No. _____

In the
Supreme Court of the United States

LARRY BENZON, WARDEN, UTAH STATE PRISON,
Petitioner,

v.

TROY MICHAEL KELL,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a district court's order staying and abeying a capital prisoner's habeas corpus petition under *Rhines v. Weber*, 544 U.S. 269 (2005), is immediately appealable under the collateral-order doctrine.

PARTIES TO THE PROCEEDINGS

1. Petitioner Larry Benzon, Warden of the Utah State Prison, was the appellant in the court of appeals and the respondent in district court.

2. Respondent Troy Kell, a prisoner serving a capital sentence in the Utah State Prison, was the appellee in the court of appeals and the petitioner in district court.

LIST OF PRIOR PROCEEDINGS

The Utah Sixth District Court's judgment sentencing Kell to death for aggravated murder in *State of Utah v. Kell*, case number 941600213, was entered on August 9, 1996. The Utah Supreme Court's opinion affirming Kell's conviction and sentence, case number 960377, issued on September 30, 2004, and is published at 61 P.3d 1019 (Utah 2002).

The Utah Sixth District Court's judgment denying post-conviction relief in *Kell v. State of Utah*, case number 030600171, was entered on January 23, 2007. The Utah Supreme Court's opinion affirming denial of post-conviction relief, case number 20070234, issued on September 5, 2008, and is published at 194 P.3d 913 (Utah 2008).

The Utah Sixth District Court's judgment denying Kell's post-judgment motion in *Kell v. State of Utah*, case number 030600171, was entered on October 26, 2009. The Utah Supreme Court's opinion affirming denial of post-judgment relief, case number 20090998, issued on May 4, 2012, and is published at 285 P.3d 1133 (Utah 2012).

The United States District Court for the District of Utah entered a memorandum decision and order staying Kell's habeas corpus proceedings in *Kell v. Benzon,* case number 2:07-CV-00359-CW, on November 16, 2017. The United States Court of Appeals for the Tenth Circuit's order dismissing the Warden's appeal from the district court's stay order, case number 17-4191, issued on May 28, 2019, and is published at 925 F.3d 448 (10th Cir. 2019).

The Utah Sixth District Court's judgment denying Kell's successive state post-conviction petition in *Kell v. State of Utah*, filed after the federal stay and abeyance, case number 180600004, was entered on September 4, 2018. Kell appealed that judgment to the Utah Supreme Court, case number 20180788. Briefing is not yet complete in Utah Supreme Court, so that court has not yet heard argument or issued a judgment.

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Larry Benzon, Warden of the Utah State Prison, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The divided opinion of the Tenth Circuit is reported at 925 F.3d 448. Pet. App. 1a-68a. The district court's opinion granting Respondent Troy Kell a second *Rhines* stay is unreported. *Id.* at 69a-83a. The district court's opinion declining to certify its second *Rhines* stay for review under 28 U.S.C. § 1292(b) is unreported. *Id.* at 84a-90a.

JURISDICTION

The Tenth Circuit issued its opinion on May 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1291 reads in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

INTRODUCTION

This Court has long required a state prisoner's federal habeas corpus petition to contain only exhausted claims—that is, claims previously presented to the state's highest court. Petitioners who flout this

rule by filing mixed petitions—those with both unexhausted and exhausted claims—have their petitions dismissed so state courts get the first chance to dispose of the claims. *Rose v. Lundy*, 455 U.S. 509, 510, 518-19 (1982). After prisoners exhaust their claims, they may return to federal court and file new petitions.

At least, they always could before Congress passed the Antiterrorism and Effective Death Penalty Act of 1996. AEDPA adopted *Lundy*'s complete-exhaustion requirement. *See Rhines v. Weber*, 544 U.S. 269, 274 (2005) (citing 28 U.S.C. § 2254(b)(1)(A)). But AEDPA also adopted a one-year statute of limitations for federal petitions. *See id.* at 275 (citing 28 U.S.C. § 2244(d)). So now if a district court follows *Lundy* and dismisses a mixed petition—but does so more than one year after the limitations period began to run—a prisoner would be barred from seeking federal habeas relief.

In response, district courts began staying and holding in abeyance mixed habeas petitions to allow the petitioner to exhaust his claims in State court and then return to federal court unhindered by AEDPA's one-year limitations bar. And in *Rhines*, this Court reversed the Eighth Circuit—which had vacated a stay-and-abey order on the ground that such orders are always impermissible—and held that district courts may use this stay-and-abey procedure "only in limited circumstances." 544 U.S. at 277. *Rhines* emphasized that stay and abeyance should not be "employed too frequently" or it would "frustrate[] AEDPA's objective of encouraging finality" and "undermine[] AEDPA's

goal of streamlining federal habeas proceedings." *Id.* After all, one of AEDPA's "purposes is to 'reduce delays in the execution of state and federal criminal sentences, particularly in capital cases.'" *Id.* at 276 (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). Capital prisoners, the Court observed, pose a special problem because they do not "have an incentive to obtain federal [habeas] relief as quickly as possible." *Id.* at 277. Rather, their incentive is to "deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Id.* at 277-78.

