No. 22-7466

In the Supreme Court of the United States

RICHARD EUGENE GLOSSIP,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF AMICUS CURIAE

Expressly invoking *Escobar v. Texas*, 143 S. Ct. 557 (2023)—a still pending case out of Texas that the Court is now apparently holding for this one, *see Escobar v. Texas*, No. 23-934 (U.S.)—Petitioner's second question presented asks whether the federal Due Process Clause requires reversal of a judgment upon a prosecutor's confession of error. Pet.i. An affirmative answer to that question would significantly undermine the finality of convictions and the separation of powers in all 50 States. But it would be especially problematic for Texas because it would shut Texas's Attorney General out of some of the State's most significant criminal justice disputes. It would also precipitate sentencing outcomes that turn on the politics of individual local prosecutors rather than generally applicable State law.

As this Court has observed, "the Texas Attorney General represents state respondents in federal habeas cases, but not state habeas cases," which are handled by local district attorneys (DAs). *Buck v. Davis*, 580 U.S. 100, 110 (2017). Because of that shared authority, the Texas Attorney General's only means of defending a conviction on state-habeas is to file an *amicus* brief, as the Attorney General did in *Escobar*. *See* Amicus Curiae Br. of Corr. Insts. Div. of Tex. Dep't of Crim. Just. in Opp'n to Pet., No. 23-934, *Escobar v. Texas* (U.S. Apr. 18, 2024). The ability to do so is critical in cases, like *Escobar*, in which the local prosecutor has abdicated his duty to defend a valid conviction. A constitutionally mandated rule of judicial deference to a prosecutor's confession of error would preclude this option, undermining the role of the Texas Attorney General while also injecting profound arbitrariness into the Texas criminal justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals (CCA), Texas's highest criminal court, does not grant habeas relief just because a party asks for it—regardless of whether the request comes from the convicted person, the State, or the two combined. Instead, the CCA conducts an independent review to determine whether relief from a judgment is warranted. Such review safeguards the independence of the judiciary and prevents parties from colluding to nullify court decisions.

Nor is Texas alone in this. Other state courts also refuse to "rubber stamp[]" a prosecutor's confession of error. *Commonwealth v. Brown*, 196 A.3d 130, 149 (Pa. 2018). After all, "if the 'power' of a court amounts to nothing more than the power to do exactly what the parties tell it to do, simply because they said so and without any actual merits review, it is not judicial power at all." *Id.* (quotation marks omitted). A contrary rule would also "impinge" on a State's exclusive decision of where to place the State's "power over executive clemency." *Copeland v. Commonwealth*, 664 S.E.2d 528, 530 (Va. Ct. App. 2008).

The second question presented imperils the judiciary's power and duty to undertake independent review of confessions of alleged error. That is the special focus of Texas's *amicus* brief.[1] The Court should either dismiss that question as improvidently granted or answer it in the negative after reaffirming the holding of

[1] Texas's focus on the petition's second question should not be understood as suggesting disagreement with the briefing of the court-appointed *amicus* or other *amici* supporting affirmance with respect to the other questions presented. To aid the Court, however, Texas has focused on the second question, which concerns *Escobar*, a case for which Texas has particular interest and expertise.

Young v. United States that "administration of the criminal law cannot be left merely to the stipulation of parties." 315 U.S. 257, 259 (1942).

I. The Court should dismiss the petition's second question presented as improvidently granted because it is no longer in dispute. The parties and *amici* offer sundry characeterizations of the respect owed the Oklahoma Attorney General's confession of error. But the Court will search the hundreds of pages of briefing in this case in vain for a single argument in support of the untenable position that the federal Due Process Clause requires absolute judicial deference. That should be the ball game for certiorari jurisdiction. When it comes to the Court's discretionary docket, the Court does not grant review to resolve nonexistent controversies.

