No. 22-7466

In the
Supreme Court of the United States

RICHARD EUGENE GLOSSIP,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

ON WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF OF *AMICI CURIAE* STATE OF UTAH AND SIX OTHER STATES IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Utah, Alaska, Arkansas, Louisiana, Montana, South Carolina, and Tennessee. *Amici* have a substantial interest in federal-court respect for state-court decisions applying state law. That's especially true when state courts apply their state's successive post-conviction procedural bars bringing criminal matters to an end. Those bars unquestionably provide adequate and independent state-law grounds to support those state court judgments and preclude this Court's review. That conclusion—grounded in the bedrock principles of finality, comity, and federalism—doesn't change depending on whether elected state law enforcement choose to defend the criminal judgment. All stakeholders—criminal defendants, crime victims, and the public—need the stability provided by state criminal law and procedures, including this Court's long-upheld adequate-and-independent-state-ground doctrine. The potential federal-court rejection of a decades-old state court conviction and sentence—despite the Oklahoma Court of Criminal Appeal's (OCCA) factually and legally well-supported decision based on state law—portends widespread ramifications for state-court convictions, capital and non-capital, nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over twenty years ago, an Oklahoma jury convicted Petitioner of First-Degree (malice) Murder, found the existence of a capital aggravating circumstance, and set death as punishment. JA 980-81. The

conviction and sentence have already gone through several rounds of judicial review, including a direct appeal and multiple post-conviction proceedings. Now, on his *fifth* application for state post-conviction relief, Petitioner garnered support from the newly elected Oklahoma Attorney General (OAG). JA 981. To be sure, the OAG admits that Petitioner is criminally culpable for murdering Barry Van Treese. JA 981-82. But the OAG still supported Petitioner's successive request for post-conviction relief based on an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959) and requested that the Oklahoma state court vacate Petitioner's decades' old murder conviction and death sentence and remand for a new trial. JA 981-82.

The OCCA—Oklahoma's court of last resort for criminal matters—correctly denied Petitioner post-conviction relief or a stay of execution based on the State's legislatively enacted Post-Conviction Procedure Act. JA 982. The state court applied the procedural bar based on the longstanding availability of the proffered "new" evidence and alternatively noted that *Brady* and *Napue* were not violated. JA 989-94. This Court should not disturb the OCCA's state-court ruling in a successive post-conviction proceeding because it rested on an independent and adequate state law ground sufficient to support the judgment. That's true regardless of the OAG's current position.

Finality, comity, and federalism are served best when federal courts respect state-court procedural bars, even when their application contains alternative analysis of a federal claim. To do otherwise risks limiting beneficial state-court review for defendants and destabilizing the criminal justice system for the public and non-capital crime victims alike.

ARGUMENT

I. Federal court review of the OCCA's decision would harm state sovereignty and other significant interests.

The prescribed order for federal court review of state prisoners' federal constitutional claims requires them to first raise their claims in state court under state procedures and then present them in a federal habeas petition. *See* 28 U.S.C. § 2254(b); *Lawrence v. Florida*, 549 U.S. 327, 335 (2007); *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of stay of execution). And when a state prisoner has failed to comply with state procedural rules so that a state court would dismiss on that basis, the claim is procedurally defaulted under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and unreviewable by a federal court. *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022). This remains true even after the federal habeas process has run its course and a defendant pursues additional, successive state post-conviction proceedings that are now procedurally

barred. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

The OCCA dismissed Petitioner's latest attempts at relief on just that basis. JA 981-82, 984-96. So federal review is now barred absent compliance with AEDPA requirements not relevant here in this successive collateral attack in state court. But Petitioner's cert petition does not comply with AEDPA—the petition tries to bypass it altogether by seeking this Court's direct review of the dismissal of a successive state post-conviction petition by the state's highest criminal court. In other words, what would not be permitted in a second or successive federal habeas petition is being sought instead directly from this Court. *See Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005); 28 U.S.C. § 2244(b).

This finality-busting scheme—even more than federal review through normal federal habeas process—destroys core federalism principles dating back hundreds of years. "From the beginning of our country, criminal law enforcement has been primarily a responsibility of the states . . . and the power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty." *Ramirez*, 596 U.S. at 376 (cleaned up). This means that the primary authority for defining and enforcing the criminal law and adjudicating constitutional challenges to state convictions lies with the states. *Id.* The intrusion of a federal court's power into this state

sovereignty takes a toll on federalism in two particularly costly ways. *Id.*

First, when a federal court orders the release or retrial of a state prisoner, it "overrides the State's sovereign power to enforce societal norms through criminal law." *Id.* at 376 (cleaned up). And that causes states and crime victims to suffer "profound injury" to the powerful and legitimate interest in punishing the guilty born of the "real finality" that permits "victims of crime to move forward knowing the moral judgment will be carried out." *Id.* at 376-77 (cleaned up).