This case tests whether *Rhines* meant what it said. A jury sentenced Respondent Troy Kell to death for a race-motivated murder he committed in prison 25 years ago. His federal habeas petition has been pending for 10 years. In those 10 years, the district court has granted him two *Rhines* stays. The first lasted nearly three years; the second has been pending for nearly two years. Convinced that the district court's second *Rhines* stay constitutes an abuse of discretion that irreparably harms—again—Utah's sovereign interest in the timely execution of its criminal judgments, Utah asked the Tenth Circuit to review that stay under the collateral-order doctrine. By a 2-1 vote, the court of appeals concluded that the doctrine did not apply and dismissed the appeal.

If that conclusion is correct, *Rhines*'s promise that "circumscribe[d]" discretion would make stays appropriate "only in limited circumstances," *id.* at 276-77, is illusory. Whether that is so—or whether the States can get meaningful, timely appellate review of

Rhines stays in capital cases—is a question of exceptional importance. It warrants plenary review.

STATEMENT

A. Respondent Troy Kell is an avowed white supremacist. A quarter of a century ago, while already serving a life-without-parole sentence for murdering a man in Nevada, Kell murdered fellow inmate Lonnie Blackmon, an African American. Kell stabbed the shackled Blackmon 67 times in the eyes, face, neck, and back, leaving him to bleed to death in the prison infirmary. *See State v. Kell*, 61 P.3d 1019, 1024–25 (Utah 2002) (*Kell I*).

Kell's guilt for Blackmon's murder has never been in doubt: A prison security camera captured the entire grisly execution. That recording, now widely available on YouTube, shows Kell twice walk away from the fatally wounded Blackmon—only to twice return and compound his carnage. Based on that footage and other evidence, a jury convicted Kell of aggravated murder and sentenced him to death. *See id.*

B. The Utah Supreme Court has reviewed and affirmed Kell's conviction and sentence three separate times. First, it affirmed his conviction and sentence on direct appeal. *Id.* at 1038. Second, it affirmed a state district court's order denying Kell's state petition for post-conviction relief. *Kell v. State*, 194 P.3d 913 (Utah 2008) (*Kell II*). Third, when Kell then moved to set aside the post-conviction judgment against him, the district court denied his motion, and the Utah Supreme Court affirmed. *Kell v. State*, 285 P.3d 1133 (Utah 2012) (*Kell III*).

C. This petition for a writ of certiorari arises from Kell's federal habeas corpus proceedings.

1. Kell filed his initial 28 U.S.C. § 2254 petition in 2009, four months after he asked the state post-conviction court to set aside its judgment. *See* Pet. App. 70a-71a. Shortly after that, Kell's federal habeas counsel filed a first motion to stay the § 2254 proceedings under *Rhines*. Counsel sought the stay so they could help Kell with his then-pending state-court post-judgment motion. Over the State's objection, the district court granted Kell's motion. *See id.* at 71a.

2. Kell's first *Rhines* stay ended three years later when the Utah Supreme Court decided *Kell III*. He then returned to federal district court and filed an amended § 2254 petition. *See* Pet. App. 71a. In that amended petition, filed in 2013, Kell raised two new claims, only one of which is relevant here: his claim that his trial judge allegedly had an off-the-record discussion with the jury that shifted to him the burden to prove the jury should not impose death. *See id.* at 71a, 79a-80a. To support his new claim, Kell attached declarations from jurors—each signed in May 2012—describing alleged off-the-record interactions between his trial judge and his jury. *Id.*

Utah and Kell then litigated his amended § 2254 petition—both its old and new claims—for more than three years, including conducting extensive discovery. During those more than three years, Kell never moved for a second *Rhines* stay to facilitate pursuing his new claim in state court. Nor did he file a separate state post-conviction petition raising the new claim.

After those years of intensive litigation, the district court scheduled oral argument on Kell's amended § 2254 petition for August 2017. But on the eve of final decision—after argument on his petition, and more than *five years after* he obtained the affidavits that he claimed supported his new claim—Kell moved for a second stay under *Rhines* so he could return to state court and exhaust his new claim.

3. Over Utah's objection, the district court granted Kell's motion and entered a second *Rhines* stay. Pet. App. 69a-83a. The court concluded that Kell satisfied each of the three *Rhines* factors: (1) there was good cause for his failure to exhaust, (2) his new claim was potentially meritorious, and (3) his motion was not abusive or intentionally dilatory.

On the first factor, the district court acknowledged a lower-court split about what constitutes good cause for a *Rhines* stay. *Id.* at 72a-73a. The court ultimately rejected Utah's argument that "good cause in the *Rhines* context is akin to good cause to excuse procedural default in federal court." *Id.* at 72a; *see Carter v. Friel*, 415 F. Supp. 2d 1314, 1319 (D. Utah 2006); *Hernandez v. Sullivan*, 397 F. Supp. 2d 1205, 1207 (C.D. Cal. 2005). Instead, the court agreed with Kell and with the Ninth Circuit that *Rhines* good cause is "a more expansive and equitable reading of good cause (which is a lower standard that allows the claim to return to the state court for merits review)." *Id.* at 72a; *see id.* at 74a (citing *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014)). The court concluded that Kell's "post-conviction counsel's deficient performance" for not

raising his new claim "constitutes cause under *Rhines*." Pet. App. 75a.

