No. 14-360

IN THE

Supreme Court of the United States

ANTHONY J. ANNUCCI,

Petitioner,

v.

SHAWN MICHAEL VINCENT, *et al.*,

Respondents.

(For Continuation of Caption See Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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Petitioner,

v.

SEAN EARLEY,

Respondent.

BRIAN FISCHER, *et al.*,

Petitioners,

v.

PAUL BETANCES, *et al.*,

Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Laws **Page(s)**

INTRODUCTION

The decision below subjects New York corrections and parole officials to millions of dollars in personal liability for complying with a state law mandating postrelease supervision (PRS) terms—even though state courts continued to uphold those terms as valid and enforceable. The petition presents two issues for certiorari, both with nationwide impact and importance: (1) whether *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), clearly establishes a due process right to judicial pronouncement of mandatory postrelease supervision, a requirement that many States impose by statute for felony offenders; and (2) whether, absent a definitive ruling from this Court, federal courts can deny qualified immunity to state and local officials by ignoring contrary rulings of state courts that approve of the officials' challenged conduct.

Respondents' attempts to narrow the decision below and distinguish it from conflicting precedent from other circuits do not withstand scrutiny. This case presents an ideal vehicle for addressing questions that will recur in both state and federal courts across the nation with sweeping implications for the operation of state criminal justice systems. Review by this Court is needed to settle the due process implications of *Wampler*, if any, and to clarify the scope of the qualified-immunity test for state and local officers confronting a disagreement between state and federal courts in their home jurisdiction.

I. Courts Are Divided on Whether a Right to Judicial Pronouncement Exists.

On the first question, respondents cannot dispute that courts are sharply divided on whether judicial pronouncement is necessary when a legislature mandates a sentencing term. The Second Circuit has interpreted *Wampler* to clearly establish a due process right to judicial pronouncement of statutorily mandated postrelease supervision terms. By contrast, New York state courts, the Seventh and Ninth Circuits, and the Illinois Supreme Court have all expressly rejected the Second Circuit's interpretation of *Wampler* and concluded that state legislatures may impose postrelease supervision by statute without further action by sentencing judges. (Pet. 14-17.) Respondents assert three reasons for denying certiorari despite the direct conflict among courts nationwide. None justify declining review.

1. First, respondents assert that the validity of their damages claims "does not necessarily" depend "on the proper reading of *Wampler*." (Br. in Opp. 32.) But in *Earley*, the Second Circuit found a broad right to judicial pronouncement based on *Wampler* alone. (Pet. 7-8.) Respondents identify no other authority for constitutionally requiring pronouncement. As a result, the merits of respondents' claims—and similar claims that are arising nationwide based on *Earley*'s newfound interpretation of *Wampler*—rise and fall based on the meaning and scope of *Wampler* itself, a question only this Court can definitively settle.

2. Second, respondents assert that true conflict is absent because New York's PRS statute is

materially different from supervision schemes in other States. (Br. in Opp. 36-37.) Respondents are incorrect. The core of New York's PRS statute is a mandatory, nondiscretionary five-year PRS term—a term that applies to the vast majority of violent felony offenders (Pet. 5 n.2). For *first-time* violent-felony offenders only, the Legislature prescribed a mandatory minimum period of PRS and gave judges limited discretion to impose a longer PRS term.[1] Penal Law § 70.45(2) & 2(e)-(f) (Pet App. 121a-122a).

This feature is common to state supervision schemes. For example, the Illinois supervision statute at issue in *Carroll v. Daugherty*, 764 F.3d 786 (7th Cir. 2014), and *People v. McChriston*, 2014 IL 115310, *cert. denied*, 135 S. Ct. 59 (2014), was not, as respondents assert, "in all respects mandatory" (Br. in Opp. 34). Rather, like New York, Illinois sets mandatory periods of postrelease supervision for most classes of convicted felons, but for a limited class of offenders establishes mandatory periods subject to discretionary increases by the sentencing judge. 730 Ill. Comp. Stat. 5/5-8-1(d)(4) (governing supervision for sex offenders). Other state schemes likewise prescribe mandatory postrelease supervision but allow judges—and in some cases parole officials—to increase the period of supervision for certain offenders.[2]

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[1] The New York Legislature has amended the PRS statute several times. But at all times, the Legislature prescribed mandatory PRS terms for all non-first-time violent felony offenders.

[2] *See, e.g.*, Kan. Stat. Ann. § 22-3717(d)(1)(D) (authorizing judges to impose up to sixty months of additional postrelease supervision for designated sex offenders); Ohio Rev. Stat.

