No. 17-389

In the Supreme Court of the United States

PAUL C. HAMILTON,
Petitioner,
v.
CHRISTOBAL CABRAL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fifth Appellate District

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITY

INTRODUCTION

Petitioner Paul Hamilton demonstrated in his petition that the decision below irreconcilably conflicts with decisions of other courts regarding inmates' right of access to prosecute civil rights litigation, is inconsistent with this Court's decisions governing such cases, and violates centuries of common law practice. Respondents' brief in opposition does not dispute the validity or the accuracy of those arguments, focusing instead on irrelevant procedural contentions to dodge and deflect. Respondents' submission casts no doubt on the appropriateness of granting immediate review in this case.

Respondents initially contend that the state appellate court's decision green lighting the dismissal of this lawsuit, upon reconsideration by the trial court on remand, is unreviewable under 28 U.S.C. § 1257. This Court, however, has adopted a pragmatic approach to section 1257's finality requirement specifically so that it can review cases, such as this one, in which federal issues implicating important constitutional rights might otherwise evade review. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975). Because "appealability is not necessarily limited to 'the last order possible to be made in a case,'" Stephen Shapiro et al., *Supreme Court Practice* 158 (10th ed. 2013) (citation omitted), respondents' procedural argument is dead on arrival.

Alternatively, respondents flyspeck this case's suitability as a vehicle for review of the question presented. While they try to create the impression that future developments on remand would be helpful, the truth is that no future development can change the

appellate court's refusal to allow Hamilton the opportunity to appear in person at his trial on remand. Based on the appellate court's view that state law categorically precludes inmates from attending civil (as opposed to criminal) trials, Pet. App. 9, the trial judge, the intermediate appellate court and the state supreme court are bound by that ruling in future appeals.

In sum, respondents' arguments fail at every turn. The undisputed, exceptional significance of the nationwide conflict on the treatment of abused prisoners' rights cries out for review, Pet. 2, given that "over 25% of the district courts' civil caseload in our country entails prisoner litigation." *Entler v. Gregoire*, 872 F.3d 1031, 1040 (9th Cir. 2017) (citing 2016 statistics); cf. *Estate of Miller by Chassie v. Marberry*, 847 F.3d 425, 433 (7th Cir. 2017) (Posner, J., dissenting) (noting that a "dog would have deserved better treatment" than that of the subject inmate in another prisoner rights case).

REASONS FOR GRANTING THE PETITION

I. This Court Has Jurisdiction Under *Cox Broadcasting*'s Third Category.

1. a. Respondents contend the decision below is not a "[f]inal judgment" within the meaning of § 1257(a), thereby precluding this Court's jurisdiction. BIO 3-6. Respondents note (BIO 3) that § 1257(a) establishes "a firm final judgment rule," *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997), but this Court has never administered the finality requirement of § 1257 in the "mechanical fashion" that respondents urge. *Cox Broad.,* 420 U.S. at 477. Instead, this Court follows a "pragmatic approach" in determining finality,

id. at 486, recognizing that in some circumstances a state court judgment may be sufficiently final to support the Court's jurisdiction to review a federal question, even if further proceedings remain pending in the state court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Indeed, in *Cox Broadcasting* itself, this Court granted certiorari where the Georgia Supreme Court remanded a case for a trial after reversing an award of summary judgment. 420 U.S. at 475, 485.[1]

This case meets all of the requirements of *Cox Broadcasting*'s third category, which permits review of interlocutory state-court rulings "where the federal claim has been finally decided but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984) (ellipses and citation omitted). Instead of allowing Hamilton the opportunity to attend his trial in person, the state appellate court adopted respondents' view that state law categorically bars the use of the writ of habeas corpus *ad testificandum* in civil cases. Pet. App. 9 (citing California statutes and concluding that inmates may appear in person only in *criminal* trials). As a result, the state court has definitively rejected – with unquestionable finality – Hamilton's view that he has a federal constitutional right to attend his trial in person or that, at a minimum, due process requires trial courts to exercise their discretion to entertain

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[1] *Jefferson* did not require literal finality. Instead, *Jefferson* applied *Cox Broadcasting*'s pragmatic approach and found review inappropriate because, "[f]ar from terminating the litigation," the federal issue affected "only two of the four counts" in the complaint. 522 U.S. at 81.

such requests in civil cases. Given this record, the only issue left is whether Hamilton can raise this federal argument in a subsequent appeal.

