No. 13-555

IN THE

# Supreme Court of the United States

JUSTIN MICHAEL WOLFE,
*Petitioner*,

v.

HAROLD W. CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
*Respondent*.

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

## BRIEF OF THE NORTHWESTERN UNIVERSITY SUPREME COURT PRACTICUM AND CENTER ON WRONGFUL CONVICTIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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## QUESTION PRESENTED

Whether a federal court has authority in extraordinary circumstances to bar a state from reprosecuting a defendant when state officials violate a federal habeas order and engage in continuing misconduct that substantially prejudices the defendant's ability to secure a fair retrial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued



CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

## INTEREST OF *AMICI CURIAE*

*Amici curiae* the Northwestern University Supreme Court Practicum[1] and the Center on Wrongful Convictions of Northwestern University School of Law's Bluhm Legal Clinic ("CWC") regularly participate in cases as advocates on behalf of indigent criminal defendants.

The Northwestern University Supreme Court Practicum assists with the drafting and filing of numerous *amicus curiae* briefs each year with the specific aim of providing assistance in cases that raise issues of broad importance regarding the protection of the constitutional rights of individual criminal defendants.

The CWC is dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice. The CWC has three components: representation, research, and public education. The research and public education components focus on developing initiatives that raise public awareness of the prevalence, causes, and social costs of wrongful convictions and promote substantive reform of the criminal justice system. As part of its work representing clients, the CWC investigates possible wrongful convictions and represents imprisoned clients with claims of actual innocence in federal and state habeas and post-

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that the Northwestern University Supreme Court Practicum is affiliated with Sidley Austin LLP. Sidley Austin attorneys are assisting Mr. Wolfe, on a pro bono basis, only on remand, before the Circuit Court of Prince William County, and not in connection with Mr. Wolfe's petition for certiorari other than in connection with this brief. No person other than *amici curiae* and their counsel contributed monetarily to this brief's preparation or submission.

conviction proceedings. Through its research and representation of clients, the CWC has identified prosecutorial misconduct as a major cause of wrongful convictions.

The Northwestern University Supreme Court Practicum and the CWC have a particular interest in this case because it highlights the key question of what deference, if any, federal courts owe state courts once the writ of habeas corpus has issued. [2]

## I. THE FOURTH CIRCUIT IMPROPERLY RELIED ON FEDERALISM CONCERNS THAT HAVE NO PLACE IN THE HABEAS REMEDIAL CALCULUS

### A. Upon Issuance of a Writ of Habeas Corpus, Federal District Courts Enjoy Wide Discretion to Craft an Equitable Remedy to Redress Constitutional Violations

The federal habeas statute confers broad authority on the federal courts to "summarily hear and determine the facts, and dispose of the matter *as law and justice require*." 28 U.S.C. § 2243 (emphasis added). This Court has repeatedly recognized that a district court has "broad discretion . . . in fashioning the judgment granting relief to a habeas petitioner . . . ." *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987). Indeed, the breadth of a habeas court's remedial discretion has long been considered without equal. See *In re*

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[2] Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae's* intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

*Bonner*, 151 U.S. 242, 261 (1894) ("The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus."). The Fourth Circuit reversed the relief fashioned by Judge Jackson, cabining his discretion in a way contrary both to the broad language of the statute and the long history of the Great Writ.

Though today governed largely by statute, habeas corpus emerged as an equitable remedy, rooted in the English common law. At an elemental level, the writ has changed remarkably little since its inception,[3] save for the more recent development of orders for new trials. Traditionally, "the only remedy a court could grant a petitioner was full release." Note, *Extradition Habeas Corpus*, 74 Yale L.J. 78, 82 (1964). And for well over a century, federal courts in the United States continued in this vein, believing "they lacked the ability to order a retrial and had no choice but to order the prisoner released unconditionally." Marc M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 Minn. L. Rev. 437, 506 n.287 (1990). As "[t]his rigid position began to erode by the end of the nineteenth century," *id.*, courts began to recognize that the federal habeas statute had codified a more flexible incarnation of the Great Writ, one that permitted something less than a prisoner's unconditional release, should "law and justice [so] require," 28 U.S.C. § 2243.

