No. 23-1146

In the Supreme Court of the United States

JADE JOSEPH NICKELS, PETITIONER,

v.

DREW EVANS, SUPERINTENDENT,
BUREAU OF CRIMINAL APPREHENSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

REPLY BRIEF FOR THE PETITIONER

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This case presents an important question about the scope of the Constitution's liberty guarantees, affecting the interests of nearly a million individuals nationwide. The State attempts to throw up several procedural roadblocks to petitioner's writ, but in doing so loses the thread of what is actually at issue: in Minnesota a person can be labeled a predatory sex offender and be forced to comply with rigorous registration requirements on pain of criminal punishment without being afforded any sort of process whatsoever. And three federal Circuits—the Sixth, Eighth, and Ninth—also have concluded that there is no liberty interest at stake in being forced to comply with similar registration requirements. The Court should grant review and hold that an individual has a liberty interest, entitling her to some amount of process, against being erroneously required to submit to a registration scheme that forces her to continually report personal information to the government under pain of criminal penalties.

Minnesota concentrates virtually all its fire on non-merits arguments that pose no barrier to the Court's

review. Minnesota's jurisdictional argument is simply wrong. The text of 28 U.S.C. § 1257 and this Court's precedents make clear that this Court has jurisdiction to review the decision of the Minnesota Court of Appeals.

Minnesota's next argument—that petitioner received all the process he was due at his criminal trial—is incorrect but also irrelevant because the decision below did not reach that question. The Court below held only that petitioner had no liberty interest in the first place and therefore no right to due process. The process that was due would be a question for remand, not an issue that would prevent this Court from resolving the question presented.

When Minnesota finally gets to the question whether this case is certworthy, deep in its brief, it all-but-concedes that the circuit conflict at issue supports review. The State agrees that three circuits—the Sixth, Eighth, and Ninth—have held, like the Minnesota Supreme Court, that schemes materially identical to Minnesota's implicate no liberty interest. The need to correct those erroneous decisions is enough on its own to warrant certiorari. Minnesota's claim that there are no cases on the other side of the split is contrary to the text and reasoning of those cases, and at odds with the conclusions of the numerous scholars and commentators who have discussed how the circuits have "split jaggedly on the issue."[1]

Finally, Minnesota's two vehicle arguments are not real vehicle arguments and are not reasons to deny review. Minnesota argues that the decision below is not important enough to review because it is an unpublished

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[1] Melissa Blair, *Wisconsin's Sex Offender Registration and Notification Laws: Has the Wisconsin Legislature Left the Criminals and the Constitution Behind?*, 87 MARQ. L. REV. 939, 951 (2004); *see also* Pet. 2 n.1.

opinion from an intermediate state appellate court. But that is irrelevant; this case warrants certiorari because it presents an ideal vehicle to resolve a nationally important question over which courts are split. Minnesota also claims that answering the question presented will have limited practical scope. That is false. Answering the question presented will have immediate and far-reaching implications for countless individuals, and will set an important precedent about the correct interpretation of the constitutional right to liberty.

ARGUMENT

I. THE COURT HAS JURISDICTION

A. The Court has jurisdiction to review the question presented. This Court's rule is that it "can review … judgments … of a lower state court if the 'state court of last resort' has denied discretionary review." *Gonzalez* v. *Thaler*, 565 U.S. 134, 154 (2012). For a federal question to be reviewable it must have been "either addressed by, or properly presented to, the state court that rendered *the decision* [the Court has] been asked to review." *Adams* v. *Robertson,* 520 U.S. 83, 86 (1997) (per curiam) (citation omitted) (emphasis added). This case falls within that rule. The Minnesota Court of Appeals ruled on petitioner's federal procedural due process claim. The Minnesota Supreme Court declined discretionary review. This Court therefore has jurisdiction.

Minnesota cannot point to a single case in which this Court has ever declined to exercise jurisdiction where a state supreme court has denied review on the basis of what was in the petition for discretionary review filed in that court.[2] To counsel's knowledge there is no such case.

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[2] It is not clear how this Court even could deny a petition for certiorari on the basis of a filing made in the state courts, because state court filings, like a petition for discretionary review, are not part of the record and thus are not used by this Court to determine

That is because 28 U.S.C. § 1257(a) provides jurisdiction without regard to why a state supreme court denied discretionary review; the statute provides jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Here, that was the Minnesota Court of Appeals.

B. There is no prudential reason to decline review either. This Court's calculus of whether to review a nationally important federal question arising from a state court should not turn on the contents of a petition for discretionary review to a state supreme court. By definition, a decision by this Court to resolve a federal question implicates no unique state interests. This Court taking up and deciding this issue only benefits the Minnesota Supreme Court: if this Court affirms the Court of Appeals' decision, its decision vindicates the Minnesota Supreme Court's position while saving that Court the effort involved in revisiting it; and if this Court reverses the Court of Appeals' decision, that will only have saved the Minnesota Supreme Court the time and effort involved in reviewing this federal issue and overruling its existing precedent. At bottom, there is no basis for inventing a prudential rule requiring litigants to press futile federal claims to state supreme courts in petitions for discretionary review merely to unlock the opportunity to petition for review of federal issues from this Court.