On the second factor (potential merit), the district court expressly refused to "address" whether state-law time and procedural bars would preclude merits review of Kell's new claim. *Id.* at 76a. Nor did the district court acknowledge Utah's argument that the federal time bar would preclude merits review. In the end, after refusing to consider the dispositive procedural problems with Kell's new claim, the court held that his claim was potentially meritorious. *Id.* at 79a-81a. But rather than look at the claim's merits, the district court reasoned that Kell's post-conviction counsel's "failure to raise this potentially meritorious claim constitutes good cause under *Rhines*." *Id.* at 81a.

On the third factor, the district court disagreed that Kell had intentionally and abusively delayed the litigation by waiting five years after obtaining his new evidence to seek a stay. *Id.* at 81a-83a. This was so, the court said, because Kell had indicated—in "one sentence buried in a 208-page reply brief to his petition," *id.* at 45a n.1—that he would file a second *Rhines* stay "at the appropriate time," *id.* at 82a, and because the parties stipulated to a case management schedule in 2013, *see id.*

D. Consistent with *Rhines*'s teaching that a stay of a capital prisoner's habeas petition can "constitute[] an abuse of discretion," 544 U.S. at 279, Utah sought the Tenth Circuit's interlocutory review of the district court's second *Rhines* stay. It did so through two alternative routes. First, it asked the district court to certify the order for Tenth Circuit review under 28

U.S.C. § 1292(b). The district court refused. *See* Pet. App. 84a-90a.

Second—and leading to the decision now presented for review—Utah sought review under the collateral-order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). In a 2-1 decision, the Tenth Circuit concluded that *Rhines* stays are not immediately appealable collateral orders and dismissed Utah's appeal for lack of jurisdiction. Pet. App. 1a-68a.

1. Writing for the panel majority, Judge Bacharach applied *Cohen*'s familiar three-part test, recognizing that *Rhines* stays are immediately appealable only if they (1) "conclusively decide[] the disputed question," (2) "resolve[] an important issue separate from the merits, and" (3) "could not be effectively reviewed on direct appeal." Pet. App. 6a. The majority assumed that "a *Rhines* stay conclusively determines the disputed question," *id.* at 7a, thus satisfying *Cohen*'s first element. But it concluded that orders granting *Rhines* stays do not satisfy *Cohen*'s second and third elements.

a. The majority reasoned that *Rhines* stays are not completely separate from the merits and thus fail *Cohen*'s second element. The majority believed that interlocutory review "would often require federal appellate courts to consider the merits at least twice:" first on interlocutory appeal and "again after entry of the judgment." *Id.* at 8a. In the majority's view, that was because the second *Rhines* factor looks at "'potential merit,'" which "is obviously not 'completely separate' from the actual merits." *Id.* at 11a.

Applying its reading of the complete-separation element, the majority rejected Utah's argument that what constitutes good cause for a *Rhines* stay is an issue completely separate from the merits. *Id.* at 13a-19a. The majority also suggested that Utah did not argue that "timeliness, dilatoriness, and procedural default are separate from the merits." *Id.* at 20a. Even so, the majority "would not" have found those questions to "constitute important issues, as required to trigger the collateral-order doctrine." *Id.* at 21a.

The majority ended its analysis of *Cohen*'s second element by invoking this Court's teaching that "the collateral-order doctrine cannot apply absent complete separation for the *entire* class of orders." *Id.* at 22a (citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985)). To the majority, that meant "consider[ing] the issues in all grants of stays under *Rhines*" when deciding whether *Rhines* stays as a class "entail[] complete separation from the merits." *Id.* at 23a. The majority supported this conclusion by citing this Court's "handling of qualified immunity," *id.*, which the majority viewed as "considering the issues arising in the entire class of" qualified-immunity orders "rather than in the particular case being reviewed," *id.* at 24a.

b. The majority also held that a *Rhines* stay in a capital case can be effectively reviewed following final judgment, meaning *Cohen*'s third element is not met.

The majority specifically rejected Utah's argument that *Rhines* stays are "unreviewable after a final judgment because (1) the loss of time can never be remedied and (2) the grant of a stay becomes moot upon entry of a final judgment." *Id.* at 26a. The

majority acknowledged that "delay is unreviewable because a court can't restore Utah's lost time." *Id.* But, it continued, "ordinarily" the "loss of time" is not "sufficiently important to trigger the collateral-order doctrine." *Id.* The majority believed that *Rhines* stays do not differ from "most" routine "pretrial decisions" not subject to immediate appeal. *Id.* That was so—even though "swift action" in habeas cases "is essential," *id.* at 29a—because Congress's countervailing "effort to avoid piecemeal review," *id.* at 31a, outweighed the States' interests in "enforc[ing] criminal judgments, especially those involving capital sentences," *id.* at 29a.