Federal courts have taken full advantage of this latitude, which still includes an unconditional re-

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[3] *See* 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.3 (6th ed. 2011) (noting that "breadth and continuity, not historical expansion and recent contraction, are the principal characteristics of the writ's function in our legal tradition.").

lease. No longer "confronted with the dilemma . . . of having to choose between ordering an absolute discharge of the prisoner and denying him all relief," *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 209-10 (1951), habeas courts routinely opt for a "conditional order of release unless the State elects to retry the successful habeas petitioner," *Herrera* v. *Collins*, 506 U.S. 390, 403 (1993). Conditional orders frequently set time limits on a State's reprosecution, as the District Court did originally in this case, see Order at 2, *Wolfe* v. *Clarke*, No. 2:05-cv-432 (E.D. Va. Aug. 30, 2011), ECF No. 220, and may impose further consequences should the State fail to meet them, see 2 Hertz & Liebman, *supra*, § 33.3 (collecting cases). But while the conditional order has emerged as the dominant habeas remedy, it is by no means the only one. In the case of a very narrow violation, even a conditional release may prove too blunt a remedy, and courts may opt instead to modify directly a prisoner's sentence, require the State to honor its plea bargain, or unilaterally withdraw a prisoner's guilty plea. See *id.* § 33.4 (collecting cases). Conversely, a conditional release order may, as here, prove toothless in the face of a pattern of violations, spurring courts to order the prisoner's unconditional release, barring reprosecution by the State. See *id.* § 33.2 (collecting cases).

While unconditional release orders have become a "remedy of last resort," David P. Saybolt et. al., *Habeas Relief for State Prisoners*, 85 Geo. L.J. 1507, 1541-42 (1997), they remain a vital and appropriate remedial option for habeas courts, especially when States prove unwilling or unable to rectify fully—or at all—their unconstitutional practices. Courts have ordered the unconditional release of state prisoners in a variety of situations, including where

reprosecution would itself be unconstitutional, see *Corey* v. *Dist. Ct. of Vt., Unit # 1, Rutland Cir.,* 917 F.2d 88, 92 (2d Cir. 1990) (retrial barred by Double Jeopardy Clause), and where reprosecution could technically proceed, but the State had ignored the District Court's deadline, see *Satterlee* v. *Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006) (state refused to make plea offer as instructed by conditional writ); see also 2 Hertz & Liebman, *supra*, § 33.3 ("The 'retry or release' form of the typical conditional release order . . . may justify an order forbidding reprosecution . . . if the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period . . . ."). Here, the Fourth Circuit's remarkable statement that it was "unwilling to embrace" these well-established principles, *Wolfe* v. *Clarke*, 718 F.3d 277, 290-91 (4th Cir. 2013), offered no basis for asserting that Judge Jackson had abused his discretion.

Despite recognizing the District Court's "substantial discretion in fashioning an appropriate remedy," *id.* at 288, the Fourth Circuit merely substituted its own judgment in striking down the reprosecution bar, relying on prudential considerations of comity and federalism that, as the District Court well knew, are of no issue when fashioning the habeas remedy.

### B. Because Habeas Corpus is a Uniquely Federal Remedy, Principles of Federalism and Comity Must Not Narrow the Scope of the Relief

In calibrating habeas relief, a district court must consider only two factors: "law and justice." 28 U.S.C. § 2243. The sheer breadth of those factors means that AEDPA-esque principles of deference and comity have no place in the remedial calculus. In the end, that the relief may strain federal-state relations is as

irrelevant as it is unavoidable. Habeas is the sole province of the federal government, designed to vindicate federal rights, and its immense importance to that government is apparent from both the constitutional scheme and the history that wrought it. The interests of another government cannot impact the scope of the remedy, particularly when it is that very other government that is responsible for the underlying violation. The habeas writ was adopted by the Framers as an express exception to the comity that underlies federalism doctrines.

