No. _____

In The

Supreme Court of the United States

ADAM DARRICK TOGHILL,
Petitioner,

v.

HAROLD W. CLARKE,
Director, Dept. of Corrections,
Respondent.

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

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CORRECTED PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court invalidated, as inconsistent with the requirements of substantive due process, Texas's blanket prohibition on sodomy. In light of that decision, does the decision of the Supreme Court of Virginia, which revived, through a subsequent narrowing construction, a criminal statute that was in all relevant respects identical to the one invalidated in *Lawrence*, and affirmed the Petitioner's conviction under that statute, violate the Due Process Clause?

II.

Whether the Equal Protection Clause permits a State court to so construe its statutes as to result either in 1) unequal treatment of individuals engaging in acts other than vaginal intercourse, or 2) unequal penal consequences for two identically situated defendants?

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Petitioner Adam Darrick Toghill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 877 F.3d 547. App. 1–25. The decision of the United States District Court for the Western District of Virginia is not reported, but appears at 2016 WL 742123 (W.D. Va. Feb. 23, 2016) and is reprinted at App. 26–39.

The opinion of the Supreme Court of Virginia is reported at 768 S.E.2d 674 (Va. 2015). App. 60–86. The decision of the Court of Appeals of Virginia is not reported, but appears at 2014 WL 545728 (Va. Ct. App. Feb. 11, 2014) and is reprinted at App. 49–59.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on December 15, 2017. App. 1. It then denied Mr. Toghill's petition for rehearing on January 16, 2018. App. 87. On February 26, 2018, the Chief Justice granted Mr. Toghill's application to extend the time to file a petition for a writ of certiorari up to and including June 15, 2018. *Toghill v. Clarke*, No. 17–A–866 (U.S. Feb. 26, 2018). App. 176.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution reads, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Antiterrorism and the Effective Death Penalty Act (AEDPA), 22 U.S.C. § 2254(d), reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Virginia Code § 18.2–374.3(C)(3), under which Mr. Toghill was convicted, at the time of the conviction read:

> It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child less than 15 years of age to knowingly and intentionally:
>
> ***
>
> 3. Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2–361.

Virginia Code § 18.2–361, at the time of Mr. Toghill's conviction read, in relevant part:

> A. If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be is guilty of a Class 6 felony, except as provided in subsection B.

INTRODUCTION

"[T]he Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre–existing laws." *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring). Yet, the Petitioner in this case was convicted under a statute that required, for his conviction, solicitation of a minor for an offense under a statute that this Court, and the United States Court of Appeals for the Fourth Circuit, held to be unconstitutional on its face. The conviction, therefore, offends the fundamental principles of due process stretching all the way back to 1215 when the Magna Carta "declared that no person shall be deprived of his life, liberty, or property but by the … law of the land." *Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855). This Court should take the opportunity to reaffirm a fundamental principle of American jurisprudence — no conviction can be valid and no person can be deprived of his liberty pursuant to a statute that is itself repugnant to the Constitution.

On June 26, 2013, this Court issued its decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Court wrote that *Bowers*, which upheld Georgia's anti–sodomy statute against a facial challenge, "was not correct when it was decided, and it is not correct today …." *Lawrence*, 539 U.S. at 578. The Court's message was clear — statutes that prohibit consensual sexual conduct between adults are *facially* unconstitutional. The Commonwealth of Virginia, however,

did not heed the Court's admonition until 2014, when the Virginia Legislature finally amended its laws.

In 1950, the Commonwealth of Virginia enacted its "Crimes Against Nature" statute (the "anti–sodomy statute"). *See* Va. Code § 18.1–212 (1950). By the time that the events giving rise to the present litigation took place, Virginia's statute was in all relevant respects identical to the Texas statute struck down in *Lawrence* and Georgia's statute that this Court recognized should have been struck down in *Bowers*. *Compare* Va. Code § 18.2–361(A) (2014), App. 88, *with* Tex. Penal Code Ann. §§ 21.01(1)(A); 21.06(a) (2003) (quoted in *Lawrence*, 539 U.S. at 563) *and* Ga. Code § 16–6–2 (1984) (quoted in *Bowers*, 478 U.S. at 188 n.1).

In 2013, the United States Court of Appeals for the Fourth Circuit, while entertaining a habeas petition under § 2254, held that the *Lawrence* decision rendered Virginia's anti–sodomy statute unconstitutional on its face. *See MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2014), App. 139–68. The Court of Appeals concluded that "the anti–sodomy provision is unconstitutional when applied to *any* person," *id.* at 162, App. 153 (emphasis added), and that Virginia courts' decisions to the contrary "evidence[d] a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent, and therefore [could not] stand." *Id.* at 166 n.17, App. 159. Accordingly, the Court of Appeals ordered MacDonald's conviction quashed. This Court denied certiorari. *Moose v. MacDonald*, 571 U.S. 829 (2013).

Despite the clear message of this Court in *Lawrence* and the unambiguous determination of the Court of Appeals in *MacDonald*, the Commonwealth of Virginia

continued to apply the anti–sodomy statute as then written to its citizens, including the Petitioner. Mr. Toghill was convicted of using electronic means to solicit a child for the performance of an act constituting an *offense* under Va. Code § 18.2–361(A). App. 40–46. In light of *Lawrence*, however, the anti–sodomy statute was wholly invalid and therefore none of its prohibitions constituted an "offense" under the law. Yet, Virginia charged and convicted Mr. Toghill under a statute that required, as an element of the crime, proof that he solicited a sexual act that in and of itself is an "offense" under Virginia law. App. 40–46, 103–04. The Commonwealth compounded its error when its appellate courts affirmed Mr. Toghill's conviction even after the Fourth Circuit's decision in *MacDonald,* which should have put to rest any doubts about anti–sodomy statute's constitutionality. *See Toghill v. Commonwealth*, No. 2230–12–2, 2014 WL 545728 (Va. Ct. App. Feb. 11, 2014) (*Toghill I*), App. 49–59, *aff'd* 768 S.E.2d 674, 677–79 (Va. 2015) (*Toghill II*), App. 60–86.

