No. 19-239

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

REPLY BRIEF FOR PETITIONER

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Kell's brief in opposition discloses his position on whether a *Rhines* stay in a capital prisoner's habeas case is immediately appealable under the collateral-order doctrine. (It is not, he says.) But he discloses no good reason why this Court shouldn't finally settle that question. The Court should grant the petition.

I. ABSENT PLENARY REVIEW, THE SOVEREIGN HARM RESULTING FROM ABUSIVE *RHINES* STAYS—IMPROPER DELAY IN EXECUTING STATES' CRIMINAL JUDGMENTS—WILL REMAIN UNSOLVED.

Like the Tenth Circuit majority, Kell fails to grasp the magnitude of the constitutional interest trampled by abusive *Rhines* stays: A State's sovereign prerogative to enforce its presumptively valid criminal judgments.

"Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). That is one reason "States suffer 'severe prejudice' when they are prevented from exercising" their "'sovereign power to enforce the criminal law.'" Pet. App. 61a (quoting *In re Blodgett*, 502 U.S. 236, 239 (1992)).

Federal habeas review of state criminal judgments "necessarily causes" "harm to federalism" interests. *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017) Among other things, it "degrades the prominence of the State trial, and it disturbs the State's significant interest in

repose for concluded litigation and denies society the right to punish some admitted offenders." *Id.* (cleaned up); *see also Harrington v. Richter*, 562 U.S. 86, 103 (2011) (federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority") (internal quotation marks omitted); *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998) ("Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights") (internal quotation marks omitted).

Improper federal habeas review exacerbates those harms. And abusive *Rhines* stays typify federal habeas review conducted improperly: As the Court itself recognized, they improperly "frustrate[] AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings" and "drag[] out indefinitely" a petitioner's "federal habeas review." *Rhines v. Weber*, 544 U.S. 269, 277, 278 (2005). In short, abusive *Rhines* stays inflict the very harms to federalism that *Rhines* sought to avoid.

Kell never disputes those arguments or conclusions. Perhaps he did not because he could not without bucking decades of this Court's cases. Whatever the reason for Kell's silence, the point stands unrebutted: The harms to States resulting from improper *Rhines* stays implicate bedrock federalism issues that this Court is singularly situated to address.

II. THE CIRCUITS' DISPARATE VIEWS ON A *RHINES* STAY'S IMMEDIATE APPEALABILITY WARRANT PLENARY REVIEW.

Rather than counter Utah's point that the Third Circuit almost certainly would have exercised jurisdiction and reviewed Kell's second *Rhines* stay (Pet. 18-19), Kell argues a different point entirely. He says six circuits have held that *Rhines* stays are not immediately appealable, and that the Third Circuit made *Rhines* stays appealable "without analysis." BIO at 25. For Kell, the upshot is a lack of "meaningful dissent among the circuits." *Id.*

Kell's answer is no real answer at all. Even if the Third Circuit does not explain why its post-*Rhines* approach varies from other circuits' practices, its disparate treatment of *Rhines* stays remains a fact, and Kell cannot say otherwise. Kell offers no reason why the Court should tolerate a collateral-order-doctrine map whose topography varies by circuit.

III. *RHINES* STAYS IN CAPITAL CASES MEET THE REQUIREMENTS FOR IMMEDIATE APPEALABILITY.

Unable to rebut Utah's arguments for plenary review, the bulk of Kell's BIO focuses on the merits—why he thinks *Rhines* stay orders in capital habeas cases do not belong on the "narrow and selective" list of orders subject to collateral-order jurisdiction. *Will v. Hallock*, 546 U.S. 345, 350 (2006). His arguments against adding *Rhines* stays to that list are not persuasive.

A. Kell follows the Tenth Circuit majority's lead and contends principally that a *Rhines* stay is not "completely separate" from the merits. BIO at 10 (internal quotation marks omitted). But as Utah explained (Pet. 22), this Court has already rejected the view that "any factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." *Mitchell v. Forsyth*, 472 U.S. 511, 529 n.10 (1985). That is why orders denying qualified immunity may be appealed under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Pet. 22-24.

Beyond qualified-immunity appeals, this Court has also approved collateral-order appeals in criminal cases where the legal and practical value of an asserted right "would be destroyed if it were not vindicated before trial." *Flanagan v. United States,* 465 U.S. 259, 266 (1984) (internal quotations omitted); *see also Abney v. United States,* 431 U.S. 651, 662 (1977) (order denying pretrial motion to dismiss on double jeopardy grounds); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (order denying motion to reduce bail); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (immunity conferred upon Congressman by the Speech or Debate Clause).

The high-order values in those cases that justify applying the collateral-order doctrine resemble the high-order value at issue here. As Kell does not dispute, *see supra* at 1-2, excluding *Rhines* stays in capital cases from the collateral-order doctrine's scope erodes a State's sovereign interests in timely vindicating its presumptively valid criminal judgments.

In any event, this case shows one reason why even a requirement of complete separation would erect no bar to applying the collateral-order doctrine to *Rhines* stays in capital cases. Kell's supplemental jury instruction claim was barred in State court. *Kell v. State*, No. 180600004, Dkt. 69 (Utah 6th Dist.). So the federal courts will never address it on the merits. Foreclosing collateral-order review of the *Rhines* stay arising from that defaulted claim thus does not further 28 U.S.C. § 1291's purpose; there is no chance of a federal decision on that defaulted claim, let alone of multiple, overlapping decisions on it.

