No. ______

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Idaho

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APPLICATION FOR STAY OF EXECUTION

Directed to the Honorable Elena Kagan as Circuit Justice for the Ninth Circuit

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THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR FEBRUARY 28, 2024

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To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Thomas E. Creech respectfully requests a stay of execution while his petition for certiorari is pending pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f) or, alternatively, until an opinion is issued in *City of Grants Pass v. Johnson*, No. 23-175.

A STAY OF EXECUTION IS WARRANTED

In deciding the present application, the Court must apply four factors: 1) whether Mr. Creech "has made a strong showing that he is likely to succeed on the merits"; 2) whether he "will be irreparably injured absent a stay"; 3) whether a "stay will substantially injure" the State; and 4) "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).[1] As set forth below, all four factors are satisfied.

I. Mr. Creech is likely to succeed on the merits.

To begin, Mr. Creech has made a strong showing that he is likely to succeed on the merits, i.e., there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and there is "a significant possibility of reversal of the lower court's decision." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

[1] Unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

First, certiorari review is reasonably probable because Mr. Creech has identified a substantial need for guidance from the Court on an issue of great national importance, and he has brought a strong vehicle for it to do so. As elaborated on in more detail in his certiorari petition, Mr. Creech is asking the Court to provide clarity on the question of when a state's post-conviction regime affords so little meaningful review to legitimate federal constitutional claims that it violates due process. That is a question the Court flagged as important enough to justify certiorari review in 1965, *see Case v. Nebraska*, 381 U.S. 336, 337 (1965) (per curiam), yet still has not answered. The certiorari petition explains how the question is more urgent now than ever given this Court's gradual narrowing of federal habeas review over the last twenty years, which has increased the need for full and fair state post-conviction proceedings. *See, e.g.*, *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (establishing onerous restrictions on the development of the habeas record because "the States possess primary authority . . . for adjudicating constitutional challenges to state convictions").

There are strong reasons to suspect that at least some states have gone too far in limiting post-conviction review, thus calling for the Court's intervention. The certiorari petition surveys a number of problems in state post-conviction schemes that are obstructing meaningful review of serious constitutional claims, such as the fact that more than 300 death-row inmates in California are waiting for the appointment of initial state post-conviction counsel, and more than 100 of them have been waiting for more than twenty years. *See* 2023 Annual Report, Habeas

Corpus Resource Center, available at

https://www.hcrc.ca.gov/documents/HCRC%20Annual%20Report%202023.pdf.

Because this Court's decisions have increased the pressure on state post-conviction structures, and because those structures are showing signs of inadequacy, it is an opportune time to consider them. And Mr. Creech's certiorari petition provides the ideal chance for the Court to do so. As detailed in his petition, Mr. Creech's situation presents a particularly striking illustration of how post-conviction systems can lock proper claims out of court.

Mr. Creech asserted a claim that has long been recognized by the Court as valid—an appeal to the evolving standards of decency. *See Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). The Idaho Supreme Court deemed the claim untimely because Mr. Creech did not identify an "unusual" event occurring during the limitations period sufficient to give rise to his claim. Pet. App. 7. Yet this Court's evolving-standards cases have never demanded any "unusual" event. To the contrary, evolving-standards precedent is largely about *absences*—that is, the non-occurrence of death sentences and executions. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (indicating that "no individual ha[d] been executed for the" crime in question for many years).

The Idaho Supreme Court also squarely lined up the due process issue when it concluded that Mr. Creech was compelled by state law to bring his claim as soon as he "should have known of the facts supporting" it even though he would not then have been able to "sustain" it. Pet. App. 8. In other words, the Idaho Supreme

Court acknowledged that it was applying a timeliness requirement that would inevitably foreclose review of any evolving-standards claim, which will always be the product of years of accumulating evidence, *see, e.g.*, *Graham v. Florida*, 560 U.S. 48, 65 (2010), and thus known in some abstract sense long before it actually becomes viable based on the evidence. Because the Idaho Supreme Court constructed a test that will strand in limbo every evolving-standard claim, the decision below implicates "[t]he core of due process," i.e., the right to "a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). Mr. Creech's case consequently gives the Court a clean, simple set of facts for it to begin the project of setting down due process boundaries in the state post-conviction realm.

