NO. _____

In the

Supreme Court of the United States

BRIAN J. DORSEY,
Petitioner

v.

WARDEN DAVID VANDERGRIFF,
Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

An indigent state death row petitioner in state clemency may be represented by federal counsel, pursuant to 18 U.S.C. § 3599. The language of 18 U.S.C. § 3599 provides that death-sentenced individuals are entitled to "the furnishing of services" and district courts are empowered, when appropriate, to "authorize the defendant's attorneys to obtain such services." 18 U.S.C. §3599(a)(1), (f).

The questions presented are:

Whether the court below erroneously denied jurisdiction pursuant to 18 U.S.C. § 3599 based on a failure to follow fundamental rules of statutory interpretation and clear congressional intent?

Whether, as a matter of comity, Missouri's death penalty scheme necessitates jurisdiction in the district court to give full effect to the state's constitutional and statutory due process protections?

PARTIES TO THE PROCEEDINGS

Petitioner is Brian J. Dorsey, an inmate imprisoned at the Potosi Correctional Center in the State of Missouri.

Respondent is Warden David Vandergriff, Warden at the Potosi Correctional Center.

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INTRODUCTION

Petitioner, a death row defendant and citizen of Missouri, was denied expert assistance in preparation for his clemency petition based on a cribbed and contextless reading of 18 U.S.C. § 3599. Such an interpretation conflicts with this Court's holdings and congressional intent. Worse, a decision that may have been intended as a measure of respect for the sovereignty of Missouri's laws and state death penalty scheme instead frustrated the meaningful functioning of those statutory and constitutional processes. The courts below failed to take into any consideration Missouri's specific statutes, constitution and due process protections before impairing the governor's ability to fully effectuate executive clemency as provided by state law.

Missouri specifically contemplates executive clemency as more than just a fail-safe; it is a meaningful opportunity to present new evidence and spur further review of a case based on that evidence. Indeed, not only are Missouri courts clear that executive clemency is the appropriate forum for new evidence, but the state's statutes provide for the governor to convene a Board of Inquiry to further review the merits of a capital conviction and death sentence. This is not a *pro forma* exercise—two prior Boards of Inquiry have resulted in commutations.

Given the protections and procedures provided for by law in Missouri, reading § 3599 as providing for a right to expert assistance but no remedy for implementing that assistance deprives the Missouri governor of the ability to fully and fairly evaluate any new evidence on executive clemency. District courts should not interpret federal laws which may impact state proceedings in ways that frustrate those state proceedings from having full effect, thereby undermining the sovereignty of states, their laws, and the due process protections provided for their citizens.

OPINIONS BELOW

The opinion of the court of appeals is unreported, *see Dorsey v. Vandergriff*, No. 23-1078, 2023 WL 4363640 (8th Cir. July 6, 2023). The opinion and order of the district court denying Mr. Dorsey's motion pursuant to under 18 U.S.C. § 3599 is unreported, s*ee Dorsey v. Steele*, No. 4:15-CV-08000-RK, 2023 WL 159781, at *1 (W.D. Mo. Jan. 11, 2023).

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Missouri Revised Statutes section 552.070 provides:

> In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. All information gathered by the board shall be received and held by it and the governor in strict confidence.

Section 3599(a)(1) of title 18 of the U.S. Code provides in relevant part:

> Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—
>
> (A) before judgment; or
>
> (B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;
>
> shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f):
>
> . . .
>
> (f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection.

STATEMENT OF THE CASE

A. LEGAL FRAMEWORK

18 U.S.C. § 3599(a)(1) provides that death-sentenced individuals who are "financially unable to obtain adequate representation … or other reasonably necessary services … shall be entitled to … the furnishing of such other services." Subsection (f) provides that "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g)." 18 U.S.C. § 3599(f) (emphasis added). The statute therefore contains multiple imprimaturs – furnishing of … other services, funding services, and obtaining them. Funding alone is not always sufficient to "furnish" or "obtain" reasonably necessary services.