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the grounds for a state court decision. *See, e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) (stating that because "we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions" this Court would determine its jurisdiction from the "face" of the opinion below, stating "[t]his approach obviates in most instances the need to examine state law in order to decide the nature of the state court decision" while also "avoid[ing] the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court").

This Court has never held that they must and it should not start now.

In any event, the basis for Minnesota's argument—that petitioner deprived the Minnesota Supreme Court of the "opportunity" to decide the question presented—is false. *See* Opp. 10. The Minnesota Supreme Court grants discretionary review of whole cases, not individual issues. On discretionary review, the Minnesota Supreme Court may reach and resolve any issue in a case. Minn. R. Civ. App. P. 103.04 ("On appeal from or review of an order the appellate courts may review any order affecting the order from which the appeal is taken and on appeal from a judgment may review any order involving the merits or affecting the judgment."). And it routinely does so. Thus, contrary to Minnesota's claims, the questions presented in a petition for discretionary review to the Minnesota Supreme Court do not confine the appeal on the merits to those issues only. But petitioner never had the chance to press his procedural due process argument in that Court because it declined discretionary review.

II. THIS CASE WARRANTS THE COURT'S REVIEW

A. Minnesota's Claim That Petitioner Received Sufficient Process is Wrong and Irrelevant

Minnesota's contention (Opp. 11, 15) that petitioner received constitutionally sufficient process is both wrong and irrelevant. As an initial matter, it is wrong. Petitioner received exactly zero process. Minnesota asserts that "any process that was due was provided in the criminal proceedings that led to the convictions" (Opp. 15) but provides absolutely no explanation as to how that is so. Contrary to Minnesota's suggestion, the criminal court never found petitioner's offense required registration, nor could it have because petitioner was promised that if he pled guilty to a non-predatory charge, he would not have to register as a predatory offender. To determine that

registration was necessary would have required the criminal court to compare the "set of circumstances" underlying a dismissed charge to the "set of circumstances" underlying the crime to which petitioner pleaded guilty. *See* Opp. 2; Minn. Stat. § 243.166. But the factual underpinnings of the dismissed charge obviously were not before the criminal court because it was dismissed before trial.

In any event, this argument is irrelevant to whether the Court should grant review. Having denied the existence of a constitutional liberty interest, the Court of Appeals did not reach the question whether petitioner received due process. *See* Pet. App. 13a. Thus, even if Minnesota might prevail on remand on the grounds that petitioner received sufficient process—and to be clear, it cannot—that is not an obstacle to the Court's review. "[T]he existence of a potential alternative ground … not addressed by the court of appeals, is not a barrier to [this Court's] review." U.S. Cert. Reply Br. at 3, *United States* v. *Bean*, 537 U.S. 71 (2002) (No. 01-704). Indeed, this Court "routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason." Cert. Reply Br. at 2, *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15).

B. The Circuit Split Is Entrenched, Important, and Conceded

1. Minnesota agrees that the Sixth, Eighth, and Ninth Circuits have all "found no liberty interest at stake" in being forced to comply with registration requirements that were either "like Minnesota's" or that literally were Minnesota's (in the case of the Eighth Circuit). Opp. 23-25. As the Minnesota Supreme Court has held, requiring a person to provide private information to the government on pain of criminal penalties is, according to these courts,

"a minimal burden and is clearly not the sufficiently important interest" to warrant the protections of the Due Process Clause. *Boutin* v. *LaFleur*, 591 N.W.2d 711, 718 (Minn. 1999); *see Gunderson* v. *Hvass*, 339 F.3d 639, 644 (8th Cir. 2003) ("The burden imposed … is a minimal one."); *Cutshall* v. *Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) ("[T]he burdens imposed are minor, involving only the completion of the appropriate forms."); *Russell* v. *Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997) (registration scheme impinges on no liberty interest because it "is carefully designed and narrowly limited").