Virginia's treatment of Mr. Toghill's claims is no less a "plain example of state action that is flatly contrary to controlling Supreme Court precedent" than its prior treatment of MacDonald's identical claims, and "therefore cannot stand." *MacDonald*, 710 F.3d at 166 n.17, App. 159. In Mr. Toghill's case, however, the Court of Appeals, rather than following its published opinion in *MacDonald*, concluded that AEDPA, 28 U.S.C. § 2254(d), required deference to the judgment of the Virginia courts. However, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003). This Court should

grant this petition to once and for all make clear that it meant what it said in *Lawrence* — statutes that "prohibit all sodomy," *Toghill II*, 768 S.E.2d at 681, App. 77, are facially invalid and cannot be applied to anyone — whether directly or as a predicate for the crime of solicitation.

STATEMENT OF THE CASE

I. Factual history.

The facts are not in dispute and are stated in the Virginia Court of Appeals' opinion.

> As part of his work with the Internet Crimes Against Children Taskforce, Louisa County Deputy Sheriff Patrick Siewert posted an advertisement in the "miscellaneous romance" section of Craigslist with the heading: "suspended, bored and lonely–w4m." The text of the advertisement read:
>
> hey well i just started on CL earlier this week cuz im suspended from skool and was bored but idk what i am really lookin 4 just sumthin 2 do even tho itz rainin outside so hit me up if u want and maybe we can chat or get together or sumthin k? Becca
>
> Toghill answered the ad, and engaged in an approximately 80–minute email exchange with "Becca" on March 10, 2011.

App. 50 (original orthography preserved).

During his exchange with "Becca Flynn," Mr. Toghill made a number of sexually explicit comments, expressing his desire to perform oral sex on her. *Id.*

II. Proceedings below.

A. State Court Proceedings.

Mr. Toghill was indicted for "use [of] … electronic means for the purpose of soliciting, with lascivious intent, any person he knows or has reason to believe is a

child less than 15 years of age to knowingly and intentionally" perform sexual acts in violation of the then–existing § 18.2–374.3 of the Code of Virginia. App. 103–04.

At the close of trial, the prosecution conceded that the only act of solicitation it could prove was solicitation for oral sex, a purported offense under Va. Code Section 18.2–361(A) (the anti–sodomy statute). App. 107–09. Accordingly, the trial judge instructed the jury that "[t]he Commonwealth must prove beyond a reasonable doubt … [t]hat the defendant used a mobile phone to solicit Becca Flynn for the performance of an act of oral sex …." App. 110. The jury found Mr. Toghill guilty, and sentenced him to a mandatory minimum term of five years incarceration. App. 45–46. The court entered judgment consistent with the jury's verdict and imposed a further suspended three year term of incarceration conditioned on the satisfactory completion of post–release supervision. Consistent with the requirements of Va. Code § 9.1–900, *et seq.*, Mr. Toghill was required to register with the Virginia Sex Offender and Crimes Against Minors Registry.[1] App. 40–44.

While Mr. Toghill's appeal was pending in the Court of Appeals of Virginia, the United States Court of Appeals for the Fourth Circuit, relying on this Court's decision in *Lawrence*, held Virginia's anti–sodomy statute to be unconstitutional on its face. *See MacDonald*, 710 F.3d 154. App. 139–68. The Virginia Court of Appeals thereafter directed the parties to brief the effect of *MacDonald* on Mr. Toghill's case, App. 47–48, but ultimately affirmed the conviction concluding that

[1] Mr. Toghill was released from prison on April 24, 2017 but remains subject to the terms of supervised release and the registration requirements of the Sex Offender and Crimes Against Minors Registry Act. *See* Va. Code §§ 9.1–901; –902(B)(1); –904; –910(A). App. 42–44.

MacDonald was of no import, and holding that the decisions of the Fourth Circuit are not binding precedent on Virginia courts, especially when they are in conflict with the decisions of the Supreme Court of Virginia. *Id.* at *2–3, App. 51–52.

In his appeal to the Supreme Court of Virginia, Mr. Toghill argued that because Va. Code § 18.2–361(A) was facially unconstitutional, it could not be applied to anyone including him, and that therefore, his conviction, which required the Commonwealth to prove that he solicited a minor to perform an "act constituting an *offense* under § 18.2–361," Va. Code § 18.2–374(C)(3), App. 90 (emphasis added), could not stand. App. 62, 65–66. Virginia's Supreme Court held that the *Lawrence* decision was not applicable outside of the context of consenting adult activity, and therefore, Mr. Toghill had no standing to bring a facial challenge to the Virginia anti–sodomy statute. *Toghill II*, 768 S.E.2d at 677–79, App. 66–73. Notwithstanding *Lawrence's* conclusion "that the anti–sodomy provision, prohibiting sodomy between two persons without any qualification, is *facially* unconstitutional," *MacDonald*, 710 F.3d at 166, App. 159 (emphasis added), and its own recognition that "[t]he intent of the [Virginia] legislature was to prohibit *all* sodomy," *id.* at 681, App. 77 (emphasis added), the Supreme Court of Virginia concluded that the proper remedy is to "prohibit[] those applications of Code § 18.2–361(A) that are unconstitutional and leav[e] the constitutional applications of Code § 18.2–361(A) to be enforced." *Id.* at 682, App. 79.

B. Federal Court Proceedings.

Having exhausted his State remedies, Mr. Toghill filed a timely federal habeas petition under 28 U.S.C. § 2254. App. 26–28. The United States District Court for the Western District of Virginia denied relief holding that Supreme Court of Virginia's refusal to declare the anti–sodomy statute facially unconstitutional was not unreasonable. *Toghill v. Clarke*, 2016 WL 742123, at *3–6 (W.D. Va. Feb. 23, 2016) (*Toghill III*), App. 29–37. The District Court granted a Certificate of Appelability. *Id.* at *9, App. 38.

In a published opinion, the Fourth Circuit also rejected Mr. Toghill's arguments and affirmed the denial of habeas relief. *Toghill v. Clarke*, 877 F.3d 547 (4th Cir. 2017) (*Toghill IV*), App. 1–25. The Court of Appeals concluded that Mr. Toghill's case was in a different posture from *MacDonald* because the Supreme Court of Virginia had "adopted an authoritative, narrowing construction of the anti–sodomy statute so as to save it from total invalidation." *Id.* at 554, App. 11 (citing *Toghill II*, 768 S.E.2d at 681), and AEDPA required deference to that decision despite this Court's holding in *Lawrence*. The Court of Appeals reached its conclusion despite the fact that the same "narrowing" construction had been used by the Virginia courts in the *MacDonald* case. *See McDonald v. Commonwealth*, 645 S.E. 2d 918, 924 (Va. 2007), App. 137.[2]

[2] Virginia courts were inconsistent in their spelling of William MacDonald's last name, alternatively spelling it as MacDonald and McDonald. *See MacDonald*, 710 F.3d at 158, n.5, App. 145.