II. Should the Court decide to reach the second question presented notwithstanding the absence of adversarial briefing, it should reaffirm *Young* and once again hold that the Due Process Clause does not bar a court from performing its duty to exercise independent judgment. Not only is there no special justification for overruling *Young*, but first principles and centuries of experience demonstrate that the rule from *Young* is both correct and wise. Rejecting *Young* would put inordinate power in the hands of individual prosecutors and spoil State experiments with the local-prosecutor model of criminal justice. Departing from precedent in this way would profoundly harm federalism and trigger significant unintended consequences.

III. The dangers of opening Pandora's box here are very real. The Court is apparently holding *Escobar* for this case. *Escobar*, however, demonstrates how a prosecutor can abuse confessions of error. In *Escobar*, the district attorney of a single county who campaigned

on an anti-death penalty platform is attempting to nullify a criminal conviction, despite overwhelming evidence of guilt and in the teeth of Texas law. Federal due process does not require the CCA or any other court to surrender its power and duty of indendepent judgment.

ARGUMENT

I. The Second Question Presented Should Be Dismissed as Improvidently Granted.

Petitioner Glossip's opening brief expressly abandons his "standalone claim under *Escobar v. Texas*." Br. for Pet'r (i), n.*. And Oklahoma now agrees that the "Attorney General does *not* . . . have the final word on whether" a conviction comported with due process. Br. for Resp't 2.

When parties discover common ground over a question presented between the grant of certiorari and the merits stage, the prudent course is for the Court to dismiss the question over which it lacks adversarial briefing. *See City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015). "Because certiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion.'" *Id.* (quoting Sup. Ct. R. 10).

Here, everyone now seems to agree on the correct answer to the second question. The consensus position of all parties and *amici* is that confessions of error do not "relieve this Court of the performance of the judicial function." *Young*, 315 U.S. at 58. "No one argues the contrary view." *Sheehan*, 575 U.S. at 610. Glossip has expressly dropped his contention that the Due Process Clause requires habeas relief when the prosecutor responsible for defending a conviction confesses error. *Compare* Pet.i., *with* Br. for Pet'r (i), n.*. And, however strongly it insists that the Oklahoma Court of Criminal Appeals should have given greater "weight to the State's

confession," Br. for Resp't 1, Oklahoma ultimately acknowledges that "the State's confession of error reflects" no more than "a legal opinion that Glossip's due process rights were violated, and on that question this Court has the final say," *id.* at 36. At no point does Oklahoma assert that "courts do not have the final word on whether a prosecution comported with due process." *Id.* at 35; *see also id.* at 32.

Neither do any of the *amici* disagree. The District of Columbia comes closest in urging that a confession of error "should be afforded great deference." Amicus Br. of D.C. 2. But that contention does not suggest that federal law *requires* unqualified judicial acquiescence to such confessions. The formulation itself—"great" as opposed to "total" deference—indicates the opposite. Indeed, the District of Columbia later concedes that "in rare circumstances" a court may "refuse to vacate a criminal conviction that an Attorney General has determined—and declared—rests on prejudicial error." *Id.* at 4. That concession means that courts should *not* reflexively adopt confessions of error.

What is more, the District of Columbia does not locate its preferred rule in the federal Due Process Clause, but in the party-presentation principle, *id.* at 4–8, as well as the prosecutor's unique role in the American criminal justice system, *id.* at 7–11. Yet absent a preemptive federal command, States are free to decide for themselves what role the party-presentation principle should play and the permissible breadth of prosecutorial power. *See, e.g.*, U.S. Const. amend. X (reserving to the States those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States"). Because there is no applicable federal command, how States balance these policy questions is for them to decide and is

not subject to this Court's second-guessing. *Cf. City of Grants Pass, Or. v. Johnson*, No. 23-175, slip op. at 39 (U.S. June 28, 2024) (warning against judicial efforts to "'match' the collective wisdom the American people possess in deciding 'how best to handle' a pressing social question").

