No. 12-1490

In The Supreme Court of the United States

TIM MOOSE,

Petitioner,

v.

WILLIAM SCOTT MACDONALD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of Respondent below, Tim Moose, respectfully submits this reply in support of his Petition for a Writ of Certiorari to review the Fourth Circuit's decision in *MacDonald* v. *Moose*, 710 F.3d 154 (4th Cir. 2013).

ARGUMENT

Because *Lawrence* v. *Texas*, 539 U.S. 558 (2003), did not establish beyond all fair minded dispute that state statutes that could be applied to conduct between consenting adults acting in private were facially unconstitutional in all other applications, the Court should grant this petition and reverse.

I. *Lawrence* Did Not Address, Much Less Plainly Hold, Whether State Sodomy Statutes Were Facially Unconstitutional.

As explained in the Petition, (Pet. 14-21), and not meaningfully countered by Respondent, the Court in *Lawrence* did not make a facial holding regarding the Texas statute at issue there, and thus did not do so with regard to all other state sodomy statutes in other applications. *See* 539 U.S. at 578. The question that controls is whether the "'holdings, as opposed to the dicta,'" in *Lawrence*, *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003), should lead all fair minded jurists to conclude that applying Virginia's sodomy statute to an adult's solicitation of oral sex from a minor

contradicts a "'specific legal rule'" established in *Lawrence*. *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011) (citation omitted). For "'[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Id.* (citation omitted).

The best that Respondent can do on this point is to posit ambiguity. But *Lawrence* is not even particularly ambiguous on the facial versus as-applied point. *Lawrence* framed the issue as one regarding the constitutionality of specific criminal convictions before it, 539 U.S. at 564, and employed strongly limiting language. *Id.* at 578; *see also id*. at 585 (O'Connor, J., concurring) (agreeing with the majority "[t]hat this law *as applied* to private, consensual conduct is unconstitutional" (emphasis added)); (Pet. 14-21). In view of this the Fourth Circuit plainly failed to conduct the pertinent inquiry: "the question is not the reasonableness of the federal court's interpretation of [this Court's decision], but rather whether the [state] court's narrower reading of that opinion was 'objectively unreasonable.'" *Wright* v. *Van Patten*, 552 U.S. 120, 128 (2008) (Stevens, J., concurring) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 409 (2000)).

The only subsequent decision by this Court to address *Lawrence* is the majority opinion in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013). But that decision supports an as-applied interpretation of *Lawrence*. *Windsor* summarized *Lawrence* as

recognizing protection for a class of conduct from prosecution: "[p]rivate, consensual sexual intimacy between two adult persons of the same sex." *Windsor*, 133 S. Ct. at 2692. The lower federal courts have settled on a similar understanding of *Lawrence*. *See*, *e.g.*, *Interactive Media Entm't & Gaming Ass'n* v. *Att'y Gen. of the U.S.*, 580 F.3d 113, 118 (3d Cir. 2009); *Cook* v. *Gates*, 528 F.3d 42, 52 (1st Cir. 2008); *Reliable Consultants, Inc.* v. *Earle*, 517 F.3d 738, 744 (5th Cir. 2008); *Muth* v. *Frank*, 412 F.3d 808, 812, 818 (7th Cir. 2005); *D.L.S.* v. *Utah*, 374 F.3d 971, 975 (10th Cir. 2004); *Anderson* v. *Morrow*, 371 F.3d 1027, 1032-33 (9th Cir. 2004); *Doe* v. *Pryor*, 344 F.3d 1282, 1287 (11th Cir. 2003).[1] The only court of appeals cases that are even consistent with the view that *Lawrence* was a facial holding probably represent nothing more than imprecision in expressing dicta. *See Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 n.4 (1st Cir. 2012) (describing *Lawrence* in passing as having "struck down Texas' statute forbidding homosexual sodomy"); *Sylvester* v. *Fogley*, 465 F.3d 851, 857 (8th Cir. 2006) (same).

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[1] Respondent incorrectly claims that "Texas courts . . . have also recognized that the Court invalidated Texas's anti-sodomy law on its face," (Br. in Opp'n 9-10), as the Court to which *Lawrence* was remanded merely "order[ed] the complaints be dismissed, and render[ed] judgments of acquittal in each cause," *Lawrence* v. *State*, Nos. 14-99-00109-CR & 14-99-00111-CR, 2003 Tex. App. LEXIS 9191, 2003 WL 22453791 (Tex. App. Oct. 30, 2003). *Ochoa* v. *State* characterized *Lawrence* as holding the statute "unconstitutional as applied to private sexual conduct between consenting adults." 355 S.W.3d 48, 53 (Tex. App. 2010).