REASONS FOR GRANTING THE WRIT

This petition presents two important and interrelated questions that require this Court's attention. First, whether courts can, once a criminal statute is declared to be facially unconstitutional, bring that statute back to life by creating a purportedly narrower construction to impose criminal sanctions. Second, whether in so doing a court can interpret statutes in such a way as to create significant equal protection problems that burden both the defendant and third parties. Underlying these issues is the question of the proper meaning and reach of this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

The Supreme Court of Virginia held that its anti–sodomy statute survived *Lawrence*, despite being "in no way dissimilar to the Texas and Georgia statutes deemed unconstitutional by the Supreme Court." *MacDonald*, 710 F.3d at 164.

To be sure, Virginia, like any other State, is free to enact statutes that proscribe and punish sexual acts between adults and children. *See id.* at 165; *Lawrence*, 539 U.S. at 569. As a general matter, a "State has a compelling interest in the well–being of its children and in the exercise of its police powers may enact legislation to protect children from adult sexual predators." *State v. Taylor*, 101 P.3d 1283, 1286 (Utah 2004). *See also Ginsberg v. New York*, 390 U.S. 629, 639–41 (1968).

But this Court has never endorsed the proposition that a State may enact a wholly unconstitutional statute and then have its judiciary engage in a statutory rewrite in order to capture conduct that the legislature could, but failed to, properly proscribe. As Justice Scalia wrote in *Massachusetts v. Oakes*, "if *no* conviction of

constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal — then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place." 491 U.S. 576, 586 (1989) (Scalia, J., concurring) (emphasis in original).[3] Allowing courts to revive statutes that have been invalidated by this Court implicates the Due Process Clause because it permits convictions under statutes that have never properly been the "law of the land." A prosecution under a properly–enacted statute is constitutionally different from a prosecution under a statute that, as a legal matter, never existed and that was essentially enacted not by the "deliberate action by the people's representatives, [but] rather [] by the judiciary." *MacDonald*, 710 F.3d at 164. *See Duncan*, 391 U.S. at 169 (Black, J., concurring).

If state courts can "revive" statutes that have been adjudged to be facially invalid, facial challenges will lose their entire *raison d'être*. *See* David H. Gans, *Strategic Facial Challenges*, 85 B. U. L. Rev. 1333, 1339–41 (2005) ("A facial challenge … goes beyond declaring the rights of the litigants; its very purpose is to obtain a judicial declaration that the statute is invalid as a whole and cannot be enforced against anyone. … [F]acial invalidation is not an outgrowth of declaring the plaintiff's rights; its very purpose is to protect the rights of all subject to the law ….").

The Supreme Court of Virginia is not alone in misunderstanding the effect of a facial invalidation in general, and the import of this Court's decision in *Lawrence* in particular. *See, e.g.*, *Williams v. State*, 184 So. 3d 1064 (Ala. Crim. App. 2015)

[3] This part of Justice Scalia's opinion was joined by four other Justices, and thus commanded the majority of the Court.

(holding that *Lawrence* did not facially invalidate Alabama's anti–sodomy statute); *State v. Pope*, 608 S.E.2d 114 (N.C. Ct. App. 2005) (same, for North Carolina's anti–sodomy statute). *See also*, Jonathan F. Mitchell, *The Writ–of–Erasure Fallacy*, 104 Va. L. Rev. ___, *4–5 (forthcoming 2018), *available at* https://bit.ly/2t0NBAy (last visited June 12, 2018).

Other courts, however, do not labor under such a misunderstanding. *See MacDonald*, 710 F.3d 154 (concluding that Virginia's anti–sodomy statute does not survive *Lawrence* in any of its applications); *Doe v. Jindal*, 851 F. Supp.2d 995 (E.D. La. 2012) (holding that post–*Lawrence*, though a State remains free to punish solicitation of sodomy for money, it cannot treat it differently than solicitation of other sexual acts for money); *Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009) (Cochran, J., concurring) (concluding that *Lawrence* facially invalidated Texas's anti–sodomy statute).

Certiorari is warranted here to clarify the scope of judicial power to continue affirming convictions under statutes that this Court has found to be facially invalid, as well as to provide further guidance about the proper meaning and reach of this Court's decision in *Lawrence v. Texas*.

I. The Supreme Court of Virginia erred by upholding a conviction based on an unconstitutional statute.

A. Virginia's anti–sodomy statute did not survive *Lawrence*.

The Supreme Court of Virginia erred when it failed to acknowledge the full scope of this Court's decision in *Lawrence*. The *Lawrence* Court invalidated Texas's anti–sodomy statute not just as applied to the defendants in that case, but *in toto*,

holding that the statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578. The true reach of *Lawrence* is evidenced by the Court's endorsement of Justice Stevens's dissenting opinion in *Bowers*, *id.*, which concluded that "selective application" of a statute that "cannot be enforced as it is written" is permissible only where justification for such enforcement reflects the considered judgment of the State's electorate. *Bowers*, 478 U.S. at 218–19 (Stevens, J., dissenting). The *Bowers* Court "posited as a justification for the Georgia statute the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." *Id.* at 219 (internal quotations omitted). However, as Justice Stevens noted, "the Georgia electorate has expressed no such belief — instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable." *Id.* (emphasis in original). Because "Georgia statute d[id] not single out homosexuals as a separate class meriting special disfavored treatment," the Court, in the view of Justice Stevens, could "not rely on the work product of the Georgia Legislature to support its holding" that the statute does not impact on a marital relationship. *Id.*