Former Virginia Attorney General Kenneth T. Cuccinelli similarly urges "[m]aximum [d]eference" to confessions of error in capital cases." Amicus Br. of Kenneth T. Cuccinelli 13. Such deference is necessary, Cuccinelli argues, not because of the federal Due Process Clause, but rather to preserve "the public trust" and to honor the "prosecutorial duty." *Id.* at 15. But Cuccinelli also stresses that he "does not contend that state attorneys general should be given the last word on capital convictions" and that "[t]here remain good reasons why a court should be cautious about confessions of error." *Id.* at 26. In other words, federal law does not obligate state courts to accept a prosecutor's confession. Instead, there is an acknowledged role for independent judicial judgment.

The National Association of Criminal Defense Lawyers (NACDL) is the only other *amicus* to discuss confessions of error. But like the District of Columbia and Cuccinelli, NACDL does not contend that the federal Due Process Clause requires judicial obeisance to such confessions. Rather, NACDL maintains that because Oklahoma courts have a long history of deference to confessions of error, the Oklahoma court's departure from that practice in this case negates the ordinary preclusive effect of the court's reliance on an adequate and independent state ground. *See* Amicus Br. of NACDL 7. Besides misunderstanding the law of independent and adequate state grounds, *see Beard v. Kindler*, 558 U.S. 53,

60–61 (2009), that argument is irrelevant to the second question presented.

Indeed, even Areli Escobar—whose case is the source of the petition's second question—disavows that the federal Due Process Clause requires courts to accept confessions of error. In his reply in support of certiorari, Escobar effectively conceded that this Court already rejected that untenable (and ahistorical) position in *Young*, which Escobar does not ask this Court to revisit. *See* Reply Br. 6, *Escobar v. Texas*, No. 23-934 (U.S. May 13, 2024) ("[N]o one asks the Court to overrule *Young*."). Instead, he claims only that the CCA misapplied *Young* by giving "zero weight to the State's confession," *id.*, even though the CCA expressly acknowledged *Young*'s observation that "the State's confession of error in a criminal case is important and carries great weight," *Ex parte Escobar*, 676 S.W.3d 664, 672 (Tex. Crim. App. 2023). In other words, not even Escobar says the CCA misstated the law on this point. He argues only that the CCA misapplied the law it correctly invoked. Escobar is wrong about that, but regardless, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In short, the parties and *amici* differ in pitch on the uncontroversial proposition that "[c]onfessions of error are, of course, entitled to and given great weight." *Sibron v. New York*, 392 U.S. 40, 58 (1968*); see also Young*, 315 U.S. at 258. But no one argues that "due process of law *requires* reversal" merely because "a capital conviction is [allegedly] so infected with errors that the State no longer seeks to defend it." Pet.i (emphasis added). Because the Court's practice with respect to certiorari is to "decide only questions presented by the

parties," *Greenlaw v. United States*, 554 U.S. 237, 243 (2008), the Court should dismiss at least Glossip's second question presented as improvidently granted and deny further review in Escobar's case which forms the basis of that question presented.

II. If the Court Reaches the Second Question Presented, It Should Reaffirm *Young*.

"Because the shape of [this] case[] has substantially shifted" since the grant of certiorari, the Court ought to dismiss the second question presented (if not the entire petition) as improvidently granted. *Idaho v. United States*, No. 23-726, slip op. at 1 (U.S. June 27, 2024) (Barrett, J., concurring). But should the Court decide to reach the question notwithstanding the absence of adversarial briefing or genuine controversy, it should do so through a straightforward application and reaffirmation of *Young*. This Court has already held that judges need not accept prosecutorial confessions of error. In addition to being correct, that ruling is supported both by principles of stare decisis and respect for federalism.

A. *Young* requires courts to independently review judgments, not defer to prosecutors.

The Court need look no further than its decision in *Young* to answer the petition's second question presented. There, the government confessed error following a petitioner's conviction of certain drug crimes because the government thought the petitioner had been charged under an erroneous construction of the law. 315 U.S. at 258. *Young* held that the prosecutor's exculpatory interpretation was not dispositive because bedrock principles vest in the courts a power and duty of independent judgment. The prosecutor's confession, in other words, did not relieve the "Court of the performance of the judicial

function." *Id.* Rather, while "[t]he considered judgment of law enforcement officers that reversible error has been committed is entitled to great weight," "judicial obligations" nonetheless compel independent review. *Id.* at 258–59.