Assuming that the case is not dismissed on remand prior to trial, as expressly authorized by the state appellate court,[2] there are only two possibilities left: Either Hamilton will prevail on his civil rights claims at trial or he will lose. Respondents already concede that "if [Hamilton] prevails on his underlying claims, his present contention will be moot." BIO 7. As a result, he will be precluded in a post-trial appeal from challenging his statutory inability to attend the trial in person under the first scenario.

Conversely, if Hamilton loses at trial under the second scenario, he would be precluded from raising his federal due process arguments in the next appeal based on the law-of-the-case doctrine. Under California law, where an appellate court decides a particular point raised in an initial appeal, that principle becomes the law of the case which must be adhered to both in the lower court and upon subsequent appeals. *Clemente v. State of California*, 707 P.2d 818, 822-23 (Cal. 1985). This is true even if the court that issued the opinion becomes convinced later "that the former decision is erroneous." *Id.* at 822 (citation omitted). Accordingly, this is a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broad.*, 420 U.S. at 481. This is precisely

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[2] As respondents acknowledge, based on the appellate court's decision under review, if the trial "court determines [telephonic appearance] is not reasonably feasible, then it may dismiss the action." BIO 2.

why this case fits squarely under the third category of *Cox Broadcasting*.

b. The Court's pragmatic approach to finality is particularly appropriate in cases implicating procedural issues like this one, where the petitioner is unable to secure the Court's review of a federal issue regardless of the outcome of contemplated future proceedings. In such cases, pending proceedings in the state courts, including a full trial on the merits, do not prevent the Court from exercising jurisdiction.

In *Cox Broadcasting*, for example, the Court explained that *California v. Stewart*, 384 U.S. 436 (1966) "epitomizes this [third] category." 420 U.S. at 481. In the state proceedings in *Stewart*, the California Supreme Court vacated the defendant's conviction on Fifth Amendment grounds and remanded the case for a new trial. When the State appealed to this Court, the respondent contested jurisdiction on finality grounds, noting that a new trial was upcoming. *Stewart*, 384 U.S. at 498 n.71. The Court determined that the state court's disposition on the federal issue was final for the purposes of § 1257 because the trial would result either in acquittal or conviction without the questionable confession. *Id*. Either way, the state courts would have no opportunity to address the federal issue on remand; the decision was thus "final" for jurisdictional purposes.

Hamilton's inability to seek review of the federal issue in the future distinguishes this case from those that the Court has held to fall outside the third *Cox Broadcasting* category. See, e.g., *Florida v. Thomas*, 532 U.S. 774, 779-80 (2001); *Jefferson v. City of Tarrant*, 522 U.S. 75, 82-83 (1997). In each of those

cases, the petitioners had the option under state law to seek further review of the federal question at some stage of the remaining proceedings. Hamilton does not enjoy such an opportunity.

The lower court has issued a final ruling while rejecting Hamilton's federal arguments, coupled with a remand for retrial. Pet. 11. Neither the trial nor any other potential future appellate proceedings, however, would provide opportunities for Hamilton to raise the federal issue, for the lower courts to address it, or for the Court to review it. In short, the decision below is the last word of the state appellate court, *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945), and is "final" for the purposes of § 1257. Respondents' position ignores the "long lineage" of cases holding that the fact that further proceedings in a state court are anticipated does not render a state judgment nonfinal or unappealable within the meaning of § 1257(a). *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 161-162 (1973) (collecting cases). Otherwise, the absolute rule espoused by respondents defies this Court's "intensely practical approach" to the issue of finality. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (internal quotation marks omitted). After all, federal due process concerns can arise at virtually *any* stage of state court proceedings; if review were limited to post-trial appeals, the third *Cox Broadcasting* category, an exception to the general finality requirement, would be practically a dead letter.