Justice Stevens's opinion precisely illustrates the error committed by the Supreme Court of Virginia's decision in *Toghill II*. The Supreme Court of Virginia explicitly acknowledged that "[t]he intent of the legislature was to prohibit all sodomy," and not just those instances of sodomy that could be constitutionally prohibited. *Toghill II*, 768 S.E.2d at 681, App. 77. Much like Georgia's statute did not express that Legislature's belief that only "homosexual sodomy is immoral and

unacceptable," *Bowers*, 478 U.S. at 219 (Stevens, J. dissenting), Virginia's statute did not express the Virginia Legislature's belief that only sodomy involving minors is "immoral and unacceptable." *Id.* Rather, both statutes reflected the respective Legislatures' "belief that *all sodomy* is immoral and unacceptable." *Id.* (emphasis in original). According to Justice Stevens — whose approach was explicitly endorsed by *Lawrence*, 539 U.S. at 578, but ignored by Virginia courts — a statute that sought to and did prohibit *all* sodomy cannot be saved by a limiting construction. *Id*. Consequently, it was wholly improper for the Virginia courts to "rely on the work product of the [Virginia] Legislature to support its holding" narrowing the application of the anti–sodomy statutes to conduct between adults and minors. *See Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1157 n.5 (D.N.M. 2014) (noting that although in theory Texas's "statute criminalizing male–male sexual relations … *could* validly be applied to nonconsensual male–male sexual relations," it was nonetheless subject to a successful facial challenge) (emphasis added).

It goes without saying that nothing in the Constitution stands in the way of Virginia prohibiting any sexual conduct between adults and minors. Indeed, in 2014, the General Assembly of Virginia amended the statute used to convict the Petitioner to bring it into compliance with Constitutional requirements. *See* Va. Acts 2014, c. 794, § 1 (eff. April 23, 2014), App. 95–96.[4] And just as certainly, while Virginia may "not single out homosexuals as a separate class meriting special disfavored treatment," *Bowers*, 478 U.S. at 219 (Stevens, J., dissenting), it *may* treat pedophiles

[4] The current versions of Va. Code §§ 18.2–361 and 18.2–374.3 are reproduced at App. 89 and 92–93 respectively.

unfavorably. *See MacDonald*, 710 F.3d at 165; *cf. Lawrence*, 539 U.S. at 569 (noting that "19th–century sodomy prosecutions typically involved relations between men and minor girls or minor boys …"). The problem is that, up until 2014, the Virginia Legislature did not choose to do so. *MacDonald*, 710 F.3d at 165 ("[A]lthough the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor, it has not seen fit to do so. The anti–sodomy provision does not mention the word "minor," nor does it remotely suggest that the regulation of sexual relations between adults and children had anything to do with its enactment.") (footnote omitted).

In *Bowers*, this Court declined to find Georgia's anti–sodomy statute to be facially invalid. However, because "*Bowers* was not correct when it was decided," *Lawrence*, 534 U.S. at 574, it follows that Georgia's statute at issue in that case was invalid on its face. *See Gillmor v. Summit Cty.*, 246 P.3d 102, 111 n.30 (Utah 2010) (noting that *Lawrence* "permit[ed] a plaintiff to bring a facial challenge…"); *Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009) (Cochran, J., concurring) ("[I]n *Lawrence v. Texas*, the defendants successfully challenged the facial constitutionality of the Texas sodomy statute …."); Roger Pilon, *Foreward — Facial v. As–Applied Challenges: Does It Matter?,* 8 Cato Sup. Ct. Rev. vii, x (2009) ("[I]n Lawrence v. Texas, the Court upheld a facial *challenge* to a state statute that criminalized homosexual sodomy in the privacy of one's home."). *Cf. Griffin*, 30 F. Supp. 3d at 1157 n.5. And therefore, Virginia's "anti–sodomy provision — an enactment in no way dissimilar to the Texas and Georgia statutes deemed unconstitutional by the Supreme Court," *MacDonald*,

710 F.3d at 164 — is equally invalid. The Supreme Court of Virginia's refusal to so hold, "resulted in a decision that [is] contrary to … clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Fourth Circuit's deference to that judgment was an improper "abdication of judicial review." *Miller–El*, 537 U.S. at 322. Neither decision should be allowed to stand.

B. An unconstitutional statute cannot serve as a basis of conviction.

A basic principle of law is that "[a]n unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Ex parte Siebold*, 100 U.S. 371, 376–77 (1879); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 730–31 (2016), as revised (Jan. 27, 2016). Such laws are void not merely as of the date of judgment declaring their unconstitutionality, but "are void *ab initio*, or void from inception, as if they never existed." *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 619 (E.D. Tex. 2016); *see also Montgomery*. 136 S. Ct. at 731; *Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 566 (1913); *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002); *Rodgers v. Mabelvale Extension Rd. Imp. Dist. No. 5*, 103 F.2d 844, 846–47 (8th Cir.1939); *Gary v. Spires*, 473 F. Supp. 878, 883 (D.S.C. 1979); *Reyes v. State*, 753 S.W.2d 382, 383–84 (Tex. Crim. App. 1988); *City of Atlanta v. Gower*, 116 S.E.2d 738, 742 (Ga. 1960); *Hannigan v. Chicago Motor Coach Co.*, 109 N.E.2d 381, 383 (Ill. App. 1952); 16 Am. Jur. 2d, Constitutional Law, § 256 (1968).

The caselaw stretching back at least 150 years is clear — "a valid [conviction] does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment." *Montgomery*, 136 S. Ct. at 724. Yet, in affirming the Petitioner's conviction, the Supreme Court of Virginia flouted this black letter rule.

In order to obtain a conviction, the Commonwealth needed to prove that Mr. Toghill solicited a child to "perform any act constituting *an offense* under § 18.2–361" (the anti–sodomy statute). Va. Code § 18.2–374(C)(3), App. 90 (emphasis added); *see also* App. 110 (Jury Instruction No. 9). "An offence, in its legal signification, means the transgression of a law." *Moore v. Illinois*, 55 U.S. 13, 19 (1852). As the anti–sodomy statute was *never* constitutional, it could never be transgressed, and therefore, none of the acts described therein are *offenses* against the law. *See Little Rock & Ft. S. Ry. v. Worthen*, 120 U.S. 97, 101–02 (1887) ("An unconstitutional act is not a law; it binds no one …."); *Robertson v. Baldwin*, 165 U.S. 275, 297 (1897) (Harlan, J., dissenting) ("No court is bound to enforce, nor is any one legally bound to obey, an act of congress inconsistent with the constitution."); 6 Ruling Case Law 117 (William M. McKinley, ed., 1915) ("Since an unconstitutional law is void, it imposes no duties … and no one is bound to obey it ….") (and cases cited therein); 16 Am. Jur. 2d, Constitutional Law, § 256.

