this Petition means nothing.

But if they hope to achieve an order from *this* Court that nudges things toward some concrete "compliance" orders, as they may envision them, then they are asking this Court to wade deep into the superintendence of Ohio law, and into the superintendence of Ohio schools. The Court should decline that perilous invitation.

3. Petitioners appealed the wrong decision, as they truly seek review of *DeRolph IV*, but they missed the deadline.

As explained above, Petitioners' claims are vague and inconsistent, as they insist that they challenge only the *Lewis* prohibition decision, yet they more broadly assail the alleged unfairness of winning *DeRolph IV* as a declaratory matter, while being left with no avenue within *DeRolph* itself to "enforce" that victory. Thus, to some extent, they waver between attacking *Lewis* alone and attacking the result of *DeRolph IV*. In the above section, Respondent State of Ohio seeks to cover all the bases, showing how this case does not warrant review under any interpretation of Petitioners' claims. But in the final analysis, despite the Petition's mixed signals, it seems that Petitioners' fundamental dispute is with *DeRolph IV*, which closed the door on the *DeRolph* case. The issues that they ask the Court to review did not originate in *Lewis*, which "did not modify the scope of *DeRolph IV* but merely confirmed it." Pet. at 12 n.8.

But if the Petition in fact seeks to review *DeRolph IV*, then it should be denied for the simple reason that Petitioners missed the 90-day deadline for seeking review of *that* decision. *See* 28 U.S.C. 2101(c). The mandate in *DeRolph IV* was entered on December 11, 2002, so any petition to this Court was due on March 11, 2003. But this petition was filed about five months after the March deadline passed, on

August 13, 2003, within the timeframe to seek review of *Lewis*. Because the petition, in substance, seeks review of *DeRolph IV*, it is too late.

To be sure, Petitioners purport to challenge only *Lewis*, Pet. at 9-10, but the substance of the Petition points to a quarrel with *DeRolph IV*. The question presented asks whether Petitioners have been deprived of their federal rights by virtue of a "decision of the Supreme Court of Ohio barring them from access to Ohio's courts for the enforcement of" their declarative victories in *DeRolph*. Pet. at i. While *Lewis* is purportedly the offending "decision . . . barring them from" achieving further relief, *DeRolph IV* had already done the same thing, making *it* the challenged "decision . . . barring" further *DeRolph* litigation. As noted above, most Justices of the Ohio Supreme Court expressed the view, in *DeRolph IV*, that the door was closed on *DeRolph*, and in *Lewis*, the court merely confirmed what *DeRolph IV* had already said. *See DeRolph IV*, Pet. App. at 29a ("I do believe that it is proper for the *majority to dismiss the case* once it has reached a finding of unconstitutionality") (Stratton, J., concurring in part and dissenting in part) (emphasis added); *compare* Pet. at 12 ("Nothing in . . . *DeRolph*, in particular, foreshadowed *Lewis*' sudden and anomalous divestment of the rights already declared and the relief already ordered in *DeRolph IV*").

The fact that Petitioners' dispute is with *DeRolph IV*, not *Lewis*, is best shown by asking what remedy might satisfy them. Surely Petitioners will not consider their federal rights vindicated if *Lewis* is vacated, allowing the trial court to consider Petitioners' request for a "compliance conference," only to lead to an appeal to the Ohio Supreme Court and a future *DeRolph V* decision that simply states that the case is over and that no further remedies will be allowed. Petitioners' case centers on the idea that their federal rights were violated when the Ohio Supreme Court took away their

right to seek further relief in *DeRolph*, so they would be no happier if that result is reached on further appeal rather than by prohibition. And if they would be unsatisfied with any relief from this Court that would still allow for a closure in *DeRolph V* that echoes *Lewis* and *DeRolph IV*, then that confirms that their dispute is indeed with *DeRolph IV*, so they should have appealed *that* case.

Not only is this a matter of missing the right deadline and of appealing the right case, but the fact that the *Lewis* decision was *compelled* by *DeRolph IV* also means that *Lewis* is supported by an independent and adequate state law ground, preventing review of *Lewis*. That is because the court's duty to follow its prior decision is a matter of state law, regardless of any alleged federal issues that independently arose in that stage of the litigation. *See Western Electrical Supply Co. v. Abbeville Elec. Light & Power Co.*, 197 U.S. 299, 303 (1905) (party could not appeal second of two related state supreme court cases, even if federal issue was raised, where the first state court case dictated the outcome of the second; second decision independently resulted from state-law issue of law of the case, regardless of other grounds); *Bonner v. Gorman*, 213 U.S. 86, 92 (1909) (second state court decision could not be appealed on federal issue where second decision merely affirmed the trial court's execution of the mandate from first decision; "[c]ompliance with the mandate was the only question open to and determined by the higher court" on the second appeal, so the federal question "came too late.")