Finally, and more generally, Idaho's statute of limitations for successive capital post-conviction petitions is likewise a good procedural vehicle for the same project by virtue of its extreme severity. The forty-two-day deadline at issue "is the shortest in the nation." *Hoffman v. Arave*, 236 F.3d 523, 532–33 (9th Cir. 2001). Over many years, the Idaho Supreme Court has continually re-defined the triggering dates for such claims in such a way as to make them invariably untimely, even when state actors suppress evidence the petitioner needs to assert the violation. *See, e.g.*, *Fields v. State*, 298 P.3d 241, 242 (Idaho 2013) (faulting a petitioner for taking too long to realize that a police officer had destroyed a critical piece of forensic evidence that also happened to be a court exhibit). Idaho's

successive capital post-conviction regime is the most restrictive in the country, making it an ideal place for the Court to begin laying down lines in this area.

At a bare minimum, Mr. Creech's claims are surely "plausib[le]," and that should be enough to satisfy this factor for purposes of a stay of execution. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers).

II. The balance of harms weighs in Mr. Creech's favor.

The second and third factors—whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will substantially injure the other parties interested in the proceeding—also weigh in Mr. Creech's favor. As for the harm to Mr. Creech, he will be executed in the absence of a stay, which obviously constitutes an irreparable injury. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (observing that this factor "is necessarily present in capital cases"); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice) (granting a stay of execution and noting the "obviously irreversible nature of the death penalty"). This Court has granted stays to prevent far less severe consequences. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (issuing a stay to stop a court from broadcasting a trial, as it would have chilled testimony). A stay to prevent a potentially unconstitutional execution is a fortiori warranted. In addition, the denial of a stay would cause irreparable harm by "effectively depriv[ing] this Court of jurisdiction to consider the" petition. *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord*

Mikutaitis v. United States, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers) (granting a stay because the absence of one "may have the practical consequence of rendering the proceeding moot").

Plus, a stay will not substantially injure the opposing party. Mr. Creech has been on death row for this offense for more than forty years. *See State v. Creech*, 670 P.2d 463 (Idaho 1983). A brief stay of execution to allow the certiorari proceedings to reach their natural conclusion without the artificial pressure of a pending death warrant will do the State no harm. *See Mikutaitis*, 478 U.S. at 1309 (Stevens, J., in chambers) (emphasizing that the government would not "be significantly prejudiced by an additional short delay").

The public's interest in finality now is substantially diminished by the fact that Mr. Creech is not responsible for a significant amount of the delay that has occurred in carrying out his death sentence. The reason that Mr. Creech has not yet been executed is that he has had challenges pending in court to his conviction and death sentence for the last forty-plus years. One large chunk of time is attributable to the fact that Mr. Creech was resentenced to death twelve years after his initial punishment was imposed as a result of his constitutional rights being violated at the initial proceeding, which no court corrected until the Ninth Circuit intervened after extensive litigation. *See Creech v. Arave*, 947 F.2d 873, 881–85 (9th Cir. 1991), *rev'd in part*, 507 U.S. 463 (1993). Years more were tacked onto the case by virtue of this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), a decision that "represent[ed] a remarkable sea change in decades-old precedent-law which lower

courts and litigants understood as settled." *Haynes v. Thaler*, 489 F. App'x 770, 776 (5th Cir. 2012) (Dennis, J., dissenting), *vacated on unrelated grounds*, 569 U.S. 1015 (2013)). *Martinez* compelled a remand, substantial additional proceedings at the Ninth Circuit, replacement briefs on appeal, a new oral argument, and a lengthy opinion—all of which took about eleven years to accomplish. *See generally Creech v. Richardson*, 59 F.4th 372, 380–82 (9th Cir.), *cert. denied*, 144 S. Ct. 291 (2023).