Second, "federal intervention imposes significant costs on state criminal justice systems by disturbing the State's significant interest in repose for concluded litigation." *Id.* at 377 (cleaned up). Federal intervention also undermines the considerable investment States have in their criminal trials and makes a fiction of the "perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.* (cleaned up).

These sovereignty and finality harms States incur during the normal habeas process are even more problematic if the federal review occurs outside AEDPA's confines in an appeal from a state-court denial of a successive post-conviction petition based on state law. Why have a habeas process at all if it can be so easily eluded?

These injuries are not mitigated, much less justified, here just because an elected state official—the

OAG—decided to confess error and support Petitioner's AEDPA-skipping gambit. Indeed, Petitioner abandoned the issue whether due process requires reversal when a State concedes error. Pet. Br. at i n.*. Besides that, the OAG's confession isn't dispositive or due any particular weight. Ct. Appointed *Amicus* Br. at 43-46. Nor can the OAG's confessions waive the harms to state sovereignty, the criminal justice system, the public, and the crime victim's family. That is especially true here because the OAG concedes his confessed error does not suggest that Petitioner is actually innocent. JA 981-82; Resp. Br. at 13. (Everyone agrees actual innocence could, and should, justify upending finality concerns under Oklahoma's rule. JA 987.)

More importantly for resolving this case, the OAG's confession (or alleged waiver of the procedural bars) does not supersede Oklahoma's post-conviction successive petition requirements or the fact that the OCCA's reliance on that rule constitutes an adequate and independent state law ground for decision as explained below. Ct. Appointed *Amicus* Br. at 25-28, 43-48. This Court lacks jurisdiction to revisit the OCCA's application of Oklahoma's duly enacted and regularly applied procedural bar.

Plus, it would be unwise to do so. Criminal laws and rules must stay constant and above the changing opinions of rotating elected officials. Petitioner was constitutionally convicted and sentenced, which has

been affirmed through several rounds of appeal and review. If application of criminal laws and rules potentially changes with each new administration, the criminal justice system ceases to have much authority or credibility. It cannot withstand such whiplash.

II. This Court lacks jurisdiction to review Petitioner's claims because the OCCA's decision below rests on an adequate and independent state-law ground.

The Court has long held that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," regardless of "whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729. In the context of this case, seeking direct review of a state court judgment, "the independent and adequate state ground doctrine is jurisdictional." *Id.*

Here, the OCCA denied Petitioner's successive post-conviction petition for failure to satisfy both requirements of Oklahoma Statute 22-1089(D)(8)(b). That statute prohibits successive petitions unless the petitioner shows *both* that (1) he could not have previously discovered the factual basis for his claim through reasonable diligence, and (2) but for the alleged error his claim asserts, no reasonable fact finder would have found him guilty or rendered the death penalty. *Id.*

A. Oklahoma's Post-Conviction Procedure Act is an adequate state-law ground for relief because it is regularly followed and evenhandedly applied.

There can be no real dispute that Oklahoma's post-conviction statute generally provides an adequate and independent state law ground that precludes federal review. The Tenth Circuit has repeatedly recognized as much. *See, e.g.*, *Simpson v. Carpenter*, 912 F.3d 542, 570-72 (10th Cir. 2018); *Fairchild v. Trammell*, 784 F.3d 702, 719 (10th Cir. 2015); *Banks v. Workman*, 692 F.3d 1133, 1145-47 (10th Cir. 2012); *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012); *Duvall v. Reynolds*, 139 F.3d 768, 796-97 (10th Cir. 1998); *Odum v. Boone*, 62 F.3d 327, 331 (10th Cir. 1995); *Brecheen v. Reynolds*, 41 F.3d 1343, 1349 n.4 (10th Cir.1994).

Adequacy poses a low hurdle that will be satisfied in all but a "small category" of "exceptional" cases. *Lee v. Kemna*, 534 U.S. 362, 376, 381 (2002). It's not a question of whether the state court correctly applied its state law. Rather, a state law ground will generally be adequate if it is "firmly established and regularly followed." *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (quoting *Lee*, 534 U.S. at 376); *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *see also Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (failing to apply the procedural rule in a few cases does not undermine the

state's consistent application in the vast majority of cases).