Here, too, the *Lewis* result was mandated by *DeRolph IV*, so not only were Petitioners required to appeal *DeRolph IV* on time, but also, the *Lewis* decision was based on the court's state-law duty to follow its own prior decision.

B. The petition should be denied because the purported question presented is not actually raised by this case.

The petition should be denied for the further reason that the question presented, as stated by Petitioners, is not actually raised by this case. That question posits that the decision below "bar[s] them access to Ohio's courts for the enforcement of a final judgment" that "entitl[es] petitioners to affirmative relief." But *Lewis*, the decision appealed from, does nothing to broadly "bar them access" to the courts. Rather, *Lewis* grants the writ of prohibition "and end[s] any further DeRolph litigation in *DeRolph v. State*." Pet. App. 13a. Thus, *Lewis* merely prevents further proceedings *in the case styled DeRolph v. State itself*, which had already been terminated by *DeRolph IV*, as *Lewis* explains, leaving Petitioners free to "access the courts" to file a new lawsuit regarding school funding, and to seek (though not necessarily obtain) whatever relief they desire.

Thus, *Lewis* does nothing other than apply Ohio-law doctrine about when a particular case is deemed final and complete, and the comments of the Justices show that nothing about terminating *DeRolph v. State* itself barred collateral litigation to enforce rights declared in *DeRolph*. Indeed, in *DeRolph IV*, several justices regarded such collateral litigation as inevitable. Pet. App. at 24a-25a (Resnick, J., concurring); Pet. App. 29a (Stratton, J., concurring and dissenting in part); Pet. App. 31a (Moyer, C.J., dissenting). Again, nothing prevents Petitioners from filing a suit to "enforce" their rights.

Consequently, the question presented, which suggests that Petitioners are barred from all court access on school funding issues, does not actually reflect the nature of the decision below. Thus, review should be denied.

C. The Court should not violate federalist principles by entangling itself in state school-funding litigation, nor should it open the door to federalizing virtually all state law issues.

Finally, the Court should not grant review here because the Petition is nothing less than an attempt to fully immerse the Court in the school-funding litigation that has long occupied state courts around the nation—even though that litigation is based on state law, and even though the Court has already declared that there is no federal constitutional right to a public education. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). This case asks the Court to revisit *Rodriguez* through the back door, and the Court should decline to do so.

To be sure, Petitioners dutifully note that they do not challenge *Rodriguez,* which found that education is not a fundamental right under the U.S. Constitution, Pet. at 9 n.6. However, they undercut that disclaimer when they ask the Court to "reconsider the fundamentality of education in a context in which children are routinely deprived of such rights and in light of the heightened contemporary importance of those rights." *Id.* at 26 n.22. The Court should decline that misguided invitation.

In our federalist system, public education has long been the province of state and local government, and *Rodriguez* has ensured that States may work out their own approaches to education, especially when it involves litigation rooted in state constitutional provisions. Of course, the federal courts have been involved in public education where undoubted federal rights were involved, such as in the nation's long road to desegregation and its fight against racial discrimination. *See Brown v. Board of Education,* 347 U.S. 483 (1954). But in the absence of such a clear federal

constitutional mandate, the Court ought not stretch due process principles to create federal oversight over whether a State's educational system is "thorough and efficient."

Moreover, review here would not only enmesh the Court in school-funding litigation, but it would open the door to federalizing almost any state-law issue—in stark contrast to this Court's precedents—by the indirect route of policing state-court oversight of state officials. The Court long ago rejected the notion that all state-law errors became federal issues through the due process clause, explaining that:

> The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 166 (1917). And in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court held that federal courts had no jurisdiction to order state officials to follow state law, opining that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. at 106. Petitioners' theory simply involves a state court as an intermediary to get around *Pennhurst:* a federal court could not order a governor to follow state law, but in some cases it could *order the state court to in turn order the governor* to follow state law or act in a certain way.

Just as the Court ought not involve itself in questions of school funding under state law, it ought not open the door to a broad theory that would convert virtually any state law issue into a federal case.

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

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