So critical was the right to seek a writ of habeas corpus to the Framers, that they reflected it in the body of the original Constitution itself, U.S. Const. art. I, § 9, cl. 2, and not in the Bill of Rights. The majority of individual rights were appended to the original document, and then only after intense debate. In fact, Hamilton pointed to the writ as assurance that a Bill of Rights was unnecessary for the protection of "liberty and republicanism." The Federalist No. 84 (Alexander Hamilton). And whatever other disagreements they may have had, Hamilton's contemporaries shared his reverence for habeas as a guarantee of personal liberty. Jefferson, in his First Inaugural Address placed the writ among "the essential principles of our government," Thomas Jefferson, First Inaugural (Mar. 4, 1801), *reprinted in Inaugural Addresses of the Presidents of the United States,* S. Doc. No. 101-10, at 16 (1989), while Madison praised the principle as "sacred" in the "administration of preventative justice," 4 *The Debates in the Several State Conventions on the Adoption on the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787* 555 (Jonathon Elliot ed., 1881). It is far from surprising then that the Framers afforded the writ

such prominence and shielded it from suspension in all but the narrowest of circumstances.[4]

What is inconceivable by contrast is that the inviolability of this revered remedy should somehow yield to the very party found to have triggered its issuance. To be sure, this Court has long noted "the profound societal costs that attend the exercise of habeas jurisdiction," *Smith* v. *Murray*, 477 U.S. 527, 539 (1986), and held that "our enduring respect" for our system of dual sovereignty often counsels restraint in its use, *Calderon* v. *Thompson*, 523 U.S. 538, 555-56 (1998), but when the writ has issued, the district court owes the *perpetrator* of the underlying violation no deference or comity in forging the solution. Indeed, a writ's issuance to a state prisoner is perhaps the most lopsided interaction between a state and the federal government, a true exception to the principles of federalism. Cf. *Hensley* v. *Mun. Ct., San Jose Milpitas Jud. Dist.,* 411 U.S. 345, 351 (1973) (framing the writ as "an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism . . . .").

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[4] Indeed, "[d]uring the period from the framing of the Constitution through the close of the twentieth century, Congress authorized suspension on four occasions, and the President claimed the authority to do so once." Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 578 n.2 (2008). Though efforts, "arising out of the war on terror," have been on the rise in recent years, *see id.* at 579, all leave not just the core, but the great majority of the writ's jurisprudence intact.

### C. The Fourth Circuit Improperly Deferred to the Commonwealth's Interests in Substituting its Own Habeas Remedy

#### 1. The Fourth Circuit Applied Prudential Concerns that Affect Only the Question of Whether the Writ Should Issue, Not the Ultimate Scope of the Relief

In substituting its own remedy for that of the District Court, the Fourth Circuit was driven by considerations of federalism and comity to the Commonwealth's judicial process. In dismissing the District Court's concerns of an ongoing violation as "speculative," the court discussed the myriad ways such a violation could possibly be avoided before concluding: "Put simply, the task of conducting Wolfe's retrial is for the state trial court, and it is not for us to express a view on how that court should manage its affairs." *Wolfe*, 718 F.3d at 289. This statement reveals a fundamental misunderstanding of the role of a habeas court at the remedial stage. Indeed, what else does such a court stand to do if not "express a view on how the [state] court should manage its affairs" going forward, in order to prevent further violations? Judge Jackson, who had heard and seen the witnesses in this matter, found that the Commonwealth had simply demonstrated that its processes would stifle rather than promote the "law and justice" at the heart of the remedial decision. Critically, the Fourth Circuit shared in this judgment, affirming the District Court's grant of the original, conditional writ that "ordered the Commonwealth to either retry him within 120 days or release him unconditionally from custody." See *Wolfe* v. *Clarke*, 691 F.3d 410, 413 (4th Cir. 2012). The Court of Appeals' newfound "confiden[ce] that the retrial will be properly handled," *Wolfe*, 718

F.3d at 289, reflects little more than a difference of opinion, flatly insufficient to establish an abuse of discretion. And yet, wary of "federal interference with a State's reprosecution," *id.* at 290, the Fourth Circuit granted an intransigent Commonwealth another opportunity for retrial without any assurance that the Commonwealth intended to remedy the earlier violations. See Tr. Oral Arg. at 68, *Wolfe* v. *Clarke*, No. 2:05-cv-432 (E.D. Va. Dec. 13, 2012) (Commonwealth's attorney stating: "I'm not recalling a specific violation that this Court found on *Brady* with respect to Mr. Barber. It found that it believed the prosecutors knew or should have known his testimony was false, but their testimony here was that they did not believe and do not believe his 2002 testimony was false.").