Whether 18 U.S.C. § 3599(f) empowers federal courts not simply to provide funding, but to authorize court-appointed counsel in capital cases to obtain reasonably necessary investigative, expert or other services on behalf of the defendant is a question of subject-matter jurisdiction. *Beatty v. Lumpkin*, 52 F.4th

632, 634 (5th Cir. 2022) (citing *Ayestas v. Davis*, 584 U.S. ___, 138 S. Ct. 1080, 1088-92 (2018).

The United States Supreme Court has been presented with a similar situation where the predecessor to this statute, 21 U.S.C. §848(q)(4)(B), provided for appointment of counsel to indigent death row inmates for purposes of §2254 proceedings. *See McFarland v. Scott*, 512 U.S. 849 (1994). McFarland sought appointment of counsel and a stay of execution prior to filing a petition for writ of habeas corpus because the State of Texas had set an execution date upon affirmance of his conviction and death sentence on direct appeal. The district court denied the motion, and the Court of Appeals affirmed the denial. This Court reversed, rejecting the analysis that federal courts lacked subject-matter jurisdiction. Rather, it said, its broader interpretation "is the only one that gives meaning to the statute as a practical matter." *Id.* at 855. Further, this Court said that the statutory provision should be "construe[d] in light of related provisions. . . ." *Id.* at 854.

Missouri's clemency scheme is codified at Missouri Revised Statutes section 552.070, and it grants the governor, under the powers granted by the Missouri Constitution, to appoint a board of inquiry in response to new evidence submitted in a clemency petition. In order to give effect to the Missouri statute, petitioners must be able to bring that new evidence to the governor at the clemency stage, and the governor must

have access to that new evidence in order to make a fully informed determination. For federal courts to functionally prevent petitioners from doing so is to render a state-provided procedural due process protection extraneous.

Lower courts have failed to heed this Court's guidance on statutory interpretation, as well as principles of comity, here. To not render § 3599(f) superfluous, and to give effect to Missouri's specific death penalty scheme, jurisdiction must be vested in the federal courts in Missouri.

B. FACTUAL BACKGROUND

On January 6, 2023, prior to the Supreme Court's denial of certiorari in Mr. Dorsey's §2254 proceedings, Mr. Dorsey filed an ex parte motion with the District Court, seeking an order directed to the Warden of Potosi Correctional Center to transport Mr. Dorsey three miles from the prison to Midwest Imaging Center, 20 Southtowne Drive, Potosi, MO, 63664. (See App. at A). A neurologist from the University of Missouri's School of Medicine, Dr. Joel Shenker, issued a prescription for magnetic resonance imaging (MRI) testing for Mr. Dorsey based on school records, medical and mental health records, testimony and reports of mental health professionals from legal proceedings in Mr. Dorsey's case, and anecdotal evidence provided him about Mr. Dorsey's history of head injuries and head trauma, including

multiple instances of significant head trauma from falls and from four years as a starting high school football player. (See App. at B).

The district court dismissed Mr. Dorsey's ex parte motion to order the Warden of Potosi Correctional Center to transport him to the neuroimaging center, concluding that it lacked authority to grant the motion. (See App. at C). The Eighth Circuit affirmed, joining its sister circuits in incorrectly denying the grant of subject matter jurisdiction contained in 18 U.S.C. § 3599. (See App. at D).

This Court should correct this statutory misinterpretation among the lower courts and remand with instructions to grant the motion, as Mr. Dorsey has made the requisite showing of need and as the Missouri clemency process requires. In the alternative, this Court should remand with instructions to consider whether the results of the testing Mr. Dorsey seeks would be available for consideration by the Missouri Board of Probation and Parole and, ultimately, by the Governor of Missouri for purposes of executive clemency, as provided by state statute. If the results would be available for consideration, then the district court should have jurisdiction to entertain Mr. Dorsey's motion for transport.

C. PROCEDURAL HISTORY

1. On January 11, 2023, the District Court denied Mr. Dorsey's motion seeking an order for neurological testing by written order. On January 17, 2023, Mr. Dorsey

filed his notice of appeal. *See Dorsey v. Steele*, No. 4:15-CV-08000-RK, 2023 WL 159781, at *1 (W.D. Mo. Jan. 11, 2023).