The majority also rejected Utah's argument that a final judgment will moot a State's objection to a *Rhines* stay. It reasoned that "[b]ecause the district court's ultimate rulings on the habeas claims would be reviewable after the final judgment, the collateral-order doctrine's third element would remain unsatisfied even if the grant of a *Rhines* stay were to become moot." *Id.* at 36a.

c. Finally, the majority disagreed with Utah's argument that *Rhines* itself supports collateral-order review since the Eighth Circuit's order that this Court reviewed in *Rhines* expressly rested on collateral-order jurisdiction. *See Rhines v. Weber*, 346 F.3d 799, 800 (8th Cir. 2003). The majority concluded that because the Eighth Circuit decision reviewed in *Rhines* applied a different test to determine whether district courts should stay mixed habeas petitions, the Eighth Circuit's interlocutory review of the stay order "supplies no meaningful guidance" over whether

interlocutory review of a *Rhines* stay is similarly appropriate. *Id.* at 38a.

2. Judge Baldock dissented. He faulted the majority for "neglecting to put the grant of a *Rhines* stay in the proper context of AEDPA" and "severely understat[ing] a state's important interest in executing its sentence of death without delay." *Id.* at 40a.

After reviewing AEDPA's backdrop and purposes, *id.* at 40a-43a, the dissent recounted this case's extensive procedural history, *id.* at 43a-48a, including two of its more troubling aspects: The district court's "confusing[]" choice to "conclude[] [Kell's] claim was potentially meritorious without analyzing whether the claim was potentially meritorious," *id.* at 47a, and its "odd[]" refusal to grant Utah's request for § 1292(b) certification, *id.* at 48a. The dissent then explained why *Rhines* stays belong in the "'narrow and selective'" group of appealable collateral orders. *Id.* at 50a (quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006)).

a. Judge Baldock found "at least three" issues in *Rhines* stays to be "'completely separate' from the merits." *Id.* at 53a. First, what is "the appropriate standard for 'good cause'" to support a *Rhines* stay? *Id.*; *see id.* at 53a-55a. Second, should district courts "consider state time and procedural bars in determining whether a claim is 'potentially meritorious'"? *Id.* at 55a. And third, has the petitioner "engaged in intentionally dilatory litigation tactics"? *Id.* at 56a. The first two issues are "purely legal," and "the facts involved" with the third "are completely separate from the facts involved in a petitioner's unexhausted claim." *Id.*

Judge Baldock differed with the majority "on exactly what must be separate in order to satisfy" *Cohen*'s second element. *Id.* at 51a. The majority held that "the entire collateral *order* must be completely separate from the merits," but he concluded that it is sufficient if "at least one *issue* involved in granting a *Rhines* stay" is "completely separate from the merits." *Id.* In Judge Baldock's view, "[t]his is clearly what the Supreme Court has required." *Id.* (citing cases). And it comports with this Court's "*explicit rejection* of the argument that there must be no overlap whatsoever between a collateral order and the merits of a claim." *Id.* at 52a (citing *Mitchell v. Forsyth*, 472 U.S. 511, 529 n.10 (1985)).

Judge Baldock did adhere to "the well-settled requirement that we must focus on the class of orders." *Id.* at 52a-53a. And he "agree[d]" with the majority that "analyzing case-specific issues" is "unacceptable." *Id.* at 53a. But he recognized that the majority contradicted this Court's precedent by "look[ing] to issues that any order granting a *Rhines* stay could hypothetically raise," and denying collateral-order jurisdiction "if any of these issues overlap with the merits." *Id.*

b. Judge Baldock concluded that a *Rhines* stay is effectively unreviewable on appeal, thus satisfying *Cohen*'s third element. *Id.* at 58a. He agreed that Utah's objections to a *Rhines* stay "would be moot on appeal" from a final judgment, *id.*, because a court of appeals cannot "possibly grant the State" relief for an improper stay granted "years earlier," *id.* at 59a.

And even if a *Rhines* stay were reviewable after a final judgment, "the importance of the interests at

stake" also justifies collateral-order review. *Id.* at 60a. The "'*decisive consideration* is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order.'" *Id.* (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (internal quotation marks omitted)).

Delaying review of a *Rhines* stay "resounding[ly]" imperils the substantial public interest and high-order value in a State's right to timely "enforce its criminal judgments, particularly in capital cases." *Id.* at 60a-61a. That conclusion inevitably follows from this Court's recognition that "States suffer 'severe prejudice' when they are prevented from exercising" their "'sovereign power to enforce the criminal law.'" *Id.* at 61a (quoting *In re Blodgett*, 502 U.S. 236, 239 (1992) (per curiam)). And it is magnified by AEDPA's purpose "to 'reduce delays in the execution of state and federal criminal sentences, *particularly in capital cases*.'" *Id.* (quoting *Rhines*, 544 U.S. at 276). The precedent and statute combine to make "a state's ability to enforce its criminal judgments without delay . . . a 'substantial public interest' or 'value of a high order' that ranks among" those previously held sufficient to justify collateral-order jurisdiction: "'honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual.'" *Id.* at 62a (quoting *Will*, 546 U.S. at 352-53).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER ORDERS GRANTING *RHINES* STAYS IN CAPITAL CASES ARE APPEALABLE UNDER THE COLLATERAL-ORDER DOCTRINE.