That three circuits have issued such flatly erroneous holdings is reason enough to grant review. There can be no doubt that forcing someone to provide current and accurate highly personal information to the government on pain of criminal penalties impinges on a constitutionally protected liberty interest. This Court declined to say so when it last had the opportunity. *Smith* v. *Doe*, 538 U.S. 84, 111 (2003) (Stevens, J., dissenting in part and concurring in the judgment in part); *see also Conn. Dep't of Pub. Safety* v. *Doe*, 538 U.S. 1, 7 (2003). It should do so now.[3]

2. Minnesota disputes that numerous courts of appeals and state courts have held that there is a

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[3] This Court has recognized for centuries that the right to liberty is "broad indeed." *Bd. of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 572 (1972). It carries forward the Magna Carta's promise that no individual shall be subject to the "arbitrary exercise of the powers of government." *Hurtado* v. *California*, 110 U.S. 516, 526-27 (1884). It "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized … as essential to the orderly pursuit of happiness by free men.'" *Roth*, 408 U.S. at 572 (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)).

constitutionally protected liberty interest in not being required to comply with burdensome reporting obligations backed by criminal penalties. Minnesota is wrong. This split has been recognized for decades by courts, scholars, and commentators. *See* Pet. 2 n.1. Minnesota's halfhearted efforts (Opp. 15-19) to distinguish petitioner's principal cases, *Gwinn* v. *Awmiller*, 354 F.3d 1211 (10th Cir. 2004), *Schepers* v. *Comm'r, Indiana Dep't of Correction*, 691 F.3d 909 (7th Cir. 2012), and *State* v. *Norman*, 282 Neb. 990 (2012), are unpersuasive.

Minnesota cannot escape the fact that *Gwinn* concluded, in direct conflict with the holding below, that by being required to register as a sex offender—period—the plaintiff "experienced a governmentally imposed burden that 'significantly altered [his] … status as a matter of state law'" even without any information at all as to "what specific obligations any such registration imposed." 354 F.3d at 1224 (citations omitted). The "differ[ing]" facts between the two cases (Opp. 15) make no difference as to that bottom line conflict on the legal issue between that case and this one.

Minnesota similarly cannot escape that *Schepers* concluded that depriving "members of the class [of sex offenders] of a variety of rights and privileges held by ordinary . . . citizens" impinges on a liberty interest. 691 F.3d at 914. Minnesota points out that the statute in *Schepers* was "more restrictive" than Minnesota's (Opp. 18-19), but the *Schepers* court made clear that any burden that goes beyond what is imposed on "ordinary" "members of the public" implicates a liberty interest. *Id.* Thus, the "need to report to the police periodically," conditioning the right to travel "on notifications to the police in both the home and the destination jurisdiction," and forbidding a person "from living within 1,000 feet of a

school or park" each would be sufficient, standing alone, to trigger the protections of the Due Process Clause. *Id.*

Nor can Minnesota escape the clear holding of *Norman*, that Nebraska's registration scheme implicated a liberty interest because "[t]he imposition on a person of a new set of legal duties that, if disregarded, subject him or her to felony prosecution, constitutes a change of that person's status under state law under *Paul* and constitutes the plus factor" sufficient to trigger the protections of due process. 282 Neb. at 1008 (citations omitted) (cleaned up).

The split has remained entrenched for decades. Neither side has changed course, even as reporting requirements have become more onerous and states (like Minnesota) have made the determination of who must register process-free.

C. This Is the Ideal Case to Review this Important Question

This case is the ideal vehicle to resolve this important question of federal law. Minnesota has identified no barriers to the Court's resolution of the question presented, which is purely legal and was decisive below.

Minnesota argues that the question presented should escape review because the decision below is an unpublished decision by a state intermediate appellate court. *See* Opp. 25-26. But that is irrelevant. This Court frequently grants review of state intermediate appellate court decisions and of unpublished decisions where the cases present appropriate vehicles to resolve recurrent, important federal questions. *See Counterman* v. *Colorado*, 600 U.S. 66 (2023) (reviewing intermediate state appellate court decision); *Torres* v. *Texas Dep't of Pub. Safety*, 597 U.S. 580 (2022) (same); *Dupree* v. *Younger*, 598 U.S. 729 (2023) (reviewing unpublished,

nonprecedential Fourth Circuit decision). This case offers just such an ideal vehicle.

That the decision below was unpublished supports review. It was unpublished because it was so thoroughly controlled by settled law in Minnesota, namely, a longstanding published decision from the Minnesota Supreme Court, *Boutin* v. *LaFleur*, 591 N.W.2d at 718, holding that being labeled a predatory sex offender and forced to comply with the registration requirements do not create a liberty interest.

As a last gasp, Minnesota argues that a decision on the question presented would be "applicable to very few other jurisdictions." Opp. 25. That is false. Numerous jurisdictions have registration requirements "like Minnesota's," Opp. 23-24, that require individuals to provide the government with detailed private information and keep it up to date on pain of criminal penalties. *See, e.g.*, *Cutshall*, 193 F.3d at 474; *Russell*, 124 F.3d at 1094. Deciding the question presented would also have consequences far beyond the particular statute at issue in this case: it would mark the boundaries applicable to any future government efforts to impose registration and reporting requirements on individuals without process. That is profoundly consequential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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