Section 1089 "meets this requirement." *Simpson*, 912 F.3d at 571; *see also* Resp. Br. at 41 (noting section 1089(D)(8)(b) "is generally a valid rule of Oklahoma procedure that the State itself routinely invokes"). The OCCA has previously applied the post-conviction petition requirements to untimely *Brady* claims. Ct. Appointed Amicus Br. at 24 (citing cases). And the OCCA regularly and even-handedly applied Oklahoma's post-conviction preclusion rules to Petitioner's claims that could have been raised earlier. JA 985-96; Ct. Appointed Amicus Br. at 22-28. And even if the OCCA erred on that question, the claims would not have led to the conclusion that no reasonable fact finder would have found Petitioner guilty or imposed the death penalty. *Id.* at 25. The OCCA's regular application of state law differs markedly from *Cruz v. Arizona*. There, this Court found that the Arizona Supreme Court's application of a procedural rule in a new way that conflicted with state precedent. 598 U.S. at 26-27. That is not what happened here.

Instead, the OAG urges an abnormal process in this case. Without contesting guilt, the OAG sought retrial and resentencing of a decades old final conviction and death sentence. Had the OCCA agreed with the OAG's request, *that* would have been an irregular and non-even-handed application of Oklahoma law. Such an extraordinary request, which the OCCA held

lacked "statutory or legal grounds," JA 982, likely would not have been made in a non-capital case.

B. The OCCA's application of Oklahoma law was independent of federal law.

Oklahoma's procedural bar is independent of the merits of Petitioner's underlying federal claim. That's because "resolution of a federal question cannot affect the [OCCA's] judgment," so "there is nothing for th[is] Court to do." *Coleman*, 501 U.S. at 730. That's true even if the state court alternatively analyzes the second prong of Oklahoma's procedural bar and addresses the merits of the underlying, untimely claim.

1. The OCCA, at the outset of its analysis of Petitioner's *fifth* post-conviction proceeding, noted that "this case has been thoroughly investigated and reviewed in numerous appeals" and that Petitioner's "new application provides no additional information which would cause this Court to vacate his conviction or sentence." JA 984. Citing section1089(D)(8), the OCCA outlined the limits on its ability to review "repeated appeals of issues that have previously been raised on appeal, or could have been raised but were not." JA 985-86; *see also Slaughter v. State*, 108 P.3d 1052, 1054 (Okla. Crim. App. 2005). Review is permitted only for errors that would have changed the outcome and claims of factual innocence. *Id.*

The OCCA then recognized that the post-conviction rules "preserve the legal principle of finality of judgment" and reiterated the burden of proof for

factual innocence claims: clear and convincing evidence, which is "more than that which merely tends to discredit or impeach a witness." JA 987 (citing Oklahoma cases). The court discussed why Petitioner's most recent iteration of his actual innocence claim does "not meet the threshold showing that Petitioner is innocent" *under Oklahoma's post-conviction rules.* JA 987-88. The affidavits submitted by Petitioner in support of his actual innocence claim were reiterations of previously-submitted affidavits and thus "further review . . . was barred under Oklahoma law." JA 988-89. The court also noted that information contained in the affidavits was insufficient to establish that Petitioner is "factually innocent." JA 989.

Then, the OCCA addressed Petitioner's claims that the prosecutor "withheld material, exculpatory evidence" in violation of *Brady*, and its progeny. JA 989. The court acknowledged that Oklahoma "follows the dictates of *Brady*," but "*even if this claim overcomes procedural bar*, the facts do not rise to the level of a *Brady* violation." *Id.* (emphasis added); *see also* Victim Family Members *Amicus* Br. at 7-24. The OCCA acknowledged the OAG's support of Petitioner's claim but held that "the concession alone *cannot overcome the limitations on successive post-conviction review*" and that it was "not based in law or fact." JA 990 (emphasis added). Importantly, before its detailed rejection of the regurgitated *Brady* claim, the OCCA stated (1) the issue "could have been presented previously, because the factual basis for the

claim was ascertainable through the exercise of reasonable diligence," and (2) "the facts are not sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." *Id.*

This is the crux of the OCCA's ruling—a rejection of Petitioner's claim by application of a procedural bar that tracks section 1089(D)(8)(b). And it is precisely the sort of state-court ruling to which the independent and adequate state ground doctrine applies—"when a state court declined to address a prisoner's federal claims because the prisoner failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30.