(*continues on next page*)

While state statutes differ, the ongoing dispute over *Wampler* calls into question the central and common feature of mandatory state supervision schemes: the imposition of legislatively prescribed postrelease supervision terms by statute. In *Earley*, the Second Circuit unambiguously interpreted *Wampler* to require judicial pronouncement of PRS terms "required" by statute and thus not "within the discretion of the sentencing judge." *Earley v. Murray*, 451 F.3d 71, 74-75 (2d Cir. 2006). The circuit confirmed its broad reading of *Wampler* upon rehearing. *See Earley v. Murray*, 462 F.3d 147, 149 (2d Cir. 2006) (reiterating that "a sentence cannot [constitutionally] contain elements that were not part of a judge's pronouncement"). Other courts have been equally clear in rejecting any reading of *Wampler* that limits state legislatures' ability to directly "regulate [a] sentence" by statute. *Maciel v. Cate*, 731 F.3d 928, 935 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 72 (2014). The conflict warrants this Court's review.

Respondents also attempt to distinguish other state schemes by pointing to alleged differences in state procedural law. But if other States expressly authorize enforcement of mandatory supervision terms "absent judicial pronouncement" (Br. in Opp. 38), that is reason to settle the meaning of *Wampler*, not grounds for denying review.

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§ 2967.28(C)-(D) (authorizing parole board or court to impose up to three years of additional postrelease supervision for designated offenders if parole board determines that supervision is necessary); Va. Code Ann. § 19.2-295.2(A) (authorizing courts to impose additional periods of postrelease supervision beyond statutory minimum); W. Va. Code § 62-12-26(a) (same).

Nor are respondents correct that the due process issue is moot in New York because the New York Court of Appeals held in 2008 that judicial pronouncement of PRS was required under New York procedural statutes (Pet. 9.) "Mere violation of a state statute does not infringe the federal Constitution." *Snowden v. Hughes*, 321 U.S. 1, 11 (1944). Violations of state procedures, standing alone, would not authorize the grant of federal habeas relief, nor the award of damages under 42 U.S.C. § 1983. It makes a huge difference—indeed, respondents would have no § 1983 claims at all—if the pronouncement question were governed by state law rather than federal due process.

3. Finally, respondents point to miscellaneous differences in decisions disagreeing with the Second Circuit as reasons to deny certiorari. (Br. in Opp. 31-32.) Those differences are immaterial: the central point of conflict is whether *Wampler* clearly establishes a due process right to judicial pronouncement. Answering that question will give dispositive guidance in direct appeals, habeas proceedings, and § 1983 cases raising pronouncement claims. By contrast, leaving the *Wampler* controversy to continued case-by-case adjudication will only exacerbate confusion and conflict.

The Second Circuit's reading of *Wampler* constrains a core feature of modern sentencing regimes—the legislative imposition of mandatory sentencing terms—that has been adopted by States across the country. (Pet. 18-19) The implications of its ruling extend to a dizzying array of sentence-

related challenges.[3] Absent timely guidance from this Court, state legislatures, state officials, and state and federal courts will all have to grapple with the meaning of *Wampler* and expend enormous resources addressing, and potentially remedying, a due process problem that does not exist at all.[4] (Pet. 21-22.)

Clarification from this Court is also vitally important even if the Second Circuit's interpretation of *Wampler* is correct. Absent this Court's intervention, thousands of state offenders—in Illinois and elsewhere—will be potentially subject to unpronounced supervision terms that violate due process if *Wampler* mandates judicial pronouncement. And if pronouncement is constitutionally required, timely guidance from this Court is critical to avoid vast remedial problems for States dealing with many years of potentially unpronounced supervision terms. (Pet. 21-22.) The ability of States to supervise thousands of dangerous felony offenders is at stake. Regardless of the correct interpretation of *Wampler*, review is warranted to prevent broad disruption of state criminal justice schemes.

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[3] *See, e.g., Beckstrand v. Read*, 2012 WL 4490727, at *6-*7 (D. Haw. Sept. 26. 2012) (applying *Wampler* to calculation of parole periods); *Trice v. Crews*, 2013 WL 5234319 (N.D. Fla. Sept. 16, 2013) (applying *Wampler* to conditional release statute).

[4] In the past year alone, multiple petitions have been filed asking this Court to clarify the due process implications of *Wampler* (Pet. 19 n.8). In addition to this case, the pending petition in *Carroll v. Daugherty* (No. 14-635) also asks this Court to resolve "the stark disagreement among federal and state appellate courts" over *Wampler*'s application to state supervision and sentencing laws.