2. As an additional basis for review, this appeal falls in the category of cases granted review "where the subsequent state proceedings would themselves deny

the federal right for the vindication of which review is sought in the Supreme Court." Stephen Shapiro et al., *Supreme Court Practice* 167 (10th ed. 2013) (collecting cases). Although the petition invoked this ground for review (Pet. 5), respondents do not address, let alone challenge, the validity or the applicability of this additional basis for review. Because a per se rule banning Hamilton's physical attendance at trial – without giving the trial judge the discretion to decide whether to allow this remedy – easily satisfies this standard by rendering the trial proceedings inherently unconstitutional (Pet. 21-26), this provides another ground for rejecting respondents' cursory arguments.

II. This Case Is Perfectly Ripe for Review, Presenting a Great Vehicle to Resolve Issues of National Importance.

1. The remaining procedural arguments raised by respondents are equally meritless. For example, they contend that no "state court has yet addressed whether Hamilton can reasonably bring his case to trial by appearing by telephone[.]" BIO 3. This is totally irrelevant because Hamilton's argument is that limiting his options to a trial by telephone is per se unconstitutional; i.e., based on statutory law *categorically* denying trial judges the discretion to allow in-person testimony. Pet. 24-26. [3]

[3] Although the petition alternatively challenged (Pet. 32-35) respondents' view that California trial judges do "not have the authority to allow [inmates] to testify *** by telephone," Resp't Suppl. Cal. App. Ct. Br. 18, the presentation of telephone or remote testimony is distinct from in-person testimony.

To be sure, the remand requires the trial judge to decide whether to allow testimony by telephone or other remote procedures such as video-conferencing. Pet. App. 3, 14. The Court, however, can modify the question presented, if necessary, by limiting the scope of review to the constitutionality of the denial of Hamilton's right to attend the trial in person. Pet. App. 9. This would eliminate respondents' claim that it is premature to decide the constitutional adequacy of the alternative remedies of remote access. Either way, the Court should not countenance respondents' efforts to hide unconstitutional statutory bans on in-person testimony (BIO 6) behind spurious jurisdictional arguments and empty assurances of alternative remote-access remedies.

Seeking to further confuse the issues, respondents argue that the lower courts did not address how Hamilton may present the testimony of "other incarcerated individuals as a matter of state law, or whether any limitation that state law may impose on the manner of presenting such testimony is consistent with the federal Constitution." BIO 3. The fallacy in this argument is that the preclusion of third parties' testimony is not the sole issue here; the real issue is whether Hamilton himself may be categorically precluded from testifying in person.

What is left, then, is a straightforward and disturbing scenario. Respondents do not even deign to dispute the due process issues on the merits. The constitutional violations and the importance of the issues are plain. Only this Court can provide relief. This case is the perfect vehicle, based on the confluence of several factors, because the parties are both

represented and well-positioned to brief and argue the question presented, in a case where the issue has been fully vetted below. This appeal presents a mature conflict over a recurring legal issue, Pet. 2, with an uncomplicated procedural history and factual background.