2. The Eighth Circuit Court of Appeals affirmed the district court's denial in an unpublished, per curium opinion, stating that "this court has already determined that '[s]ection 3599's authorization for funding neither confers nor implies an additional grant of jurisdiction to order state officials to act to facilitate an inmate's clemency application," and citing to *Tisius v. Vandergriff*, 55 F.4th 1153, 1155 (8th Cir. 2022). *See Dorsey v. Vandergriff*, No. 23-1078, 2023 WL 4363640 (8th Cir. July 6, 2023).

REASONS FOR GRANTING THE WRIT

This case presents a novel question regarding federal court jurisdiction within state statutory death penalty proceedings. Courts of appeals have held that district courts do not have jurisdiction over state prison wardens during executive clemency, with no regard to the states' individual death penalty schemes. *See e.g., Beatty v. Lumpkin*, 52 F.4th 632 (5th Cir. 2022); *Bowles v. Desantis*, 934 F.3d 1230 (11th Cir. 2019); *Leavitt v. Arave*, 682 F.3d 1138 (9th Cir. 2012); *Baze v. Parker*, 632 F.3d 338 (6th Cir. 2011). In Missouri, executive clemency is not merely a question of mercy, but a quasi-judicial forum in which new evidence can be heard and further inquiry can be requested.

In the decision below, the Eighth Circuit determined that § 3599 failed to bestow jurisdiction on district courts to order state officials to act in order to give effect to a petitioner's clemency proceedings. *Dorsey v. Vandergriff*, No. 23-1078, 2023 WL 4363640, at *1 (July 6, 2023) (quoting *Tisius v. Vandergriff*, 55 F.4th 1153, 1155 (8th Cir. 2022).

This holding fails in two respects. First, it fundamentally ignores basic rules of statutory interpretation.

But second, it fails to take any notice of Missouri's state statutes and death penalty scheme. The Circuits' atextual and contextless approach does not respect

comity, but rather fails to preserve it, in effect blocking state defendants from the full processes and due process protections afforded by state constitutions and provided by state legislatures.

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). The Missouri state legislature has implemented a death penalty scheme that conveys upon the clemency process a substantive, fact-finding role, where, without recourse to a subsequent collateral petition to the courts, petitioners submit new evidence to the governor directly. The governor then has the ability to investigate further in order to ensure due process and the integrity of the proceedings below. This is not a simple question of mercy, but rather an additional due process protection afforded Missouri citizens sentenced to death. In order to respect, rather than frustrate, the state scheme in Missouri, the district court must have the jurisdiction to give full effect to the unique executive clemency process in that state.

The balance of power between state and federal death penalty schemes has erroneously been determined by district courts without any regard to individual states' laws, procedures, protections, and constitutions. This is not federalism, but

paternalism. This case is an ideal vehicle to address giving full effect to state sovereignty and the principle of comity in state death penalty proceedings.

I. THE DECISION BELOW RESTS ON A FAILURE TO APPLY BASIC RULES OF STATUTORY INTERPRETATION

Pursuant to 18 U.S.C. § 3599, undersigned counsel continue to represent Mr. Dorsey for purposes of executive clemency proceedings in the State of Missouri. *Harbison v. Bell*, 556 U.S. 180, 194 (2009) ("We further hold that § 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation."). "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (footnotes omitted).

Circuit Courts of Appeals have failed to follow this Court's guidance. This Court's review is necessary to resolve that error.

1. Statutes should be interpreted so as not to result in unreasonable results or superfluous language.

Statutes should be read "with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of*

Iran, 138 S. Ct. 816, 824 (2018) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

This Court has previously confronted § 3599 in *Harbison v. Bell*, 556 U.S. 180 (2009) and rejected a narrow reading of that statute. The government pressed the Court to read § 3599 narrowly, to hold that its provisions for federally appointed counsel for indigent death row inmates to continue representation into clemency applied only to federally sentenced death row inmates. But the Court explained that was too restrictive a reading of § 3599. Rather, the Court held, the statute was intended to apply to indigent state death row inmates so that their federally appointed counsel could continue their representation even into state clemency proceedings. *Harbison*, 556 U.S. at 186-88. To have decided otherwise would have functionally denied state death row inmates full process according to the death penalty scheme under which they were sentenced. And this Court has long held that it is "bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." *Knowlton v. Moore*, 178 U.S. 41, 77 (1900) (citations omitted).