Adopting an as-applied interpretation of *Lawrence* also finds support elsewhere in this Court's case law. In *Connecticut* v. *Menillo*, 423 U.S. 9 (1975) (per curiam), the plaintiff challenged the facial constitutionality of Connecticut's criminal abortion statute in the wake of this Court's decisions in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), on the ground that some applications of Connecticut's statute would have criminalized conduct held to be constitutionally protected in those cases. The Connecticut Supreme Court, reviewing a prosecution of a non-physician without medical training, "nevertheless overturned [the] conviction" on the grounds that *Roe* and *Doe*, by holding unconstitutional a prosecution under a similar Texas statute, had rendered the Connecticut statute "null and void, and thus incapable of constitutional application even to someone not medically qualified to perform an abortion." *Menillo*, 423 U.S. at 9-10. In doing so the Connecticut Supreme Court utilized the same logic as the Fourth Circuit.

This Court reversed because "*Roe* did not go so far." *Id.* at 10. Emphasizing the facts in *Roe*, that the woman there "sought to have an abortion '"performed by a competent, licensed physician, under safe, clinical conditions,"'" *Menillo* reasoned that the *Roe* "opinion recognized only [the woman's] right to an abortion under those circumstances." *Id.* (quoting *Roe*, 410 U.S. at 120). The Court explained that it "did not hold the Texas statutes unenforceable against a nonphysician abortionist, for the case did

not present the issue." *Id.* The Court also pointed to the rationale of its holding to limit its reach—"that a State cannot restrict a decision by a woman, with the advice of her physician, to terminate her pregnancy during the first trimester" due to the State's limited "maternal health" and "potential life" interests in the first trimester. *Id.* at 10-11. Conversely, where no physician is involved and the danger to a woman's health is thereby increased, "prosecutions for abortions . . . infringe upon no realm of personal privacy secured by the Constitution against state interference." *Id.* at 11. Accordingly, *Menillo* held that, "Connecticut's statute remains fully effective against performance of abortions by nonphysicians." *Id.*

Consistent with *Menillo*'s analysis, the Virginia courts reasonably read *Lawrence* as having addressed the circumstances before it and to have decided only whether state statutes could be enforced against consenting adults acting in private. Therefore, the Fourth Circuit exceeded its limited role in performing habeas review, 28 U.S.C. § 2254(d), and as a consequence the Petition should be granted and the decision below summarily reversed as one needlessly frustrating "'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Murray* v. *Carrier*, 477 U.S. 478, 487 (1986) (citation omitted); *see*, *e.g.*, *Nevada* v. *Jackson*, 133 S. Ct. 1990 (2013) (per curiam) (summarily reversing erroneous grant of habeas relief); *Marshall* v. *Rodgers*, 133 S. Ct.

1446 (2013) (per curiam) (same); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (per curiam) (same); *Coleman* v. *Johnson*, 132 S. Ct. 2060 (2012) (per curiam) (same); *Wetzel* v. *Lambert*, 132 S. Ct. 1195 (2012) (per curiam) (same).

II. The Fourth Circuit's Interpretation of *Lawrence* Creates Substantial Conflict and Threatens Harm to the Commonwealth and the Public.

Leaving the Fourth Circuit's decision in place would nullify the authority of the Commonwealth of Virginia and the State of North Carolina both to enforce final convictions obtained under their respective crimes against nature statutes and to prosecute future indictments to final judgment.

Respondent implausibly contends that there is no conflict between the Fourth Circuit's decision and that of the North Carolina Supreme Court affirming application of North Carolina's "crimes against nature" statute, N.C. Gen. Stat. § 14-177, to oral sodomy between an adult and a seventeen-year-old female. *See State* v. *Hunt*, 722 S.E.2d 484, 486, 490-91 (N.C. 2012). Respondent claims that this is so because North Carolina courts "have interpreted their statute not to include a general prohibition against sodomy." (Br. in Opp'n 15-16.) That is incorrect. The courts have interpreted the statute to prohibit all acts of sodomy. *See State* v. *Poe*, 252 S.E.2d 843, 844-45 (N.C. 1979) (affirming that

§ 14-177 applies to all acts of sodomy, including private, consensual acts by adults).