Young reasoned that this judicial obligation exists to safeguard the "public interest." *Id.* at 259. It is incumbent upon the judiciary, the Court explained, to "promote[] a well-ordered society" by not lightly overturning convictions. *Id.* "Furthermore, [this Court's] judgments are precedents, and the proper administration of criminal law cannot be left merely to the stipulation of parties." *Id.* After all, the judiciary's power to enter judgment is foundational to "the Constitution's separation of powers." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 213 (1995); *see also, e.g.*, *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 754 (Tex. 2017).

Young did not break new ground in recognizing the rule of independent review of judgments. The rule traces at least as far back as the 1708 trial of Lord Griffin at the Court of Kings Bench. *See Young*, 315 U.S. at 259 (citing *Rex v. Wilkes*, 98 Eng. Rep. 327 (1770)). "Sir Philip Yorke, then Attorney-General, came into Court, and said he had a sign manual 'to confess the errors and consent to the reversal.'" *Wilkes*, 98 Eng. Rep. at 340. "The court told him 'his confessing an error in law would not do: they must judge it to be an error; and their judgment would be a precedent.'" *Id.* The upshot, as distilled by the D.C. Circuit, is that Courts are bound to "examine the whole record before setting aside a conviction for crime." *Parlton v. United States*, 75 F.2d 772, 773 (D.C. Cir. 1935).

This Court has consistently followed *Young* by declining to overturn a conviction simply because a prosecutor—for whatever reason—has lost the will to defend

it. In doing so, the Court provides an important check on prosecutorial power and an important ballast for the finality of convictions. In *Sibron*, for example, the Court refused to rubber stamp a DA's repudiation of a pair of related convictions. 392 U.S. at 43–44. Citing *Young*, the Court explained that it "is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained." *Id.* at 58. To defer to a single DA's confession of error, the Court held, would be to elevate "the elected legal officer of one political subdivision within the State" above statewide authorities. *Id.* The Court thus conducted its own independent review, which resulted in one of the convictions being upheld despite the DA's confession of error. *Id.* at 66.

Nor would the second question's disregard of precedent end with *Young* and *Sibron*. The Court has reaffirmed *Young* by name in other cases, too. *See, e.g.*, *Garcia v. United States*, 469 U.S. 70, 79 (1984); *Gibson v. United States*, 329 U.S. 338, 344 & n.9 (1946). And it has routinely reaffirmed *Young* in practice by appointing *amici* to defend judgments. *See, e.g.*, *Erlinger v. United States*, No. 23-370, slip op. at 4 (June 21, 2024); *Lange v. California*, 594 U.S. 295, 301 (2021). Such appointments are no mere formality—the Court sometimes sides with court-appointed *amici*. *See, e.g.*, *Terry v. United States*, 593 U.S. 486 (2021); *Beckles v. United States*, 580 U.S. 256 (2017). Its power to do so is critical to "the independent ability of the Judiciary to vindicate its authority." *United States v. Providence J. Co.*, 485 U.S. 693, 703 (1988).

Indeed, just last term, the Court conducted a lengthy analysis of the merits despite the respondent's

confession of error and "radical agreement" with the petitioner on the question presented. *Sheetz v. County of El Dorado*, No. 22-1074, slip op. at 10 (U.S. Apr. 12, 2024). None of that analysis would have been required if a confession of error were alone sufficient.

Circuit courts also follow *Young*, including in the habeas context. *See, e.g.*, *United States v. Surratt*, 797 F.3d 240, 269 (4th Cir. 2015); *Knight v. United States*, 576 F. App'x 4, 7 (2d Cir. 2014); *Johnson v. McCaughtry*, 265 F.3d 559, 564 (7th Cir. 2001); *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996); *Every v. Blackburn*, 781 F.2d 1138, 1140 (5th Cir. 1986).