In short, Mr. Toghill did not solicit anyone to commit a transgression of the law because under the law at the time of his act, sodomy (whether between consenting adults or adults and minors) was not a criminal offense. In other words, Mr. Toghill

solicited an act that, through the Virginia Legislature's oversight, remained legal until 2014. *See MacDonald*, 710 F.3d at 165 (noting that "the Virginia General Assembly … has not seen fit to" outlaw sodomy between adults and minors.); Va. Acts 2014, c. 794, App. 94–96 (amending both the anti–sodomy and solicitation statutes to apply to conduct with minors only). Mr. Toghill's conviction violates the Due Process Clause because he was deprived of liberty other than by the "law of the land." *See Dibrell v. Morris' Heirs*, 15 S.W. 87, 95 (Tenn. 1891) ("A law which violates any provision of the constitution, whether the provision be expressed or implied, cannot be the 'law of the land,' because an unconstitutional law is, in fact, 'no law at all.') (quoting Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union, p. 3).

Because the Petitioner's conviction rests on an unconstitutional and void statute, under this Court's long–established precedent, it cannot stand. The State courts' judgments to the contrary cannot withstand even AEDPA's deferential standard of review. As this Court said in *Davis v. United States*, when "conviction and punishment are [affixed] for an act that the law does not make criminal[,] [t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief …." 417 U.S. 333, 346–47 (1974) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). The Fourth Circuit's judgment to the contrary should be reversed.

C. *Osborne v. Ohio* does not permit State courts to revive unconstitutional statutes.

The Fourth Circuit further erred when it relied on *Osborne v. Ohio*, 495 U.S. 103 (1990), to justify its deference to the Virginia courts' narrowing construction of Va. Code § 18.2–361(A).

As an initial matter, *Osborne* involved a statute that may have had a questionable reach, but had not been previously invalidated by a decision of any court. *See State v. Meadows*, 503 N.E.2d 697, 699 (Ohio 1986) ("The precise question of law posed … is whether the General Assembly's criminalization of mere private possession of materials which show minors participating or engaging in sexual activity, masturbation, or bestiality violates the First Amendment to the United States Constitution … [T]he nation's highest court has not entertained this exact issue ….").[5] The Supreme Court of Ohio noted that while this Court's decision in *Stanley v. Georgia* invalidated statutes criminalizing mere private possession of obscene materials, it expressly reserved judgment on "statutes making criminal possession of other types of printed, filmed, or recorded materials." 503 N.E. at 700 (quoting 394 U.S. 557, 568 (1969) (emphasis omitted)).

Furthermore, the Ohio court was guided by the then–recent decision in *New York v. Ferber*, which explicitly held that child pornography is not entitled to First Amendment protection. 458 U.S. 747, 756–66 (1982). Given *Stanley*'s "explicitly

[5] The Ohio Supreme Court relied on *Meadows* when it decided *Osborne*. *See State v. Young*, 525 N.E.2d 1363, 1366 (Ohio 1988), *rev'd on other grounds sub nom*. *Osborne*, 495 U.S. 103. ("The question certified to this court … has since been answered in the affirmative in *State v. Meadows* ….").

narrow and precisely delineated" holding, *United States v. 12,200–Foot Reels of Super 8mm. Film*, 413 U.S. 123, 127 (1973), and the teachings of *Ferber*, the Supreme Court of Ohio was free to interpret, in the first instance, the reach of Ohio's statute, and to measure it against the boundaries of the First and Fourteenth Amendments. *See Osborne*, 495 U.S. at 112–15.

In contrast to the courts of Ohio, which faced a novel question which "the nation's highest court ha[d] not [yet] entertained" and on which it explicitly reserved judgment, *Meadows*, 503 N.E.2d at 699–700, the Supreme Court of Virginia was presented with a question on which this Court has spoken clearly and forcefully — statutes that express the "belief of a majority of the electorate … that … sodomy is immoral and unacceptable" cannot stand. *Bowers*, 478 U.S. at 219 (Stevens, J., dissenting) (adopted by *Lawrence*, 539 U.S. at 577–78). Because "[t]he intent of the [Virginia] legislature was to prohibit *all* sodomy," *Toghill II*, 768 S.E.2d at 681, App. 77 (emphasis added), it sprang from the same animosity that the Georgia's statute did, and must fall in the same manner. *Cf. Romer v. Evans*, 517 U.S. 620, 634 (1996) (holding that laws enacted out of "bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (quoting *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis and alterations in original). The Supreme Court of Virginia was not free to disregard *Lawrence*'s unambiguous holding.

Second, in *Osborne*, it was "obvious from the face of [the challenged act] that the goal of the statute is to eradicate child pornography," 495 U.S. at 116, a

permissible (and indeed laudable) aim.[6] *See id.* at 109 ("'It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well–being of a minor' is 'compelling.'") (quoting *Ferber*, 458 U.S. at 756–58). Although the language of the Ohio's statute "may have been imprecise at its fringes," *id.* at 116, the statute provided sufficient notice that only "child pornography" rather than artistic or medical depictions of nudity are proscribed. *See id.* at 112. The limiting construction used by the Supreme Court of Ohio in that case relied on statutory exceptions that were *already present* in the statute itself.

This case is different. Here, the Supreme Court of Virginia created a limiting construction of a facially invalid statute out of whole cloth and one that runs contrary to its own finding of the Legislature's intent. *See Toghill II*, 768 S.E.2d at 681, App. 77. Instead of being "imprecise at its fringes," the Virginia anti–sodomy statute was product of animosity and thus rotten at its core. Unlike the petitioner in *Osborne*, who was on notice that his conduct was criminal (even if there were some questions about other type of conduct that may have been a closer call), Mr. Toghill was on notice that the Virginia anti–sodomy statute was null and void and that the conduct described therein was not actually criminal, however morally loathsome it may have been. *Cf. Pryor v. Mun. Court*, 599 P.2d 636, 646 (Cal. 1979) (noting constitutional difficulties with criminalizing solicitation of lawful activities).