The *Harbison* court was clear that none of the language of § 3599 was superfluous, and that Congress considered state procedures when drafting the

statute. For instance, subsection (e)'s "proceedings for executive or *other* clemency" language "reveals that Congress intended to include state clemency proceedings within the statute's reach. Federal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law. By contrast, the States administer clemency in a variety of ways." *Harbison*, 556 U.S. at 187. Therefore, Congress intended the statute to encompass "the various forms of state clemency" for which a federal attorney has been appointed. *Id*. To hold that Congress never contemplated to give effect to that representation in state clemency, when it is provided for clearly in subsection (e), is to render (f) meaningless when applied to state death penalty prisoners.

A footnote in *Harbison* further illustrates why lower courts should avoid the contorted results of reading state death penalty procedures out of § 3599. It would be absurd to require that an indigent state death penalty defendant, with federal counsel representing him or her in clemency, acquire additional state counsel in order to give effect to that grant of federal representation by having state counsel request an order from state courts to receive services or expert assistance as requested by federal counsel. Such an interpretation also nullifies Congress' intent to include "executive and other clemency" within the scope of § 3599. "Such a rigid limit on the authority of appointed federal counsel would be inconsistent with the basic purpose

of the statute." *Harbison*, 556 U.S. at 187, fn. 6 (citing *McFarland v. Scott,* 512 U.S. 849, 854–857 (1994)).

Further, the *McFarland* Court explicitly cautioned lower courts from adopting narrow interpretations of subject matter jurisdiction, where the broader interpretation "is the only one that gives meaning to the statute as a practical matter." *McFarland v. Scott*, 512 U.S. 849, 853 (1994). "Congress legislated against this legal backdrop in adopting § 848(q)(4)(B) [now 18 U.S.C. § 3599], and we safely assume that it did not intend for the express requirement of counsel to be defeated in this manner." *Id.* at 856.

2. Statutes are interpreted in the context of the section in which they appear.

Here, Mr. Dorsey is seeking to effectuate the intent of § 3599, read in context with the other provisions of Chapter 228, Title 18 of the U.S. Code. There are nine individual provisions in Chapter 228. Each of those provisions provides federal courts with jurisdiction to act.

Section 3591 provides for when a federal court "shall" sentence someone to death; § 3592 provides for the district courts' consideration of both statutory and non-statutory aggravating and mitigating factors; § 3593 provides for a hearing before a district court in enumerated circumstances and compels a district court to make

certain findings in enumerated circumstances; § 3594 empowers the district court to impose sentences of either death or life, depending upon certain other conditions precedent; § 3595 mandates federal appellate courts to review federal death sentences imposed in the district courts; § 3596 mandates, inter alia, the district courts to designate another State to implement the death sentence if the sentence is imposed in a State that does not provide for implementation of a sentence of death; § 3597 authorizes federal officials to use State facilities; § 3598 specifically precludes the otherwise valid federal authority to impose and carry out a death sentence on someone subject to the criminal jurisdiction of an Indian tribal government unless the governing body of the tribe has elected that Chapter 228 has effect over land and persons subject to its criminal jurisdiction. Just as the Supreme Court read § 848(q)(4)(B), predecessor statute to § 3599, in the context of related provisions, so too must this Court read § 3599 in the context of related provisions.

To interpret § 3599 by separating it from the chapter of the U.S. Code for which federal jurisdiction is authorized strains credulity. Because the purpose of Chapter 228 is to vest the federal courts with jurisdiction and because the language of §3599 is consistent with that purpose, federal courts have the jurisdiction to consider a request to order a prison to allow expert testing of a death-sentenced inmate.

3. Congress clearly contemplated a variety of state clemency procedures when drafting § 3599; district courts should do the same.

This cribbed interpretation not only strips the statute of any meaning or purpose, it fails to consider Congress' intent to effectuate state processes and procedures. To so disregard a state's determinations of due process and fair proceedings is especially egregious after two of the prior sections of the United States Code involve federal officials commandeering state death penalty facilities in order to carry out federal death sentences.[1] Surely comity requires federal courts to do more than treat all states with the same equal disregard for state proceedings, procedures, and due process rights granted to state citizens.