A. Whether *Rhines* Stays in Capital Cases Are Immediately Appealable Raises Bedrock Federalism Issues of Exceptional Importance.

Plenary review is warranted here because *Rhines* stays in capital cases implicate the fundamental federalism concerns of when, and the extent to which, federal courts may interfere with the States' administration of criminal justice.

"[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201 (1977). And the States' authority "over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). Because administering justice is an adjunct of sovereignty, the States suffer "severe prejudice" when federal obstacles improperly prevent them from exercising their "sovereign power to enforce the criminal law." *In re Blodgett*, 502 U.S. at 239 (per curiam).

Habeas review squarely implicates those sensitive federalism concerns. Federal habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty

to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citation and internal quotation marks omitted). And when federal habeas review unjustifiably hinders the workings of the States' criminal-justice systems, "the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989).

Congress concluded that those concerns reach their apex in capital cases. In fact, one of Congress's specific purposes for passing the Antiterrorism and Effective Death Penalty Act was to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford*, 538 U.S. at 206.

Rhines recognized those concerns and tried to tailor its stay-and-abey procedure to them. Because AEDPA "circumscribe[s]" a district court's "discretion," 544 U.S. at 276, *Rhines* makes stays "available only in limited circumstances" and prohibits district courts from "employ[ing] [them] too frequently," *id.* at 277. A contrary approach creates at least three problems. First, it incents "capital petitioners" to "deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Id.* at 277-78. Second, it "frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings." *Id.* at 277. Third, it "undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all of his claims in state court prior to filing his federal petition." *Id.*

Regrettably, district courts routinely misapply *Rhines*, thereby producing the three specific harms *Rhines* sought to avoid. Utah's experience exemplifies the problem. Take just this case: it's an appeal from Kell's *second* stay under *Rhines*. And the problem extends beyond Kell. *Rhines* stays have become the norm in Utah. Seven capital prisoners in Utah have requested *Rhines* stays. The State did not object to one of those requests, but opposed the remaining six, and four of those were granted. *See* Pet. App. 33 n. 16. In these circumstances, "AEDPA has no teeth"—despite *Rhines*'s best efforts—since "federal habeas law still leads to piecemeal and repetitious litigation, and years of delay between sentencing and judicial resolution as to whether the sentence was permissible under law." Pet. App. 61a (internal quotation marks omitted).

The misapplication of *Rhines* in capital cases is troubling enough, but the States' inability to do anything about it is the heart of the problem. As discussed below, the current majority position is that *Rhines* stays in capital cases are not reviewable collateral orders. *See* Section I.B. If that is correct, and circuit courts must wait until long after a stay in a capital case has expired to review the district court's circumscribed discretion, federal district courts become complicit in "frustrat[ing] AEDPA's goal of finality by dragging out indefinitely" a capital prisoner's "federal habeas review." *Rhines*, 544 U.S. at 278. Because precluding collateral review exacerbates the very federalism concerns *Rhines* sought to quell, the States deserve to have this Court confirm whether that outcome is appropriate.

B. The Courts of Appeals' Contradictory Decisions on This Issue Manifest Tension and Confusion.

An issue as exceptionally important as this one demands a single national rule. No such rule exists. Instead, the States face intolerable tension and a lack of clarity in the circuits about whether orders staying-and-abeying a capital prisoner's federal habeas petition are immediately appealable under the collateral-order doctrine.

Like the panel majority, the Eighth Circuit has declined to apply the collateral-order doctrine to a district-court order granting a *Rhines* stay in a capital case. *Howard v. Norris*, 616 F.3d 799, 802-03 (8th Cir. 2010). But even that opinion displays uncertainty. First, and "[s]ignificantly," the warden in *Howard* did "not challenge the district court's application of the three *Rhines* factors, and thus d[id] not challenge the delay involved in the stay itself." *Id.* at 803. Instead, the warden challenged "the propriety of the stay only as it relates to the merits of whether the district court erred in concluding some of [the prisoner's] claims were unexhausted." *Id.* And that issue, the Eighth Circuit reasoned, "can be addressed on appeal after final judgment." *Id.*

Second, *Howard* recognized that the Eighth Circuit had previously held an order staying a habeas petition to be an immediately appealable collateral order. *See Howard*, 616 F.3d at 802 (citing *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998)). But it viewed *Carmichael* "as being concerned about the *delay* involved in a stay, because the delay itself cannot be

undone on appeal from a final judgment." *Howard*, 616 F.3d at 802. And it thought this Court's decision in *Rhines* made "*Carmichael*'s rationale for employing the collateral order doctrine . . . no longer applicable." *Id.* at 803. According to *Howard*, "*Rhines* conclusively decided a reasonable delay for a petitioner's trip to state court and back, to exhaust unexhausted claims, is justified in limited circumstances." *Id.* But that is question-begging: Collateral review lets States test whether any stay properly falls within those limited circumstances.