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[6] In enacting the statute the Ohio Legislature, unlike its Virginia counterpart, did not seek to prohibit lawful and protected conduct. Although it enacted an imperfectly drafted statute, that statute was aimed *only* at child pornography. The Virginia Legislature, on the other hand, enacted a statute that "prohibit[ed] *all* sodomy." *Toghill II*, 768 S.E.2d at 681, App. 77 (emphasis added).

Fundamentally, because the statute was previously found to be facially unconstitutional, no limiting construction could save it. Nevertheless, the Supreme Court of Virginia's opinion endorsed the Respondent's "argument [that in turn] misunderstands how courts analyze facial challenges." *City of Los Angeles, California v. Patel*, 135 S. Ct. 2443, 2451 (2015). To be sure, facial challenges "face a heavy burden," *Rust v. Sullivan*, 500 U.S. 173, 183 (1991), and declaring statutes facially unconstitutional "is manifestly, strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). At the same time, "when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct." *Patel*, 135 S. Ct. at 2451. "To put the matter another way … the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Upon engaging in this analysis, any reasonable jurist would be constrained to conclude that by far, the largest group affected by Virginia's anti–sodomy statute was adults having consensual intimate relations.

The Virginia anti–sodomy statute, just like the one in *Lawrence*, is facially invalid because the overbreadth of both statutes, whatever "legitimate sweep" they may have had, is, to say the least, "substantial." The fact that the Virginia statute also caught other forms of conduct the Commonwealth could validly choose (and has since chosen) to prohibit, does not affect the facial invalidity of the statute that actually existed, and under which Mr. Toghill was convicted. There were no statutory

exceptions — nothing — to in any way distinguish the Virginia statute from the facially invalid Texas and Georgia statutes.

As Justice Ginsburg explained in her concurring opinion in *Bond v. United States*, "any [] defendant, has a *personal* right not to be convicted under a constitutionally invalid law." 564 U.S. 211, 226 (Ginsburg, J., concurring) (emphasis added). That is because "Due process … is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land." *North Carolina v. Pearce*, 395 U.S. 711, 739 (1969) (Black, J., concurring in part and dissenting in part), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). *See also* Richard H. Fallon, *As–Applied and Facial Challenges and Third–Party Standing*, 113 Harv. L. Rev. 1321, 1331–1333 (2000); Henry P. Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 3. When a defendant challenges a statute as beyond the legislature's power to enact, "success on the merits would require reversal of the conviction." *Bond*, 564 U.S. at 227 (Ginsburg, J., concurring). Because "[a]n offence created by [an unconstitutional statute] is not a crime," courts can "acquire[] no jurisdiction of the causes" stemming from "laws [that] are unconstitutional and void," and "conviction[s] under [such laws] … cannot be a legal cause of imprisonment." *Siebold*, 100 U.S. at 376–77. When a law is, for whatever reason, beyond the power of the legislature to enact, it is "no law at all." *Nigro v. United States*, 276 U.S. 332, 341 (1928); *see also Bond*, 564 U.S. at 227–28 (Ginsburg, J., concurring). Everyone is entitled to be free of conviction pursuant to an *ultra vires* statute, "even where the constitutional provision that would render the conviction void is directed at protecting a party not before the Court … [and] even if the right to equal

treatment resides *in someone other than the defendant*." *Bond*, 564 U.S. at 227 (2011) (Ginsburg, J., concurring) (emphasis added).

Like the U.S. Congress that was without power to enact the statute the Court considered in *Bond*, the Virginia Legislature is and was without power to enact a broad, exceptionless anti–sodomy statute. *Lawrence*, 539 U.S. at 577–79. Indeed, the Virginia courts agreed that the State Legislature was without power to enact the statute *as written*. *Toghill II*, 768 S.E.2d at 680, App. 77. However, the Supreme Court of Virginia committed error when it held that Mr. Toghill had no standing to raise the constitutional challenge to § 18.2–361(A) because the statute *as construed by that Court* could properly be applied to him. *Id.* at 680, App. 73. *See also Bigelow v. Virginia*, 421 U.S. 809, 817 (1975) (holding that where the Petitioner brought a facial challenge to a criminal statute, "the Virginia courts erred in denying [him] standing to make this claim, where 'pure speech' rather than conduct was involved, without any consideration of whether the [statute's] alleged overbreadth was or was not substantial."). Given that the Virginia Legislature had no power to enact the anti–sodomy statute, the Virginia courts "acquired no jurisdiction of the causes"[7] arising under that statute; and therefore, they were, and remain without power to rewrite it. *See Siebold*, 100 U.S. at 376–77; *Bond*, 564 U.S. at 226–28 (Ginsburg, J., concurring); 16 Am. Jur. 2d, Constitutional Law, § 256 ("The general rule is that an

[7] The Virginia courts recognized that the constitutional challenge to Va. Code § 8.2–361(A), amounted to an "attack[] [on] the jurisdiction of the circuit court" and that "dispositive issue … [wa]s one of jurisdiction." *See Toghill I*, at *2, App. 51 (internal citations and quotations omitted).

unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law but is wholly void and ineffective for any purpose.").

The Due Process Clause does not permit Virginia to convict Mr. Toghill except in accordance with "valid *pre–existing* laws." *Duncan*, 391 U.S. at 169 (Black, J., concurring) (emphasis added). While courts have the power to adopt a limiting construction to clarify statutory language that is "imprecise at its fringes," they do not possess the power to *create* an entirely new statute to replace the Legislature's "wholly void and ineffective" handiwork. Even under AEDPA's highly deferential standard of review, the Fourth Circuit was obliged to grant habeas relief. It erred when it declined to do so and instead deferred to the plainly incorrect judgment of Virginia courts.

II. The Supreme Court of Virginia's and Fourth Circuit's Decisions Denied the Petitioner Equal Protection of Laws.

A. The Supreme Court of Virginia's rewriting of the anti–sodomy statute gives rise to an Equal Protection violation, further demonstrating why the statute is invalid in its entirety.

Although the Supreme Court of Virginia purported to address the anti–sodomy statute's constitutional infirmity, in reality, the "remedy" — a judge–made substitute to the facially unconstitutional statute — is itself unconstitutional and cannot stand.