State courts around the country do as well. *See, e.g.*, *State v. Josey*, 674 A.2d 996, 1004 (N.J. Super. Ct. App. Div. 1996) ("Numerous state courts have similarly held that a confession of error by the State must be taken into account by an appellate court but is not a controlling factor which mandates a reversal.") (collecting citations). Just as this Court does not reflexively accept confessions of error, but rather exercises its own independent judgment, state court also are not required to act as mere rubber stamps. There is no conceptual reason why the Due Process Clause should have different application to different prosecutors. A practice that this Court uses with respect to the Attorney General of the United States should be equally available to state high courts with respect to state attorneys general and local state prosecutors. States, after all, have "a coordinate responsibility to enforce [the Constitution]" and federal courts "should not assume the States will refuse to honor the Constitution." *DeVillier v. Texas*, 601 U.S. 285, 293 (2024) (alteration original).

Young establishes that courts need not adopt a prosecutor's confession of error. Instead, both before and

after the United States ratified the Due Process Clause, courts have independently decided whether judgments should stand. The Court should reaffirm that principle to prevent individual prosecutors from exceeding their authority and to safeguard the judiciary's important role to say what the law is.

B. Federalism also supports *Young*.

Not only is *Young* supported by centuries of history and precedent, but it also serves an important federalism function by allowing States, if they choose, to adopt a local-prosecutor model rather than centralize prosecutorial power in a single State-wide officer.

"This Court," of course, "has the power to prevent an experiment." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It should not do so with respect to a State's allocation of prosecutorial authority. If a State—acting through its duly elected representatives—chooses to entrust prosecutors with the prerogative to undo state-court judgments, presumably nothing prevents them from doing so. But mandating that result for every State as a matter of federal due process would impose significant federalism costs.

As far as Texas is aware, the only States to have a single prosecutorial authority for the entire State are Alaska, Delaware, Connecticut, and Rhode Island. *See 2007 National Census of State Court Prosecutors*, U.S. Dep't of Just. 2 (Dec. 2011), available at https://tinyurl.com/4fkdzh7c. The other States (and the District of Columbia) as a rule use local prosecutors with jurisdictions often corresponding to county boundaries. *Id.* That allocation of authority has the virtue of balancing a prosecutor's duty to statewide voters with the interests of a more local population. *See generally* Ronald F. Wright, *Prosecutors and their State and Local Polities*,

110 J. Crim. L. & Criminology 823 (2020). In Texas, a State with tens of millions of citizens spread across more than 250 counties, how to strike that balance between such important but sometimes conflicting interests is an important question of state constitutional law.

One danger, however, of the local-prosecutor model is that a rogue prosecutor may seek to undo the work of prior prosecutors. As the Pennsylvania Supreme Court has explained, "[e]lections alone cannot occasion efforts to reverse the result of judicial proceedings obtained by the prior office holder," lest "[e]very conviction and sentence . . . remain constantly in flux, subject to reconsideration based upon the changing tides of the election cycles." *Brown*, 196 A.3d at 149. Where power is allocated to local prosecutors, a court's duty of independent judgment becomes a critical check on prosecutorial discretion. Deprived of that failsafe, many (if not all) States may be forced to revisit the local-prosecutor model.

That would be a serious blow to federalism and the many salutary benefits it provides. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting); *see also* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 11 (2018). "This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). The Court should resist a premature end to the widespread local-state-prosecutor model that would result from a rule that aggrandizes power in individual

prosecutors—not just over current cases[2] but also cases that resulted in judgments years or even decades earlier.