The Fourth Circuit's logic is unmistakably "grounded in principles of comity" which "reflect[] a desire to 'protect the state courts' role in the enforcement of federal [constitutional] law.'" *Castille* v. *Peoples*, 489 U.S. 346, 349 (1989) (quoting *Rose* v. *Lundy,* 455 U.S. 509, 518 (1982)). In other words, the Fourth Circuit heeded the counsel that sovereigns "avoid[] interference with the process of each other . . . ." *Moore* v. *Dempsey*, 261 U.S. 86, 95 (1923) (McReynolds, J., dissenting). But the Court of Appeals' understanding of how to apply such principles is not matched by an equal understanding of when to do so.

The Fourth Circuit's misguided resort to comity is perhaps understandable, as restraint and deference have become the bread-and-butter of modern habeas courts. In recent decades, this Court has "found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." *Calderon*, 523 U.S. at 554-55. These limits undoubtedly motivated the drafters of the Antiterrorism and Ef-

fective Death Penalty Act of 1996 (AEDPA) in overhauling and contracting federal habeas procedure, and in AEDPA's wake, "the principles of comity, finality, and federalism," have taken center stage. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). In deciding whether or not to issue the writ, federal courts must now be sure to "accord the appropriate level of respect to [the State's] judgment." *Bell* v. *Thompson*, 545 U.S. 794, 813 (2005). Today's habeas jurisprudence is a cautious one, reflecting "the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not." *Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003).

Yet the deference owed states under AEDPA and this Court's cases construing it applies only to "the discretion of federal courts *to grant habeas relief*," *Calderon*, 523 U.S. at 555 (emphasis added), not to the task of crafting relief once the relief has been granted and the courts of appeals have affirmed. See also *Withrow* v. *Williams*, 507 U.S. 680, 699 (1993) (O'Connor, J., concurring in part and dissenting in part) (noting, even before AEDPA, that caution may lead "federal courts exercising their habeas powers [to] refuse *to grant relief* on certain claims . . . .") (emphasis added); *Richardson* v. *Branker,* 668 F.3d 128, 138 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 441 (2012) ("AEDPA restricts that intrusion of state sovereignty by limiting the federal courts' power *to issue a writ* . . . .") (emphasis added). But having determined that "the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns," *Lehman* v. *Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 516 (1982), a district court has no obligation to revisit those concerns. To be sure, a district court fashioning a remedy might express confidence in a State's assertions that constitutional violations

will not be repeated and defer on that ground. And an appellate court could affirm such a judgment. But here, Judge Jackson came to the opposite conclusion and the Fourth Circuit reversed that judgment on deference grounds that do not apply once the Great Writ has issued.

### 2. The Fourteenth Amendment Strengthens the Argument Against Deference

Passage of the Fourteenth Amendment further enshrined protection of the writ for state prisoners. See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 Mich. L. Rev. 862, 889 (1994). Reflecting the Fourteenth Amendment drafters' heightened concerns about the supremacy of federal law and the abuse of state power, the federal writ stands as an important check on state power. Accordingly, the Fourth Circuit's insistence on deference to the Commonwealth, over the findings of a federal district court judge, was improper.

In the wake of the Civil War, the Reconstruction Congress was gravely concerned about abuses of state power against newly freed slaves. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1228 (1992). These concerns drove the passage of the Fourteenth Amendment. *Id.* Further, the Framers of the Fourteenth Amendment specifically cited habeas relief during their debates, using the writ as an example of one "privilege" intended to be protected via the new Amendment against the states. Cong. Globe, 39th Cong., 1st Sess. 475, 499, 1117, 1263, 2765 (1866); see also *Slaughter-House Cases*, 83 U.S. 36, 79 (1872) (stating that the privilege of the writ of habeas corpus is a right of the citizen guaranteed by the Constitution).