In contrast, and consistent with the dissent below, the Third Circuit has found that a stay-and-abeyance order in a capital case is reviewable under the collateral-order doctrine. *Christy v. Horn*, 115 F.3d 201, 206 (3d Cir. 1997). To be sure, that decision predates *Rhines*. But the Third Circuit continues to apply it after *Rhines*. *See Williams v. Walsh*, 411 F. App'x 459, 461 (3d Cir. 2011) (per curiam). Indeed, *Williams* is revealing. Relying on *Christy*, *Williams* exercised collateral-order jurisdiction over a district-court order *denying* a *Rhines* stay in a *non-capital* case. *Id.* at 459. Because the Third Circuit deemed those facts sufficient to justify the post-*Rhines* exercise of collateral-order jurisdiction, it's hard to imagine the Third Circuit declining to exercise collateral-order jurisdiction over an order *granting* a *Rhines* stay in a *capital* case.

Two other circuit decisions bear a brief mention. The Fifth and Ninth Circuits have held that *Rhines* stays are not appealable collateral orders. *Grace v. Vannoy*, 826 F.3d 813, 821 (5th Cir. 2016); *Thompson v. Frank*, 599 F.3d 1088, 1090 (9th Cir. 2010). Neither

case, however, involved a stay in a capital case, and the Fifth Circuit suggested that distinction could be relevant because a non-capital petitioner will not seek stays to delay his case. *See Grace*, 826 F.3d at 819 (suggesting that State's interests "are not appreciably more valuable than every other litigant's" because petitioner "was sentenced to life in prison; he is not delaying execution of a capital sentence"). The circuit's apparent reliance on that distinction only confirms why the States need this Court's guidance for this capital-case-specific context.

In short, the tension and lack of clarity in circuit precedent about whether a stay of a capital prisoner's federal habeas petition is an appealable collateral order warrants plenary review. *Howard* and the majority opinion below diverge from *Williams*, *Christy*, and the dissent below about whether States must wait for years after *Rhines* stays have expired before seeking review of them. They also diverge on whether *Rhines* itself sheds any light on a stay's immediate appealability. Further percolation on this question will not produce additional meaningful analysis; most of the States with capital punishment reside in a circuit that has already addressed whether *Rhines* stays are appealable. So without this Court's intervention, only States in the Third Circuit have a continuing claim of right to immediate appellate review of a district-court order unjustifiably staying a capital prisoner's federal habeas proceedings. That geography-dependent outcome is intolerable for States not named Delaware, New Jersey, or Pennsylvania.

C. The Decision Below Is Wrong.

1. Read fairly, this Court's opinion in *Rhines* supports the exercise of collateral-order jurisdiction to review a stay in a capital case. The Eighth Circuit order this Court reviewed in *Rhines* was expressly based on the collateral-order doctrine. *Rhines v. Weber,* 346 F.3d 799, 800 (8th Cir. 2003) (per curiam) ("We have jurisdiction under the collateral order doctrine to review an interlocutory order holding a habeas petition in abeyance pending exhaustion of state court remedies."). If the Eighth Circuit had lacked collateral-order jurisdiction, the only appropriate outcome in *Rhines* would have been to vacate the Eighth Circuit's judgment and "remand the case with instructions to dismiss the appeal for lack of jurisdiction." *Will*, 546 U.S. at 354 (following that course when the Second Circuit erroneously exercised collateral-order jurisdiction). This Court did not do that in *Rhines,* but rather proceeded to the merits. *Rhines*, 544 U.S. at 276-79.

Beyond that, after stating that the district court's stay should be reviewed for "abuse of discretion," *id.*, this Court remanded the case to the Eighth Circuit with instructions to apply its three-part test on collateral review—"to determine, consistent with this opinion, whether the District Court's grant of a stay in this case constituted an abuse of discretion." *Id.* at 279. No waiting for a final judgment—the Eighth Circuit was to act *now*.

Utah recognizes, of course, that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the

proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). Yet if *Rhines* is a "drive-by jurisdictional ruling[]," *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91 (1998), it was a slow-roller with obvious implications for the circuits' power to superintend stays in capital habeas cases.

2. Even putting aside *Rhines*'s jurisdictional implications, the majority opinion does not comport with the Court's collateral-order doctrine jurisprudence.

Utah readily acknowledges that doctrinal limitations disfavor requests to add another kind of order to the list of those subject to collateral-order review. *Cohen*'s conditions "are 'stringent,'" *Will*, 546 U.S. at 349 (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)); the collateral-order doctrine has a "modest scope," *id.* at 350; and this Court has kept the list of orders subject to it "narrow and selective in its membership," *id.*, so the doctrine does not overrun § 1291's finality requirement.