This is not an idle fear. Robert Wharton of Pennsylvania was sentenced to death after he drowned a husband and wife over a disputed debt and then left their seventh-month old to freeze. *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 144 (3d Cir. 2024). While in prison, Wharton was shot twice while trying to escape and was written up six times for misconduct. *Id.* He was retried at one point due to a jury-instruction error but was again sentenced to death. *Id.*

Wharton collaterally attacked his second conviction in federal court, claiming, among other things, that his attorney had insufficiently investigated his prison record. *Id.* He alleged that a professionally reasonable investigation would have supported his plea for a life sentence rather than the death penalty. *Id.* The Philadelphia District Attorney's Office filed a notice of concession before the district court could hold an evidentiary hearing. *Id.* The DA "asserted that it had decided to concede relief "[f]ollowing review of this case by the Capital Case Review Committee . . . *communication with the victim's family*, and notice to [Wharton's] counsel."' *Id.* at 144–45 (alterations in original).

"The district court did not accept the concession." *Id.* at 145. Instead, when it became clear that the DA did not

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[2] Notably, again reflecting the variety of federalism, some States have mechanisms to prevent local prosecutors from refusing to enforce state law. *See, e.g.*, Becky Fogel, *Travis County District Attorney Faces Removal Attempt Under Texas's 'Rogue' Prosecutors Law*, Tex. Tribune (Apr. 20, 2024), https://tinyurl.com/3hrn2wtc; Paige Terryberry, *Florida Leads the Way in Holding Rogue Prosecutors and Cities Accountable*, Found. for Governmental Accountability (Nov. 16, 2023), https://tinyurl.com/3r6bsjkx.

intend to conduct a thorough review, the district court appointed the Pennsylvania Attorney General as *amicus curiae* to investigate Wharton's prison record. *Id.* That proved a good decision: "The Attorney General disclosed to the court what the [DA] had not—Wharton's escape attempt and the details of his prison misconduct." *Id.* The Attorney General also discovered that the DA's statements about contacting the victim's family were misleading. *Id.* When "the Attorney General explained the situation to the family members, most of them 'were vehemently opposed to' the [DA]'s concession." *Id.*

This episode led to Rule 11 sanctions against the DA's office. *Id.* at 148. In affirming those sanctions, the Third Circuit observed that the Philadelphia DA had demonstrated a pattern of conceding death-penalty cases—so much so that "the Pennsylvania Supreme Court had limited the practice" by reminding the bar "'that a district attorney's concession of error is not a substitute for independent review.'" *Id.* at 150 (quoting *Brown*, 196 A.3d at 146).

In a world without *Young*'s rule of independent judgment, the Pennsylvania Attorney General would not have been appointed as *amicus* to look into Wharton's prison record, and the district court would not have been informed of Wharton's significant prison misconduct. And, as the Pennsylvania Supreme Court recognized in reproving the Philadelphia DA, "[e]very conviction and sentence would remain constantly in flux, subject to reconsideration based upon the changing tides of the election cycles." *Brown*, 196 A.3d at 149.

Fortunately, *Young* is the rule. After a jury reaches a "decision to enter a verdict recommending a death sentence, the district attorney lo[ses] any prosecutorial discretion to alter that verdict." *Id.* "[O]therwise, district

attorneys would have the powers of courts, while courts would be reduced to mere rubber stamps." *Id.*

C. There is no "special justification" for overruling *Young*.

The doctrine of *stare decisis* also supports *Young*'s continuation, not its abandonment. *Stare decisis* promotes "the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It also "permits society to presume that bedrock principles are founded in law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986).

The doctrine thus demands a "special justification" to overrule precedent. *Allen v. Cooper*, 589 U.S. 248, 249 (2020). No party or *amici* suggests that *Young* was wrongly decided. But even assuming someone had identified a due-process problem that somehow escaped notice for centuries, *stare decisis* insists upon "reasons that go beyond mere demonstration that the overruled opinion was wrong," for "otherwise the doctrine [of stare decisis] would be no doctrine at all." *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring).

To that end, this Court has identified factors that "should be considered in deciding when precedent should be overruled." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). They include: (1) the precedent's "consistency and coherence with previous or subsequent decisions"; (2) any "changed law," "changed facts," or evidence that the precedent is not "workabl[e]"; (3) any "reliance interests"; and (4) "the age of

the precedent." *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring). Each favors upholding *Young*.