Rather, "[i]n response to the United States Supreme Court's decision in *Lawrence*, the scope of section 14-177 has been narrowed" by North Carolina courts to prevent the statute from being applied in a way inconsistent with the *Lawrence* decision, a saving construction adopted in response to a facial challenge to its constitutionality. *Hunt*, 722 S.E.2d at 490-91 (citing *State* v. *Whiteley*, 616 S.E.2d 576, 580-81 (N.C. Ct. App. 2005), and quoting its holding that the statute, after *Lawrence*, "'may properly be used to prosecute conduct in which a minor is involved, conduct involving non-consensual or coercive sexual acts, conduct occurring in a public place, or conduct involving prostitution or solicitation.'").

The Supreme Court of Virginia adopted a similar saving construction of Virginia's sodomy statute as applied. *McDonald* v. *Commonwealth*, 274 Va. 249, 260, 645 S.E.2d 918, 924 (2007) (noting that although "[t]he sodomy statute has no express age of consent; . . . it must be applied in a constitutional manner in conformity with *Lawrence*," affirming the constitutionality of applying "the sodomy statute to conduct between adults and minors"). Because the Fourth Circuit's holding is that the Virginia courts violated clearly established federal law in doing precisely what the North Carolina courts did, a

conflict exists.[2] *MacDonald*, 710 F.3d at 165-66; (Pet. App. 22).

Contrary to the arguments of Respondent, the Virginia General Assembly, in re-enacting the sodomy statute after *Lawrence*, plainly intended that it be available with respect to all conduct not held constitutionally protected in *Lawrence*. 2005 Va. Acts ch. 185; (Br. in Opp'n 13). Being presumed to have acted with knowledge of the law, *Falls Church* v. *Protestant Episcopal Church, U.S.A.*, 285 Va. 651, 665, 740 S.E.2d 530, 538 (2013), and having been advised by the Supreme Court of Virginia during that session of the Virginia General Assembly, *see* Va. Const. art. IV, § 6, that *Lawrence* "addresse[d] only private, consensual conduct between adults," *Martin* v. *Ziherl*, 269 Va. 35, 43, 607 S.E.2d 367, 371 (2005), the Virginia legislature re-affirmed the Commonwealth's policy of prosecuting acts of sodomy other than those between consenting adults acting in private by re-enacting the statute. *McDonald*, 274

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[2] Although *Powell* v. *State*, 510 S.E.2d 18 (Ga. 1998) does "predate[ ] *Lawrence*," a conflict plainly exists with it too because *Powell* upheld the facial constitutionality of Ga. Code Ann. § 16-6-2(a)(1), *see* 510 S.E.2d at 26, the very statute at issue in *Bowers* v. *Hardwick*, 478 U.S. 186, 188 n.1 (1986), and Georgia courts continue to treat the statute as valid post-*Lawrence* when applied to acts other than "consensual, private, noncommercial sodomy between individuals legally able to consent." *Green* v. *State*, 692 S.E.2d 784, 786 (Ga. Ct. App. 2010); *see*, *e.g.*, *Gunter* v. *State*, 722 S.E.2d 450, 451 n.1 (Ga. Ct. App. 2012) (affirming convictions of six counts of violating Georgia's sodomy statute).

Va. at 258-60, 645 S.E.2d at 923-24 (rejecting the argument that Virginia's sodomy statute does not apply to acts with 15 fifteen, sixteen, and seventeen year olds).

The decision below will "interfere with Virginia's efforts to protect minors from predation." (Br. in Opp'n 20.) It binds any subsequent panel of and any district court in the Fourth Circuit until the court takes the matter *en banc*, a step that court refused to take in this case. *United States* v. *Collins*, 415 F.3d 304, 311 (4th Cir. 2005) ("'A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent *en banc* opinion of this court or a superseding contrary decision of the Supreme Court.'" (citation omitted)); (Pet. App. 51-52). The effects of the erroneous decision of the Fourth Circuit are amplified by the number of other Virginia statutes that rely upon Virginia's sodomy statute as a predicate. *See*, *e.g.*, Va. Code Ann. § 18.2-346 (prostitution and solicitation); Va. Code Ann. § 18.2-348 (aiding prostitution); Va. Code Ann. § 18.2-356 (sex-trafficking); Va. Code Ann. § 18.2-370(A)(4), (5) (indecent liberties with a minor); Va. Code Ann. § 18.2-370.1(A)(ii) (indecent liberties with a minor in a custodial relationship); Va. Code Ann. § 18.2-374(C)(3) (Internet solicitation of or procurement of sodomy from a minor).

CONCLUSION

Because the Fourth Circuit's decision is in manifest conflict with this Court's habeas jurisprudence and with many other decisions the Petition should be granted and the decision below summarily reversed.

Respectfully submitted,

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