II. The Exclusion of State-Court Rulings from the Qualified-Immunity Defense Merits This Court's Review.

Review is also warranted to settle the growing conflict among circuits over the relevance of state-court decisions to qualified immunity when state courts disagree with a circuit ruling. (Pet. 23-25.) Respondents concede that a "prolific" number of New York trial courts disagreed with the Second Circuit's interpretation of *Wampler*.[5] (Pet. 21-22.) Moreover, respondents do not question the premise of the petition: that state courts have the right to disagree with a lower federal court's interpretation of constitutional law, and that, as a result, it is structural error to disregard state-court decisions in determining whether the law is clearly established for state and local officers. (Pet. 25-28.)

Instead, respondents devote their opposition to castigating state officials for "intentional defiance" of *Earley*, and to denying the existence of state-court conflict among intermediate New York appellate courts (Br. in Opp. 19-23.) Respondents' contentions are not only incorrect; they confirm why exclusion of state-court decisions from the qualified-immunity test is incompatible with our federal system—and

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[5] Respondents attempt to disguise the scope of the disagreement by asserting that only six state *judges* issued multiple conflicting decisions. (Br. in Opp. 13.) Respondents fail to account for unpublished opinions and oral rulings. Regardless, even respondents' incomplete search confirms that state judges in counties across New York rejected the Second Circuit's decision in *Earley* for large numbers of offenders.

particularly so with respect to state criminal justice and sentencing disputes.

1. First, respondents' assertion that state officials defied *Earley* ignores the limited scope of federal habeas relief. A federal habeas court lacks power to "facially invalidate[]" or enjoin any state sentencing practice (Br. in Opp. 19-20) until convicted offenders first present their legal challenges in state court.[6] *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). Respondents repeatedly equate *Earley* to a federal injunction that constrains state officials' conduct with respect to thousands of violent felony offenders. But *Earley* did not—and could not—enjoin enforcement of unpronounced PRS terms for offenders statewide. The Second Circuit in *Earley* did not even enjoin enforcement of unpronounced PRS for Earley himself. Instead, the circuit recognized that resentencing might preserve Earley's PRS term, a question that only state courts could resolve. *Earley*, 451 F.3d at 77 & n.2.

As *Earley* demonstrates, in the habeas context, state officials' reliance on state-court determinations makes perfect sense. Habeas-exhaustion requirements channel constitutional challenges to criminal sentences to state courts in the first instance. (Pet. 27.) As a result, state officials naturally look to state courts for guidance on the validity of sentences. The Second Circuit's qualified-immunity test, however, affirmatively bars consideration of the very state-court decisions that habeas-exhaustion rules *require*.

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[6] Respondents acknowledge that offenders could not obtain § 1983 relief for unpronounced PRS terms without first presenting their due process claims in state court. (Br. in Opp. 7.)

Respondents attempt to defend this irrational result by arguing that state officials are immediately bound by the circuit's habeas ruling, even if state courts are not, because *Earley* addressed officials' administrative enforcement of mandatory PRS terms. Respondents assert that state officials therefore had a duty to apply *Earley* to other offenders without waiting for state courts to consider the judicial-pronouncement question (Br. in Opp. 12, 20). But this Court rejected that theory in *Preiser* more than forty years ago. *Preiser* recognizes that claims about unconstitutional *administrative* action relating to sentencing and terms of incarceration must still be presented in the first instance to state courts. 411 U.S. at 490-92. "[B]ypassing" state courts because administrative action is attacked would violate federalism and comity because States have a compelling interest in both controlling the actions of state officers through state courts and ensuring that state courts have the first opportunity to determine potential remedies for administrative errors. *Id*. at 492.

Those goals could not be accomplished if state officers are immediately bound by a federal decision that state judges are not required to follow. The whole point of the habeas-exhaustion requirement is to ensure that state courts have an opportunity to review alleged constitutional errors in criminal proceedings, including in administrative practices, and to determine how to correct errors if necessary. This underlying policy necessarily contemplates state officials' reliance on state-court decisions, not unilateral action by state officials outside the state judicial process.