First, *Young* is consistent with this Court's overarching commitment to judicial independence. "One of the key elements of the Federalists' arguments" in the ratification debates was "that Article III judges would exercise independent judgment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 120 (2015) (Thomas, J., concurring). "Independent judgment requires judges to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources." *Id.* at 120-21. The ratifiers particularly worried about—and therefore sought to insulate the judiciary from—political pressure. "The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is duty bound to exercise independent judgment in applying the law." *Id.* at 122.

This Court thus declines to permit parties to control the judicial power. It is axiomatic, for example, that "no action of the parties can confer subject-matter jurisdiction upon a federal court." *Ins. Corp. of Ireland v. Comagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Even "[c]ommunity consensus" about the meaning of a constitutional provision, while "'entitled to great weight,' is not itself determinative." *Graham v. Florida*, 560 U.S. 48, 67 (2010). Ultimately, when it comes to the judicial function, the "unvarying rule" is that courts must "always exercise[] an independent judgment." *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 370–71 (1893).

Second, far from proving *Young* unworkable, the power and duty of independent judgment has proved to

be a stabilizing force in our criminal-justice system, preventing prosecutors from wielding the equivalent of a pardon power. Furthermore, "[o]nly with real finality can the victims of crime move forward knowing [society's] moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.*

Third, the reliance interests here are substantial. The vast majority of States delegate power to local DAs, who are elected by only small portions of the State. *See supra* II.B. As explained above, States can do that because state courts of last resort have a duty to exercise independent judgment that prevents local DAs from confessing away the entire State's interests. *See, e.g.*, *Brown*, 196 A.3d at 149. If *Young* were overruled, States would be forced to reexamine whether local DAs should have such authority. The Court should pause (and pause again) before effectively requiring States to fundamentally revisit their allocations of prosecutorial authority.

Finally, the rule stated in *Young* is older than the United States. *Stare decisis* has special force when applied to a principle that has been on the books for centuries. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, (1994) (refusing to displace a doctrine that was older than the United States itself).

III. *Escobar* Shows What's in Pandora's Box.

As the cited basis for the petition's second question, the case of Areli Escobar supplies a befitting illustration of the hazards that await should *Young* be overturned.

As the Texas Attorney General recently explained in response to Escobar's latest certiorari petition, a Texas

jury convicted Escobar of raping and murdering Bianca Maldonado, his 17-year-old neighbor. *Ex parte Escobar*, 676 S.W.3d at 666. The gruesome crime occurred in Austin, Texas, the heart of Travis County. *Escobar v. State*, No. AP-76,571, 2013 WL 6098015, at *1 (Tex. Crim. App. Nov. 20, 2013).

Represented by the Travis County DA, Texas presented significant evidence of Escobar's guilt, including: DNA evidence; Escobar's bloody fingerprint in the apartment where Bianca lived; a text message sent by Escobar's then-girlfriend the night of the murder; the same girlfriend's trial testimony that she called Escobar that night and heard a screaming woman; eye-witness testimony that Escobar returned to his mother's home soon after the murder splattered in blood and injured; cell-tower evidence suggesting that Escobar was near the crime scene; evidence that the murderer's shoes may have had tread marks like Escobar's; and testimony that Escobar's own accounts of what he did that night shifted markedly but that he told at least some people that he could not go home because someone might be looking for him. *Id*. at *4–5. Notably, a witness testified that Escobar "told him that he had 'f-ed up' and that some girl's blood was on his clothes." *Ex parte Escobar*, No. WR-81,574-02, 2022 WL 221497, at *1 (Tex. Crim. App. Feb 24, 2016); SX.370.[3] And despite claiming that he was engaged in supposedly consensual sexual intercourse with

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[3] Record citations in this section are to the record in 23-934, *Escobar v. Texas*. "SX" refers to the State's exhibits from Escobar's capital-murder trial. "SHCR-2" refers to the second volume of the habeas clerk's records from Escobar's state-habeas proceedings. "SHRR-2" refers to the second volume of the habeas reporter's record from Escobar's state-habeas proceedings.

someone when Bianca was murdered, Escobar had no alibi evidence, let alone from the mystery woman.