The Supreme Court of Virginia's interpretation of the anti–sodomy statute is constitutionally infirm because it creates vast and irrational disparities in penalties for different acts of sex, even between the same partners. As construed in Mr. Toghill's case, "sodomy involving children," *Toghill II*, 768 S.E.2d at 681, App. 76–77, is a Class 6 felony and is punishable by "a term of imprisonment of not less than one

year nor more than five years ...." Va. Code § 18.2–10(f). At the time of Mr. Toghill's conduct, however, the very same behavior, between the very same individuals, but involving vaginal intercourse, rather than sodomy, would have been a misdemeanor, *see* Va. Code § 18.2–371(ii) (2014), punishable by no more than a year imprisonment.

Although Virginia subsequently amended both § 18.2–361 and § 18.2–371 in 2014 to address this disparity, *see* Va. Acts 2014, ch. 794, App. 94–96; *see also* App. 89, 92–93, these amendments do not fix the Equal Protection problem created by the Virginia courts' attempt to save the facially unconstitutional statute. Under Virginia law, there is *no* statute of limitation on the prosecution of felonies, but misdemeanors must be prosecuted "within one year next after there was cause therefor." Va. Code § 19.2–8. Thus, under the Supreme Court of Virginia's rewrite of § 18.2–361(A), anyone who was over 18 and who engaged in sodomy with a minor prior to 2014 is subject to prosecution and felony conviction at any time in the future, while anyone who was over 18 and engaged in vaginal intercourse with a minor prior to 2014 can no longer be prosecuted.[8]

The Supreme Court of Virginia's construction of the anti–sodomy statute is the cause of these gross disparities, and is without rational basis. *See Humphrey v. Wilson*, 652 S.E.2d 501 (Ga. 2007) (setting aside a 10 year mandatory sentence imposed after a conviction stemming from an act of oral sex between a 17 year old

[8] A felony conviction under § 18.2–361 also results in the requirement to register as a sex offender for at least 25 years, whereas a misdemeanor conviction under § 18.2–371 imposes no such burden. *See* Va. Code §§ 9.1–901; –902; –910. A felony, but not a misdemeanor, conviction also imposes additional disabilities, such as loss of a right to vote, Va. Code § 24–2.101, loss of Second Amendment rights, Va. Code § 18.2–308.2; 18 U.S.C. § 922(g), and other limitations.

male and a 15 year old female when an act of vaginal intercourse would have resulted in a much lower sentence); *Kansas v. Limon*, 122 P.3d 22, 24 (Kan. 2005) (concluding that under *Lawrence* "the State does not have a rational basis for the statutory classification" which treated same–sex sexual acts with minors more harshly than opposite–sex sexual acts with minors). Indeed, the disparity is especially suspect given its basis in a wholly illegitimate statute that purports to make felons of everyone who engages in acts of sodomy. This harsher treatment simply perpetuates the very State condemnation of nonprocreative sex and of conduct particularly associated with homosexuality held by the Supreme Court in *Lawrence* to be impermissible bases for criminal law. *See* 539 U.S. at 570–71.

A Federal District Court in Louisiana considered a constitutional challenge to a similar disparity in *Doe v. Jindal*, 851 F. Supp.2d 995 (E.D. La. 2012). There, the State's statutory scheme resulted in harsher registration regime for individuals convicted of solicitation under "Crime Against Nature by Solicitation" statute than of individuals under the "Prostitution" statute. *Id.* at 997–98. The district court, citing to this Court's decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), found that "the classification has no rational relation to any legitimate government objective: there is no legitimating rationale in the record to justify targeting only those convicted of Crime Against Nature by Solicitation for mandatory sex offender registration." *Id.* at 1007. Yet, this is precisely the outcome that obtains from the Supreme Court of Virginia's construction of Virginia's anti–sodomy statute. And just like the Louisiana

statute could not withstand the Equal Protection Clause scrutiny, neither can Virginia's judicially rewritten statute.

The Supreme Court of Virginia's attempts to save the anti–sodomy statute substituted one constitutional failure for another. Both as passed by the Legislature and as rewritten by the Virginia courts, the statute is unconstitutional and may not be enforced. Any conclusion to the contrary is simply an unreasonable application of this Court's precedents in *Lawrence* and *Eisenstadt*.

B. Mr. Toghill is in the same position as the Defendant in *MacDonald*.

In addition to the general problems engendered by the Supreme Court of Virginia's construction of § 18.2–361(A), the decisions below resulted in different and unequal treatment of Mr. Toghill and the petitioner in *MacDonald*.

The defendant in *MacDonald* was charged with violating Virginia's criminal solicitation statute, Va. Code § 18.2–29. App. 118, 140. Under that statute, "[a]ny person who commands, entreats, or otherwise attempts to persuade another person to commit a felony other than murder, [is] guilty of a Class 6 felony." App. 97. At trial, the Commonwealth proved that MacDonald solicited a 17 year old female to perform oral sex on him — a felony under the anti–sodomy statute. 710 F.3d at 157–58, App. 142–44.

The Virginia Court of Appeals rejected MacDonald's argument that the anti–sodomy statute is unconstitutional, and affirmed his conviction. *MacDonald v. Commonwealth*, No. 1939–05–2, 2007 WL 43635 (Va. Ct. App. Jan. 9, 2007), App. 118–22. The appellate court relied on its decision in a prior related case which

concluded that the anti–sodomy provision "is constitutional as applied to appellant because his violations involved minors and therefore merit no protection under the Due Process Clause." *McDonald v. Commonwealth*, 630 S.E.2d 754, 758 (Va. Ct. App. 2006), App. 116–17, *aff'd*, 645 S.E.2d at 924, App. 137 ("Nothing in *Lawrence* … prohibits the application of the sodomy statute to conduct between adults and minors."). On habeas review, however, the United States Court of Appeals for the Fourth Circuit held that the decisions of Virginia courts are "a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent, and therefore cannot stand." *MacDonald*, 710 F.3d at 166 n.17, App. 159.