Still further support for the constitutional protection of state prisoners' federal habeas rights can be found through the Due Process Clause of the Fourteenth Amendment. Steiker, *supra*, at 900-12. The privilege of habeas corpus is "a strong candidate for 'incorporation' through the Due Process Clause."[5] *Id.* at 904. Not only is the writ steeped in history and tradition, and "fundamental to our scheme of ordered liberty and system of justice," but the writ is enshrined in the text of the original Constitution. See *McDonald* v. *City of Chicago,* 130 S. Ct. 3020, 3034 (2010) (summarizing modern incorporation approach). Moreover, the privilege of habeas corpus dovetails with other constitutional rights afforded state criminal defendants found applicable to the states through the Fourteenth Amendment.[6]

Because the Fourteenth Amendment further guarantees a state prisoner's right to federal habeas relief, once the writ issues, the federal habeas court possesses sole discretion to craft an appropriate remedy. The Fourteenth Amendment's familiar proscriptions ("No State shall make or enforce any law which shall

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[5] Because the federal writ of habeas corpus for state prisoners is now ensured by statute, this Court has never had occasion to examine whether the writ is incorporated against the states through the Fourteenth Amendment. *See* Habeas Corpus Act, ch. 27, 14 Stat. 385 (1867) (expanding habeas relief to include federal courts' review of state courts' decisions); Judiciary Act, ch. 28, § 1, 14 Stat. 385 (1867) (increasing federal judicial supervision over all federal laws).

[6] *See, e.g.*, *Duncan* v. *Louisiana,* 391 U.S. 145, 154 (1968) (jury trial); *In re Oliver,* 333 U.S. 257, 278 (1948) (public trial); *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964) (Fifth Amendment privilege against self incrimination); *Powell* v. *Alabama*, 287 U.S. 45 (1932) (right to counsel in a capital case); *Gideon* v. *Wainwright,* 372 U.S. 335, 342-44 (1963) (right to counsel, generally); *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (Eighth Amendment).

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1) presuppose that federal courts will be available to issue remedies for state infringement of constitutional rights and are the final arbiters of federal laws. Cf. *Marbury* v. *Madison*, 5 U.S. 137, 147 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress."); *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 351 (1816).

Deference to the state then, is neither required nor necessarily advisable, where, as here, the state had a hand in the constitutional violations in the first place. See *Wolfe*, 718 F.3d at 294-95 (Thacker, J. dissenting) (listing "sampling" of the Commonwealth's constitutional violations). If anything, the writ's protection via the Fourteenth Amendment favors federal supremacy in this realm, and any deference should flow the other way; that is, once the writ has issued, and a federal court has remedied the constitutional violations, the state court must give generous scope and strictly adhere to the federal court's decision. Cf. *Ableman* v. *Booth*, 62 U.S. 506, 522-23 (1858) (finding that state courts cannot issue rulings that contradict decisions of federal courts). Here, however, the Fourth Circuit has abandoned its duty to "say what the law is," *Marbury*, 5 U.S. at 177, and has punted "the task of conducting Wolfe's retrial [to] the state trial court," with the admonition that "it is not for us to express a view on how that court should manage its affairs," *Wolfe*, 718 F.3d at 289.

Far from an abuse of its very broad discretion, the District Court's concerns about Wolfe's fair retrial were warranted. See Order Enforcing J. at 24, *Wolfe* v. *Clarke*, No. 2:05-cv-432 (E.D. Va. Dec. 26, 2012),

ECF No. 270 ("Instead of curing the constitutional defects in Petitioner's original convictions, the Original Prosecuting Team permanently crystalized [sic] them."). Despite the Fourth Circuit and the District Court findings that triggerman Owen Barber's testimony was riddled with Commonwealth-sponsored perjury, *Wolfe*, 691 F.3d at 416; *Wolfe* v. *Clarke*, 819 F. Supp. 2d 538, 574 (E.D. Va. 2011), the Commonwealth, faced with a direct question from Judge Jackson, refused to state that they would not use it on retrial, see Tr. Oral Arg. at 68, Dec. 13, 2012 ("As far as Mr. Barber's testimony, your Honor, my recollection of the Court's ruling was it found it sufficient as a basis to allow, which would pave way for the other claims, but I'm not recalling a specific violation that this Court found on *Brady* with respect to Mr. Barber."). And the Circuit Court, despite a direct motion, has taken the matter "under advisement." Moreover, Commonwealth officials threatened Barber with the death penalty if he did not return to his original story, scaring him into invoking his Fifth Amendment privilege against self-incrimination, and thus making his prior testimony crucial to the Commonwealth's case on retrial. Order Enforcing J. at 24, Dec. 26, 2012, ECF No. 270. Considering the Commonwealth's track record in this case, and in light of the Constitution's protection of the writ via the Suspension Clause and the Fourteenth Amendment, the District Court's remedy need not have been constrained by deference to the Commonwealth.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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