A jury considered all of that evidence and found Escobar guilty of murder in the course of committing rape. He was sentenced to death in a final judgment that the CCA affirmed, *id.* at *28, and this Court denied certiorari, *Escobar v. Texas*, 574 U.S. 959 (2014).

Years later, Escobar filed a second state habeas petition that challenged the DNA evidence used at trial. *Ex parte Escobar*, 676 S.W.3d at 666–67. The Travis County DA retained new experts—including a professor with decades of experience working on DNA analysis for the Federal Bureau of Investigation—to assess blood samples using the latest methodologies. 2.Suppl.SHCR-2.93-94; 28.SHRR-2.158, .369-95. Although the new experts did not reexamine all the blood stains collected, they did determine that blood on Escobar's shoes and in his car were almost certainly Bianca's. 2.Suppl.SCHR-2.97-98; 28.SHRR-2.386-94. Indeed, for one blood stain found in the car Escobar was driving on the night of the murder, random-match probabilities were one in ten trillion with respect to Bianca. 2.Suppl.SCHR-2.97.

Despite this new DNA evidence, a judge in Travis County who had not presided over the original trial or first habeas application recommended that the CCA should grant habeas relief. *Ex parte Escobar*, 2022 WL 221497, at *3. The Travis County DA's office then confessed error under the leadership of a new DA who had been elected days before on an anti-death penalty platform. *See, e.g.*, Editorial, *Experiment in Austin: DA Candidate Vows to End Low-Level Drug Prosecutions, Not Pursue the Death Penalty*, Texarkana Gazette (July 18, 2020, 1:20 a.m.), https://tinyurl.com/mpunmuvp; 2.Suppl.SHCR-2.3-16; 2.Suppl.SHCR-2.3-16; José

Garza, *It Is Time To End the Machinery of Death in Travis County*, Facebook (Jan. 29, 2020), https://perma.cc/2F7P-V88K.

The CCA exercised its independent judgment and refused to disturb the conviction. *Ex parte Escobar*, 2022 WL 221497, at *2. And after this Court remanded the case to the CCA in light of the new DA's confession of error, the CCA stood by its original conclusion. *Ex parte Escobar*, 676 S.W.3d at 666, 670-75. Now Escobar is back at this Court demanding that the CCA be ordered to accept the views of the current Travis County DA.

But the Travis County DA's briefing to this Court paints a slanted picture of the facts, consistently downplaying the conclusion of Texas's new DNA experts that the evidence against Escobar remains overwhelming. *See* Amicus Br. of Corr. Insts. Div. of Tex. Dep't of Crim. Just., *supra*, at 20–22. The DA's briefing also fails to advise the Court of significant jurisdictional problems with Escobar's petition. Though Escobar purports to raise a *Napue* claim, for example, he neglected to allege a necessary element of that claim below. *Id.* at 18–19 (discussing *Napue v. Illinois*, 360 U.S. 264 (1959)). And his *Napue* claim is manifestly factbound. *Id.* at 19. Yet "this Court does 'not grant a certiorari to review evidence and discuss specific facts'" *Id.* (quoting *United States v. Johnson*, 268 U.S. 220, 227 (1925)).

The more complete story of what happened in Escobar's case is found in the brief submitted by the Texas Attorney General. For present purposes, the critical point is that this Court's holdings in cases like *Sibron* and *Young* prevent prosecutors from unilaterally tossing aside valid judgments. Under *Young*, the CCA was not obligated to forswear exercising its independent judgment in reviewing the capital judgment against Escobar

just because a recently-elected DA confessed error. Had the CCA shrugged its shoulders and caved in to the DA's preferred outcome to toss out a valid judgment without conducting independent review, political will would have taken precedence over impartial judging. That's not the law of Texas and it's certainly not required by federal due process.

CONCLUSION

The Court should dismiss the second question presented as improvidently granted. Alternatively, the Court should again hold that due process does not require reversal whenever a prosecutor confesses error.

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