2. The untimeliness of Petitioner's claim(s) alone supports the OCCA's judgment. JA 991-95. But the OCCA went on to hold that Petitioner's claims fail to satisfy section 1089(D)(8)(b)'s second requirement: but for the alleged error, no reasonable fact finder would have found him guilty or would have imposed the death penalty. Okla. Stat. tit. 22, § 1089(D)(8)(b). This alternative discussion does not render the OCCA's application of its state procedural law fatally intertwined with federal law.

To begin, this Court has already explained that when applying a state procedural bar to a federal claim, a state court will often make an alternative merits analysis that does not undermine the

independent and adequate state ground for the judgment. *Harris v. Reed*, 489 U.S. 255, 264, n.10 (1989) ("A state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state ruling that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." (cleaned up)). In other words, the OCCA's thoroughness in addressing both prongs of the procedural bar does not convert the court's judgment into a jurisdiction-grant to any and every federal court.

3. Plus, finding that the OCCA's alternative merits analysis subjects its regular application of Oklahoma's procedural bar to an untimely post-conviction claim will have negative consequences. First, it will discourage state courts from undertaking any acknowledgement or analysis of a (capital or non-capital) defendant's untimely or regurgitated federal claim, to the defendant's detriment.

In the capital context, the tendency to address an underlying federal claim no doubt flows from this Court's "death is different" jurisprudence—causing state courts to exercise extra caution when rejecting successive claims in capital cases. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year

or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.") (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides.").[1]

Given this litany of case law, it is little wonder that state courts reviewing successive post-conviction petitions in capital cases are at great pains to ensure

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[1] *See also Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) (capital sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (capital sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death).

all aspects of the defendant's claims are addressed, even when a time-preclusion bar applies. But then this thoroughness gets used to accuse state courts of addressing the merits of an underlying federal claim and ceasing to be independent of federal law.

More recently, this Court has suggested that capital and non-capital cases are not all that "different." It turns out that due process is the same, or at least it should be, in different legal contexts because the categories of "different" are ever increasing. *See Miller v. Alabama*, 567 U.S. 460, 481 (2012) ("if death is different, children are different too" (cleaned up)); *see also id.* at 513 (Alito, J., dissenting) (noting that the "death is different" principle was "entirely put to rest").

That means what happens in capital cases inevitably happens in non-capital cases. So, if federal courts are more inclined to grant themselves jurisdiction to review a state-court application of a procedural bar in a successive state post-conviction proceeding in a capital case, it won't be too long before the practice becomes common in non-capital cases too. That's particularly true when some sentences (such as life without parole or a 15-year sentence for a person with a medical expectation of only five years to live) are arguably the "functional equivalent" of a death sentence. *Ring v. Arizona*, 536 U.S. 584, 585 (2002) (enumerated aggravating factor is the "functional equivalent" of an element of a greater offense,

requiring finding by jury); *Apprendi v. New Jersey*, 530 U.S. 466, 494, n.19 (2000) (sentencing factor can be "functional equivalent" of an element of a greater offense).

Should a state court's wording fall short of a subsequent federal judge's application of the "plain statement rule," *Michigan v. Long*, 463 U.S. 1032, 1042 & n.7 (1983), when reviewing application of a state procedural bar, the state court risks its analysis of an underlying federal claim then falling on the wrong side of "alternative holding," *Harris*, 489 U.S. at 264 n.10, thus justifying federal jurisdiction to review it. The only way to eliminate this risk is for a state court decision to simply not discuss or even mention the underlying federal claim other than to say only that it's precluded.

But that is the wrong outcome to incentivize—preventing a defendant from being "heard" and eliminating some state judicial review when the state court is simply being thorough and conscientious. That might lead to a failure to address a potentially meritorious claim. What's more, encouraging state courts to stop their analysis at the preclusion prong to avoid an alternative merits assessment that might be deemed non-independent of federal law will definitively foreclose state *and* federal review on a successive post-conviction claim.

Second, if state court decisions implementing preclusion *and* including alternative merits rulings are

ad infinitum permission for federal court do-overs, there is little incentive for states to maintain robust post-conviction provisions. These procedures are matters of legislative largesse, not constitutional mandate. *See Garza v. Idaho*, 586 U.S. 232, 238 n.4 (2019) (noting the Supreme Court has never recognized a constitutional right to an appeal). But if the conscientious (and costly) application of those post-conviction procedures in state court are routinely repeated, reviewed, and undone in federal court, there's little reason for state court to adjudicate the issues.

CONCLUSION

This Court should dismiss Petitioner's appeal for lack of jurisdiction because the OCCA's decision below rests on an adequate and independent state law ground.

Dated this 15 July 2024.

Respectfully submitted,

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