In that vein, "interests of comity and federalism" (BIO at 8) do not support Kell's position. Comity can be served by allowing State courts to address claims first, but not by sending them claims they cannot hear at all. *See, e.g., Davila,* 137 S. Ct. at 2064 ("The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine."). And in cases of default, federalism is best served by sensitivity to a State's right to timely enforce its judgments, not by halting habeas proceedings while the parties waste time in State post-conviction proceedings whose outcome was never in doubt.

Kell argues alternatively that a "district court order regarding a stay of its proceedings 'is not ordinarily a final decision for the purposes of [28 U.S.C.] § 1291.'" BIO at 10 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 10 n. 11 (1983)). That argument erects a straw man. The operative word in *Moses H. Cone* is "ordinarily," and stays in capital

habeas cases fit no ordinary mold. They affect extraordinary interests of constitutionally unique parties—a Sovereign's interest in timely executing its criminal judgments—not mine-run interests of ordinary litigants. Beyond that, *Rhines* stays exist only because the Court crafted an equitable exception to AEDPA's exhaust-or-dismiss rule. *See Rhines*, 544 U.S. at 276-78. When district courts apply that equitable exception inequitably, they necessarily harm State sovereignty in a way that no post-judgment appeal can fix.

B. That leads to Kell's second merits argument. He contends that a *Rhines* stay is not effectively unreviewable because a State may seek interlocutory appeal under 28 U.S.C. § 1292(b) or may file a mandamus petition. BIO at 16. But as Utah argues (Pet. 26) and Kell concedes (BIO at 17), the standard for issuing a writ of mandamus is higher than the *Rhines* abuse-of-discretion standard. So when a district court—the entity that abused its discretion in the first place—denies a request to appeal under § 1292 (as happened here), the State has no chance to get abuse-of-discretion review except under the collateral-order doctrine.

Kell responds that the "State cannot be harmed by the delay inherent in a stay that is justified and appropriate under *Rhines*." BIO at 22. That, of course, is question-begging. Whether a stay is in fact "justified and appropriate" is precisely the issue on which States need (but cannot now get) appellate review.

And Kell minimizes Utah's harms from improper *Rhines* stays by saying that courts entered stays in just

four of the seven cases Utah cited. BIO at 9 n.4. But Utah did not oppose a stay in one of those cases. Pet. App. 33a n.16. The accurate math: federal district courts granted stays in two-thirds of capital habeas cases in which Utah opposed them. *See id.* The question whether a 66.7 percent grant rate qualifies as making *Rhines* stays "available only in limited circumstances," versus "employed too frequently," *Rhines*, 544 U.S. at 277, is self-answering.[1]

The possibility of an appeal at the end of the habeas case does not solve the States' predicament. Kell does not dispute that end-of-habeas-case appeals cannot restore time lost from an improperly granted stay and thus cannot cure the harms imposed by the stay. Those harms to sovereign interests are "'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Will*, 546 U.S. at 349 (quoting *Cohen*, 337 U.S. at 546). But the Tenth

[1] Worse yet, all four stays granted over Utah's objection resulted in denial of relief in State court. In three of those cases, clear procedural bars precluded review of the claims underlying the stays. *Kell v. State*, No. 180600004, Dkt. 69 (Utah 6th Dist.); *Archuleta v. State*, No. 140700047, Dkt. 347 (Utah 4th Dist.); *Taylor v. State*, 270 P.3d 471 (Utah 2012). And in the fourth, where the federal district court did not even identify a claim that qualified under *Rhines*, *see Menzies v. Benzon*, 2:03-cv-903, ECF Nos. 41 & 47 (D. Utah), the resulting state proceedings were similarly prolonged and fruitless, *see Menzies v. State,* 344 P.3d 581, 595 n.30 (Utah 2014). Federal district courts could have saved decades of wasted time in those cases by properly applying *Rhines*. But under the Tenth Circuit's rule, those wasted decades are none of the circuits' business.

Circuit's reading forever deprives the courts of appeals of power to fix them.

Neither is Utah's complaint with *Rhines* itself, as Kell contends. BIO at 8. Utah recognizes that *Rhines* stays in capital cases can be appropriate; it has confirmed as much by not opposing an appropriate request in another case. *See* Pet. App. 33a n.16. Here, Utah asks only for an appellate remedy for stays that are not "justified and appropriate." BIO at 22. And distinguishing appropriate stays from inappropriate ones falls squarely within the courts of appeals' ken.

* * * * *

The petition seeks merely to confirm that the courts of appeals can enforce *Rhines*'s existing limitations. The Court intentionally circumscribed those limits and affirmed that district courts abuse their discretion when they exceed them. *Rhines,* 544 U.S. at 277-78. But without plenary review, *Rhines*'s limits exist in name only; States have no meaningful recourse when district courts exceed them.

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

Kell argues that this case is not a good vehicle because "[e]xpanding the collateral order doctrine to include stay orders would not change the outcome." BIO at 26. Not so. Reversing the Tenth Circuit's judgment would of course change the jurisdictional outcome, meaning Utah would get the appellate review of Kell's second *Rhines* stay that the Tenth Circuit refused to perform. And when the Tenth Circuit reviews the merits of Kell's second *Rhines* stay, every

indication points to a holding that the stay is an abuse of discretion. The district court's "confusing[]" choice to "conclude[] [Kell's] claim was potentially meritorious without analyzing whether the claim was potentially meritorious," Pet. App. 47a, constitutes just one example of the stay order's flaws.

CONCLUSION

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

Respectfully submitted.

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October 30, 2019