II. THE DECISION BELOW FUNDAMENTALLY UNDERMINES THE PRINCIPLE OF COMITY AND RESPECT FOR MISSOURI'S STATE SOVERIGNTY

"The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'" *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 (2022) (citing The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)). "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty." *Webb v. Webb*, 451 U.S. 493, 499 (1981). If

[1] §§ 3596's and 3597 specifically grant federal authority to commandeer State or local facilities and/or personnel to further federal ends.

"[t]he States possess primary authority for defining and enforcing the criminal law," they must be allowed to do so according to state laws and state constitutions without federal courts impeding that authority. *Engle v. Isaac*, 456 U.S. 107, 128 (1982). The decisions below that imposed jurisdictional limitation on section § 3599(f) cannot be squared with comity, respect for state statutory schemes, or states' sovereign powers to rule themselves.

"Comity ... dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)). There is no question that Congress implemented AEDPA and other death penalty review laws to further the principles of comity and federalism. *Dretke v. Haley*, 541 U.S. 386, 388 (2004). For this reason, this Court has clarified that federal courts should not be used as "an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams*, 529 U.S. at 437.

Here, Mr. Dorsey is attempting to pursue **state** remedies; only an insupportably narrow reading of a federal statute is in his way. "The due process clauses of the United States and Missouri constitutions prohibit the taking of life, liberty or

property without due process of law." *Jamison v. State, Dep't Soc. Servs., Div. Family Servs.*, 218 S.W.3d 399, 405 (Mo. 2007) (en banc) (citing U.S. Const. amend. XIV § 1; Mo. Const. art. I § 10). The failure of courts below to consider Missouri's clemency scheme before denying jurisdiction results not only in Mr. Dorsey being denied that due process but meaningfully undermines Missouri's sovereign authority to implement its constitution as well.

1. Missouri's clemency scheme assumes and depends upon effective representation through clemency proceedings, including the ability to gather and present new evidence.

Missouri's clemency scheme is codified in statute at Missouri Revised Statutes section 552.070. Enacted in 1963 along with a host of other changes to the statutory scheme governing individuals sentenced to death, the State legislature has made no changes to section 552.070, RSMo. See S.B. 143 § A(7), 1963 Mo. Laws 674, enacted at 552.070, RSMo.

Since enactment, the governors of Missouri have had the power to empanel a board of inquiry under section 552.070, RSMo., to further investigate the propriety of a death sentence under the laws of the state. As Missouri law limits successive collateral attacks on a death sentence,[2] "[t]he only formally authorized means by

[2] While "[t]here is no absolute procedural bar to ... seeking habeas relief … the opportunities for such relief are extremely limited." *State ex rel. Johnson v. Blair*, 628

which a defendant with an untimely motion for new trial based on newly discovered evidence may present new claims is to seek relief by application to the governor for executive clemency or pardon pursuant to the Missouri Constitution." *State v. Parker*, 208 S.W.3d 331, 334–35 fn 4-5 (Mo. Ct. App. 2006) (citing *State v. Garner*, 976 S.W.2d 57, 60 (Mo.App.1998) and *State v. Gray*, 24 S.W.3d 204, 208–09 (Mo.App.2000)).

Since the law was enacted, Missouri governors have three times invoked the power to empanel a board of inquiry under section 552.070, RSMo., based on new evidence presented at clemency: Lloyd Schlup (1994). Exec. Order (Jan. 12, 1994); William Theodore Boliek, Jr. (1997). Exec. Order 97-10 (Aug. 25, 1997); Marcellus Williams (2017). Executive Order 17-20 (Aug. 22, 2017). These Boards were empaneled because there was no other forum in which these claims could have been heard. Mr. Schlup's clemency petition contained new evidence of innocence that had not been tested in court, including conflicting eyewitness accounts. See *Execution Is Stayed in Missouri*, N.Y. TIMES, Nov. 19, 1993, at A28. Mr. Boliek had a meritorious claim of ineffective assistance of counsel that he was procedurally barred from presenting in state court. See Exec. Order 97-10. And Mr. Williams presented in his

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S.W.3d 375, 381 (Mo.), cert. denied sub nom. *Johnson v. Blair*, 142 S. Ct. 2856 (2021) (quoting *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. banc 2001)).

clemency petition, "newly discovered DNA evidence, and any other relevant evidence not available to the jury." Executive Order 17-20.