2. Second, respondents now attempt to deny the existence of a material state-court conflict. But this revisionist attempt to deny a conflict has been repeatedly rejected by the Second Circuit,[7] dozens of districts courts,[8] and even more state courts,[9] all of which recognized the confusion that persisted for years after *Earley*. Respondents' assertion to the contrary relies on a timing trick that ignores how post-*Earley* PRS claims wound their way through the state-court system. Respondents pick a moment in 2008 to survey the alleged status of intermediate Appellate Division law—but that point occurred nearly two years after *Earley* was decided, and after the New York Court of Appeals had already granted leave to review conflicting state rulings on the validity of unpronounced PRS terms. (Br. in Opp. 9-11.)

Moreover, respondents do not deny that state appellate courts remained divided—even in 2008—on whether enforcement of unpronounced PRS terms violated *due process*. Respondents rely on Appellate

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[7] *See, e.g., Sudler v. City of N.Y.*, 689 F.3d 159, 176 (2d Cir. 2012) (recognizing that "New York courts continued to find" enforcement of unpronounced PRS terms "legally permissible after *Earley*," until the Court of Appeals held that pronouncement was required as a matter of state law in 2008).

[8] *See, e.g., Locantore v. Hunt,* 775 F. Supp. 2d 680, 687 (S.D.N.Y. 2011) (collecting district court decisions); *Ruffins v. Dep't of Corr. Servs.*, 701 F. Supp. 2d 385, 389 & 404-08 (E.D.N.Y. 2010) (comprehensively analyzing conflicting state-court decisions).

[9] *See, e.g., People v. Edwards*, 2007 WL 969416, at *7-*11 (Sup. Ct. N.Y. County Mar. 31, 2007) (discussing divergent state case law).

Division decisions that require judicial pronouncement of PRS terms as a matter of state procedural law.[10] (Br. in Opp. 9-10.) But violations of state procedures do not establish a violation of due process. See *supra* at 5. Nor are state-law sentencing errors governed by the same remedial framework as federal constitutional errors.

In 2008, the *Wampler*-based due process question was squarely before the New York Court of Appeals as an open and unresolved issue on which lower state courts remained divided. And before the Court of Appeals, it was not only state officials, but also elected District Attorneys who urged the Court to reject *Earley*'s interpretation of *Wampler*.[11] That state officials awaited the completion of the state appellate process and guidance from the State's highest court is not "abuse of office" (Br. in Opp. 20), but instead the orderly course that habeas-exhaustion rules both contemplate and prescribe. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

More important, even if respondents were correct about the lack of conflict, the decision below forecloses the very examination of state-court decisions that respondents now press. The Second Circuit imposed a strict and inflexible qualified-immunity test. The decision below directs that the immunity "inquiry ends," as a matter of law, once the circuit

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[10] *See, e.g., Matter of Dreher v. Goord*, 46 A.D.3d 1261 (3d Dep't 2007); *People v. Figueroa*, 45 A.D.3d 297 (1st Dep't 2007).

[11] *See* Resp. Br. at 38, *People v. Sparber*, 10 N.Y.3d 457 (2008), 2007 WL 5130706 (arguing "that *Earley* was wrongly decided and should not be followed"); Arg. Trans., *Sparber*, *supra*, 2008 WL 2773766, p.7 (Mar. 12, 2008) (same)).

finds a constitutional right, *regardless* of the depth and extent of subsequent state-court disagreement. (Pet. App. 28a.) If state-court rulings cannot "disestablish" the law after a circuit ruling, as the Second Circuit and other federal courts have declared (*see id.*), the degree of state-court unanimity or dissent is of no legal consequence in this or any future case. Courts would be barred from the same analysis of state-court decisions that respondents now ask this Court to conduct.

3. Finally, respondents do not deny the sweeping implications of the Second Circuit's qualified-immunity ruling. Nor do they contest that courts are increasingly divided over the relevance of conflicting state-court decisions to qualified immunity. This case provides only one example of the disruptive—and financially catastrophic—consequences of restricting the qualified-immunity inquiry to federal-court rulings alone. Respondents do not dispute that removing state-court decisions from the qualified-immunity test will have the result of coercing state and local officials to follow a federal decision on pain of personal liability, notwithstanding state courts' independent authority to decide issues of constitutional law.

A qualified-immunity rule that treats contrary state-court decisions as legally *nonexistent* fundamentally alters the balance of power between federal and state courts and unravels a whole host of comity doctrines, such as the habeas-exhaustion rule, which favors state-court adjudication. This Court has never held that even "controlling circuit precedent" by itself can clearly establish federal law, *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014), let alone do so without regard to state-court decisions in a defendant

officer's home jurisdiction. This case presents an ideal vehicle for confirming the relevance of state-court rulings—a question with broad federalism implications meriting this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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