2. While respondents understandably fail to question Hamilton's assertion that he has preserved his federal arguments for review (Pet. 35), respondents maintain that review is premature because the California Supreme Court did not resolve the question whether the "restrictions that state law imposes [on inmates' in-person testimony] are consistent with the federal Constitution." BIO 7. This argument is equally flawed. See *Chambers v. Miss.*, 410 U.S. 284, 290 n.3 (1973) (issue finally decided "despite the State Supreme Court's failure to address the constitutional issue"). "The trend in state supreme courts towards discretionary review has resulted in the intermediate state appellate courts taking on a large and significant role in the development and application" of federal constitutional law. *Arizona v. Kempton*, 501 U.S. 1212, 1212-13 (1991) (White, J., dissenting from denial of certiorari). In any event, a State's high court should not be able to shield the decisions of intermediate state appellate courts from scrutiny just by declining discretionary review after initially granting review, entertaining extensive merits briefing, and remanding the case to the intermediate court. The fact that the decision below was rendered by an intermediate appellate court and was not granted review *again* by the state supreme court "should make no difference." *Id.* at 1212.

To the extent that respondents try to suggest that the intermediate appellate court did not resolve Hamilton's federal constitutional argument for attending the trial in person, that suggestion is simply false. BIO 7. In fact, the intermediate court practically went out of its way to criticize Hamilton for arguing that he has a right to attend his trial in person. Pet. App. 9. In doing so, the court reasoned that the statutes invoked by Hamilton "purportedly giving the court authority to compel the attendance of inmates at his trial" merely "pertain to the transportation of inmates in criminal actions." *Id.* Eliminating any doubt regarding its rejection of Hamilton's view, the court expressly concluded that the state statutes authorizing in-person testimony "apply to criminal actions." *Id.* Because Hamilton's whole point below was that these statutes violate his federal constitutional rights (Pet. 10-11), it is totally irrelevant that the lower court did not add another redundant sentence by expressly stating the converse; that these statutes *are* constitutional despite Hamilton's federal arguments to the contrary. No such surplusage is needed.

3. Respondents also argue that if, on remand, Hamilton's "ability to present his case is restricted and he loses at trial, he will be able to appeal the judgment against him on a developed record." BIO 4. Hamilton's ability is already restricted because the trial court has no discretion to entertain his request to attend the trial in person. This dispositive argument, in part a facial attack on the state statutes precluding this remedy, does not depend on discovery or trial, nor does it turn on the form of alternative, remote-access remedies that the trial court may consider on remand. Because "no possible developments on remand could *** otherwise

affect this threshold federal issue" in terms of Hamilton's right to attend the trial in person, the lower court's "decision, is final for purposes of review in this Court." *New York v. Cathedral Acad.,* 434 U.S. 125, 128 n.4 (1977).

Finally, seeking to place Hamilton in a Catch-22, respondents claim that "a state court's application of law-of-the-case doctrine in a later state appeal would have no bearing on this Court's ability to reach the federal issue on review of a final state judgment." BIO 6. But even if this disputed assertion were true, deferring review for a possible, future post-trial appeal would merely inject additional vehicle disputes, particularly if Hamilton loses the next state appeal on an adequate and independent state ground besides law-of-the-case doctrine. Respondents will naturally argue that the state constitutional requirement of prejudicial error provides an adequate and independent state ground to affirm the future judgment, thus eliminating this Court's jurisdiction. See Cal. Const., art. VI, § 13 (no reversal unless state appellate court finds miscarriage of justice under state law's definition). This makes it even more crucial to grant review now to preclude respondents from arguing vehicle problems later based on their inevitable no-harm, no-foul argument. BIO 7. This Court has an "interest in preventing litigants from attempting to manipulate its jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 278 (2000). While respondents promise that this case will become a suitable vehicle in the next post-trial appeal, their bait-and-switch practices tell a different story, judging by the State's recent pattern and practice in radically changing its position in the same lawsuit. See

Pet. App. 11 (criticizing respondents' "about-face" below).[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Collecting other cases where this tactic was employed in the California Supreme Court, one justice criticized such unexplained conduct by respondents' counsel, noting that it "risks the perception that the Attorney General's new contention is opportunistic or that his initial briefing *** was of questionable competence. Neither does wonders for the government's credibility." *People v. Sivongxxay*, 396 P.3d 424, 463 (Cal. 2017) (Liu, J., concurring & dissenting).