Mr. Toghill's substantive claim and procedural posture are indistinguishable from MacDonald's. In *MacDonald*, the conviction hinged on proof that the defendant 1) attempted to persuade; 2) a child under eighteen years of age; 3) to engage in conduct that is a felony under the anti–sodomy statute. *See* App. 97. That conviction was set aside because sodomy with anyone was, due to Virginia Legislature's statutory drafting choices, not a crime under Virginia laws. *MacDonald*, 710 F.3d at 165, App. 158. Similarly, Mr. Toghill's conviction hinges on proof that 1) he used electronic devices; 2) to solicit, with lascivious intent; 3) a person he had reason to believe is a child less than 15 years of age to; 4) perform an act that is an offense under the anti–sodomy statute. *See* App. 110. Once again, the case fails at the last element because none of the acts listed in Va. Code § 18.2–361(A) as it then stood constituted an offense under that statute.

One of "[t]he most fundamental of our legal principles—equal justice under law—demands that" like cases be treated alike. *United States v. Irey*, 612 F.3d 1160, 1181 (11th Cir. 2010) (internal citations and quotations omitted); *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."). The Equal Protection Clause of the Fourteenth Amendment demands nothing less. *See SECSYS, LLC v. Vigil*, 666 F.3d 678, 684–85 (10th Cir. 2012) (Gorsuch, J.) ("[T]he Equal Protection Clause is a … profound recognition of the essential and radical equality of all human beings. It seeks to ensure that any classifications the law makes are made 'without respect to persons,' that like cases are treated alike, that those who 'appear similarly situated' are not treated differently without, at the very least, 'a rational reason for the difference.'") (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008)). This principle is not vitiated in habeas cases. *Cf.*, *Montgomery*, 136 S. Ct. at 731 ("Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution."). Nor is it inapplicable simply because the beneficiary may be unpopular. *See Hill v. Texas*, 316 U.S. 400, 406 (1942).

The upshot of the *MacDonald–Toghill* double–header is that two identically situated individuals, both of whom were convicted for soliciting an act made criminal by the same unconstitutional statute, in the same State, sought relief from the same courts, and yet got radically disparate results. While MacDonald's conviction was

quashed and he was freed from all the consequences flowing from that conviction, *see* *McDonald v. Moose*, 2014 WL 12519786 (E.D. Va., Aug. 7, 2014), App. 169–75, Mr. Toghill remains a convicted felon, subject to continued probation, and to sex offender registration for the next 20–plus years. *See* App. 40–44, Va. Code § 9.1–910. The Supreme Court of Virginia's decision in *Toghill II* created this anomaly, and the Fourth Circuit's decision in *Toghill IV* sanctioned it. The Equal Protection Clause, however, cannot tolerate such a disparate treatment of identically situated individuals.

C. The Supreme Court of Virginia's opinion in *Toghill II* did not newly narrow the statute, and the Fourth Circuit's conclusion to the contrary is erroneous.

The Fourth Circuit recognized that when "the Supreme Court of Virginia stood by its earlier view that Lawrence did not prohibit application of the anti–sodomy statute to conduct between adults and minors in the first instance," 777 F.3d at 557, App. 17, it "set up an intolerable conflict between" the Federal and State courts. *Id.* at 557, n.7, App. 17. The conflict would continue "[b]ecause the Supreme Court of Virginia … would continue to affirm [] convictions [under § 18.2–361(A)] against due process challenges if the victims were minors … only to have [the federal courts] grant habeas relief …." *Id.* This "intolerable conflict" was, in Fourth Circuit's view, abated only because of Supreme Court of Virginia's "authoritative, narrowing construction of a state statute," which was absent in *MacDonald*. *Id.* at 557–58, App. 16–19. That reading of the record is incorrect.

First, as early as 2007, in addressing MacDonald's habeas petition, the Supreme Court of Virginia wrote

> As we have previously held, we construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit. Therefore, when there is an as–applied challenge to a statute, we must interpret the statute in such a manner as to remove constitutional infirmities.
>
> ***
>
> The victims in this case were minors, defined by the Code of Virginia as persons under the age of eighteen. Nothing in *Lawrence* … prohibits the application of the sodomy statute to conduct between adults and minors.

McDonald, 645 S.E.2d at 924, App. 137 (internal citations and quotations omitted).

In other words, by the time *MacDonald* reached Federal courts, Virginia had already given the anti–sodomy statute a narrowing construction. The Commonwealth pressed that point on appeal in *MacDonald*, writing that "the state appellate courts' construction of § 18.2–361(A) to exclude the circumstances identified in Lawrence from its application" saved the statute from facial invalidation. *See MacDonald*, No. 11–7427, D.E. 40, pp. 42–43 (filed June 29, 2012). The Fourth Circuit rejected this judicial attempt at a statutory rewrite and held that although "[t]he Supreme Court implied in *Lawrence* that a state could, consistently with the Constitution, criminalize sodomy between an adult and a minor," such a ban required "deliberate action *by the people's representatives*, rather than by the judiciary." *MacDonald*, 710 F.3d at 164, App. 157 (emphasis added).

In its petition for certiorari in *MacDonald*, the Commonwealth recognized that under the Fourth Circuit's view of the law, "only the legislative branch of the government of Virginia — not the state courts — could harmonize Virginia law with this Court's holding in *Lawrence*." *Moose v. MacDonald*, Petition for Cert., No. 12–

1490, 2013 WL 3208674, p. 11 (filed June 25, 2013), *cert. denied*, 571 U.S. 829 (Oct. 7, 2013).[9]

In short, and contrary to the Fourth Circuit's conclusion, both the actual wording of Virginia's anti–sodomy statute *and* its judicial construction were the same in both *MacDonald* and the present case. Consequently, the Equal Protection Clause requires that the petitioners in both cases be treated in the same manner, and that Mr. Toghill is entitled to the same relief the federal courts afforded the petitioner in *MacDonald*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] The Virginia Legislature also understood the import of the *MacDonald* decision. As soon as this Court denied the Commonwealth's petition for certiorari, the Legislature enacted, on an emergency basis, a revision to §§ 18.2–361 and 18.2–374.3. *See* Va. Acts 2014, c. 794, § 1, App. 94–96 (eff. April 23, 2014); *see also* App. 89, 92–93 (post–2014 versions of the relevant statutes). There would be no reason to amend Virginia Code, much less on emergency basis (a power that the General Assembly exercises very sparingly), if the "anti–sodomy" statute was amenable to a simple saving construction.