Clemency in Missouri is an additional layer of due process protection for those sentenced to the most final of punishments, ensuring new evidence developed after it is procedurally barred from being presented in state court has a forum in which it can be heard. If the district court or Eighth Circuit Court of Appeals here had considered the state clemency scheme before denying they had jurisdiction, they would have determined that jurisdiction was proper to give meaningful effect to the state clemency scheme. While other states may make different choices about clemency, Missouri's determination that clemency should not be limited to mere consideration of mercy but the appropriate place for new, material evidence to be presented was a grant of a due process protection to its citizens that federal courts should not impede or disregard.

2. District courts fail to abide by the principles of comity and federalism when they interpret federal statutes to deny the proper exercise of states' laws and constitutional commitments.

As this Court has repeatedly stated, the "principal of comity requires 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to

perform their separate functions in their separate ways.'" *Webb v. Webb*, 451 U.S. 493, 500 (1981) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

District and circuit courts should interpret federal statutes that clearly consider state death penalty schemes in light of the mechanics of each state's scheme and interpret the statute accordingly. In Missouri, Congress intended § 3599 as a grant of subject matter jurisdiction. Here, without consideration for the specific role that clemency plays in Missouri's due process protections, the courts below have disrespected and impeded state functions. Determining that no district court has jurisdiction in any state, no matter the states' needs, is fundamentally contrary to the principles of comity and federalism.

The decision below also runs afoul of settled doctrine that "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Rhines v. Weber*, 544 U.S. 269, 274 (2005) (internal citations omitted). Clemency in Missouri is an opportunity for the state to correct any constitutional errors or hear evidence of innocence before execution, and Missouri should be given meaningful opportunity to resolve those errors within the state system as determined by their state legislature, rather than leave petitioners' only option to submit (disfavored) last-minute execution stays to

federal courts. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019); *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006).

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE

"History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *In re Lincoln v. Cassady*, 517 S.W.3d 11, 24 (Mo. Ct. App. 2016) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993). This case would allow this Court to restore states' clemency schemes to their historic position of providing meaningful due process protection before the most final of penalties. It would also correct lower courts' repeated failure to follow the most basic rules of statutory interpretation and this Court's guidance in *Harbison v. Bell*, 556 U.S. 180 (2009), and *McFarland v. Scott,* 512 U.S. 849, 854–857 (1994).

First, the question presented is fundamental to the fairness of the criminal justice system and our nation's principles of comity, federalism, and state sovereignty. For example, this Court has recently given careful consideration to the significance of states' interests in finality and federal restraint in reviewing state death sentences. *See, e.g.*, *Shinn v. Ramirez,* 142 S. Ct. 1718, 1731, 212 L. Ed. 2d 713

(2022); *Shoop v. Twyford,* 142 S. Ct. 2037, 2045 (2022). As explained *supra*, similar comity and due-process concerns warrant the Court's attention in this case.

Second, given this Court's elaboration of the proper role of federal courts in state death penalty proceedings in the past several years, states may want to amend their death penalty schemes accordingly. They should be able to do so knowing that those changes will remain valid and material, even if federal counsel is representing indigent defendants.

Thirdly, Petitioner merely wants to give effect to the process and procedures his state has deemed necessary to ensure justice and due process in death penalty proceedings. He does not ask a federal court to hear evidence, overturn a conviction, or issue a stay, all things district courts may do which frustrate Congress' purpose is passing laws like AEDPA and § 3599 and deny states comity and finality. Rather, petitioner asks that, with his federal counsel, he may undertake and meaningfully participate in the process Missouri has provided to its citizens. All state citizens, with respect to the different clemency procedures their states have adopted, deserve to be able to do the same.

Ultimately, the instant case is an ideal opportunity for this Court squarely resolve the question presented. Mr. Dorsey is not requesting any more than to be

allowed to participate meaningfully in his state clemency process, as Congress intended in passing § 3599, and as provided for in the Missouri state constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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