But Utah's request clears those high hurdles. Stay orders in capital habeas cases present "'*important* questions separate from the merits.'" *Mohawk Indus.*, 558 U.S. at 107 (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)). Viewed as a class, *see* Pet. App. 21a-25a; 52a-53a, stay orders in capital cases never require a circuit court to determine whether the petitioner is entitled to habeas relief. Rather, the important question in every appeal from a *Rhines* stay in a capital case is whether a federal court improperly

frustrated AEDPA and abused its discretion by adding more delay to the execution of the State's presumptively valid sentence—*not* whether that sentence (or underlying conviction) is illegal.

No doubt, the specific *details* of a petitioner's unexhausted claim—what it is and the facts relevant to it—will almost always be part of the story in any collateral appeal from a *Rhines* stay. That conclusion seems unavoidable since *Rhines*'s second query examines the claim's potential merit. *But see* Pet. App. 47a (here, "the district court concluded Petitioner's claim was potentially meritorious without analyzing whether the claim was potentially meritorious").

Yet that potential overlap does not itself insulate *Rhines* stays from collateral-order review. This Court has already rejected "the argument that there must be no overlap whatsoever between a collateral order and the merits of a claim." *Id.* at 52a (citing *Mitchell*, 472 U.S. at 529 n.10). Indeed, the Court already has held that a number of legal questions—the availability of certain immunities or a double-jeopardy defense—are "separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity" or double-jeopardy issues. *Mitchell*, 472 U.S. at 528-29.

So too for *Rhines* stays. An appeal of an order staying a capital habeas case asks whether the added delay in executing the State's presumptively valid sentence is justified, and that question always hinges on legal conclusions unrelated to the merits of a petitioner's claim. Some examples: Did the prisoner

adequately show good cause? *Id.* at 54a-55a. Do state or federal time or procedural bars preclude the claim? *See, e.g.*, *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010) ("when a petitioner is procedurally barred from raising his claims in state court, his unexhausted claims are plainly meritless" (internal quotation marks and brackets omitted)). Beyond that, even some mixed questions of fact and law—was the petitioner's stay request abusive or dilatory?—hinge on facts separate from the merits. *See id.* Pet. App. 56a. Each of these questions is "separate from the merits of" the prisoner's unexhausted claim even if facts about that claim relate to them. *Mitchell*, 472 U.S. at 528-29.

At bottom, then, interlocutory appeals of *Rhines* stays will not "require federal appellate courts to consider the merits at least twice"—or more, "if the district court enters multiple *Rhines* stays." *Id.* at 8a. (The very thought that district courts would enter *multiple Rhines* stays cannot be squared with this Court's commands that they "be available only in limited circumstances" and not "employed too frequently." 544 U.S. at 277.)

To put a finer point on it, States and federal courts could assume the unexhausted claim were meritorious, and other legal conclusions *entirely separate* from the underlying claim still would warrant immediate appellate review. In this vein, the majority below correctly concluded that collateral review in qualified-immunity cases provides a ready analogy, Pet. App. 23a-24a, but not for the reasons the majority thought.

Orders denying qualified immunity are immediately appealable when they present "purely legal issue[s],"

such as whether an alleged set of facts constituted a violation of clearly established law; but not when they hinge on factual issues, such as what "a party may, or may not, be able to prove at trial." *See Johnson v. Jones*, 515 U.S. 304, 313 (1995). Those distinctions readily apply in the *Rhines* context. If a *Rhines* stay really did depend on the facts underlying a petitioner's unexhausted claim, the circuit courts could decline to exercise collateral-order jurisdiction over a State's appeal from that stay, as they do in immunity cases. Otherwise, the circuit court could review the purely legal questions dispositive on whether a State must endure the continued delay a stay causes. The Tenth Circuit's failure to draw those conclusions from *Johnson*, *see* Pet. App. 24a, warrants reversal.

"More significantly," the panel majority disregarded Congress's and this Court's existing "judgment[s] about the value of the interests that would be lost" if *Rhines* stays are not immediately appealable. *Mohawk Indus.*, 558 U.S. at 107 (internal quotation marks omitted). Those judgments decisively support collateral review. Improper *Rhines* stays undermine AEDPA by compounding "delays in the execution of state and federal criminal sentences, particularly in capital cases," and by "decreasing a petitioner's incentive to exhaust all of his claims in state court prior to filing his petition." 544 U.S. at 276-77 (internal quotation marks omitted). And they encourage capital prisoners to "deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Id.* at 277-78.

These critical interests are cut from the same cloth as those the Court has previously held sufficient to justify collateral-order review: "'honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual.'" Pet. App. 62a (quoting *Will*, 546 U.S. at 352-53). So they deserve the same right to immediate appellate review.

It's no answer to say, as the panel majority did, that *Rhines* stays can be reviewed on appeal from a final judgment. *Id.* at 36a. Not so. The harm from an improper *Rhines* stay is the unwarranted delay in the execution of a State's criminal sentence. That harm "is unreviewable because a court can't restore Utah's lost time." *Id.* at 26a. And that harm decidedly is *not* the same as "lost time" for "most pretrial matters," *id.*—it's harm that Congress tried to remedy with a 1996 statute expressly designed to "reduce delays" in the execution of sentences "in capital cases." *Rhines*, 544 U.S. at 276 (internal quotation marks omitted).

What is more, the panel majority's recognition that this harm is irremediable after a final judgment explains why a State's objections to a *Rhines* stay will always be moot absent interlocutory review. *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (noting mootness arises when "a court of appeals cannot grant any effectual relief whatever" (internal quotation marks omitted)). Even so, the majority suggested that a State's objection might not become moot if the district court grants merits relief because the court of appeals could reverse the entry of a *Rhines* stay and find the

claim unexhausted. Pet. App. 34a-35a & n.18. But "once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard v. Connor*, 404 U.S. 270, 275 (1971). *Picard* prevents an appellate court from "unexhausting" a now-exhausted claim—before or after a district court enters final judgment on a habeas petition.

Finally, States have no other meaningful way to "adequately vindicate[]" their objections to improper *Rhines* stays. *Mohawk Indus.*, 558 U.S. at 107. This very case shows that review under 28 U.S.C. § 1292(b) is at best theoretical. *See* Pet. App. 84a-90a (denying Utah's request for § 1292(b) certification). And requiring a State to seek mandamus relief, as the panel majority recommends, Pet. App. 34a n.17, does not comport with *Rhines*'s holding that stays of capital habeas cases should be reviewed for "abuse of discretion," 544 U.S. at 279. "The standard for issuing a writ of mandamus is higher than the abuse of discretion standard." Pet. App. 59a n.6. Channeling all State objections to *Rhines* stays through mandamus will clog the circuit courts with petitions that need to show "*more* than what" the circuits "would typically consider to be an abuse of discretion." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (emphasis added). Reading *Rhines* to require States to make that showing either changes *Rhines*'s careful cabining of district courts' discretion or denies the States a remedy for abusive stays.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

No vehicle problems will prevent this Court from deciding the question presented. First, the facts—about Kell's murder of Blackmon, when and how Kell obtained the new evidence upon which he based his unexhausted claim, and his five-year delay in seeking a second *Rhines* stay—are undisputed.

Second, the Tenth Circuit decided the case on jurisdiction alone. Its split decision thoroughly vets the competing positions on this question. And because most of the circuits where States impose capital punishment have considered a *Rhines* stay's appealability, this question is ripe for review now, without further percolation.

Third, reversing the Tenth Circuit's decision will result in merits review of the district court's second stay order. That, in turn, will result in reversal of the stay—and an end to Kell's now-decade-old federal habeas litigation—because the district court abused its discretion on several fronts. At a minimum, it "concluded Petitioner's claim was potentially meritorious without analyzing whether the claim was potentially meritorious." *Id.* at 47a. It "did not consider the State's arguments that the claim would be time-barred or procedurally barred in state court." *Id.* at 46a. "Not surprisingly, the state trial court has since rejected this claim as both time and procedurally barred," *id.* at 47a, though the Utah Supreme Court has yet to vet this conclusion. And it excused Kell's five-year delay in asking for a *second Rhines* stay only because Kell had indicated—in "one sentence buried in

a 208-page reply brief to his petition," *id.* at 45a—that he would file a second *Rhines* stay "at the appropriate time," *id.* at 82a, and because the parties stipulated to a case management schedule in 2013, *see id.*

Fourth, the proceedings here confirm that collateral-order review is the States' only meaningful route to appellate review of a *Rhines* stay. The district court denied Utah's motion for certification under 28 U.S.C. § 1292(b). And a mandamus petition requires States to bear a heavier burden than *Rhines* imposed.

* * * * *

Prison cameras captured Kell's race-motivated execution of Blackmon more than 25 years ago. His § 2254 petition has been pending for ten years plus. Three of those years are delay from his first *Rhines* stay. His second *Rhines* stay has added nearly two more years of delay—and counting. (The district court has *not* "continued with the [§ 2254] proceedings," as the panel majority erroneously claimed. Pet. App. 2a. Consistent with the nature of a stay, nothing has happened in Kell's § 2254 petition since the second *Rhines* stay.)

If this is what the Court meant when it said that AEDPA "circumscribe[s]" a district court's discretion to stay capital habeas proceedings, *Rhines*, 544 U.S. at 276—and that stays "should be available only in limited circumstances" and not "employed too frequently," *id.* at 277—*Rhines* might have been plainer and said district courts should stay capital habeas cases as a matter of course. But if the Court "clearly intended there to be meaningful restrictions on

when a district court may issue a *Rhines* stay" in a capital case, Pet. App. 68a, it should grant this petition and confirm that the courts of appeals may say so. For if the courts of appeals lack that authority, the restrictions *Rhines* purported to place on district courts' discretion are chimerical.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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