Throughout all of the above, the parties and the courts both needed a substantial amount of time to ensure the issues received the appropriate level of care and scrutiny. All of these delays flow from the premise that courts are "particularly sensitive to insure that every safeguard is observed" in cases where "a defendant's life is at stake." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality op.). They certainly do not speak to any delay by Mr. Creech in bringing the claim at bar now.

Finally, the question of whether Mr. Creech impermissibly delayed his claim is inextricably bound up with the question he has presented in his certiorari petition. That is, if the Idaho Supreme Court violated the Due Process Clause in dismissing his petition as untimely, it would not make sense to fault Mr. Creech for the timing. Rather than pre-judging the ultimate legal question, the Court should grant certiorari and give it the searching consideration it merits.

III. The public has an interest in the claim being heard.

Turning to the final factor, the public has an interest in the claim being heard. Millions of Americans have state-court criminal convictions. Many of them live in states that have increasingly erected daunting barriers

to post-conviction review. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 Am. Crim. L. Rev. 1, 11 (2002) (discussing the "general trend in the states to restrict access to state post-conviction forums"). These people, as well as the lawyers who represent and prosecute them and the judges who preside over their cases, have a powerful stake in learning where the due process limit is when states restrict post-conviction review. Moreover, the public interest is always served when the Constitution is vindicated. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); *see also Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 736 (6th Cir. 2021) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

IV. A stay pending *Grants Pass* is appropriate.

A stay is also merited for the discrete reason that certiorari has been granted in another case with potentially wide-ranging implications for Mr. Creech's petition. On April 22, 2024, the Court will hear oral argument in *City of Grants Pass v. Johnson*, No. 23-175. The question presented in *Grants Pass* is whether the enforcement of generally applicable camping laws constitutes cruel and unusual punishment within the meaning of the Eighth Amendment. *See* Petition for a Writ of Certiorari, *City of Grants Pass v. Johnson* (No. 23-175), 2023 WL 5530379, at *i (Aug. 22 2023). In underscoring the significance of the question, the certiorari petition draws upon the original meaning of the Eighth Amendment, which Grants Pass

described as focused on "methods of punishment that inflict unnecessary pain and have fallen out of use." *Id.* at *3. An amicus brief submitted by Idaho and a number of other states unpacks how this originalist reading of the Eighth Amendment also undermines the Court's evolving-standards precedent. *See* Brief of Idaho et al. as Amici, *City of Grants Pass v. Johnson* (No. 23-175), 2023 WL 6320080, at *25 (Sept. 25, 2023). In the Ninth Circuit litigation that preceded certiorari in *Grants Pass*, the judges who took the majority view—and whose position is now being scrutinized at this Court—defended their position with reference to the evolving standards. *See* *Johnson v. City of Grants Pass*, 72 F.4th 868, 919 (9th Cir. 2023) (Silver, J., statement regarding denial of rehearing).

The continuing vitality of the Court's evolving-standards-of-decency caselaw is therefore front and center in an appeal that will be heard in April and decided by the end of June. Because the evolving standards are likewise at the heart of Mr. Creech's certiorari petition, it would be a logical and economical use of scarce judicial resources to stay the execution and hold the matter until an opinion issues in *Grants Pass*. After a decision is announced, Mr. Creech's certiorari petition can be ruled on in light of whatever clarifications the Court has rendered on the evolving-standards doctrine in *Grants Pass*.

In the past, the Court has not hesitated to stay executions and hold certiorari petitions when overlapping issues were presented in other cases

where review had been granted. *See, e.g.*, *Rook v. Rice*, 107 S. Ct. 30, 31 (1986) (Brennan, J., dissenting) (noting that the Court had entered seven stays of execution pending the release of opinions in two cases raising similar issues). It was a prudent approach then and it is so now as well. Because an opinion will be delivered in *Grants Pass* within the next four months at the most, a stay of execution will impose an exceedingly slight burden on the State, and Idaho can—other circumstances permitting—seek another death warrant after the present case is properly disposed of on the basis of the latest relevant precedent.

CONCLUSION

The Court should grant the application and stay Mr. Creech's execution pending a decision on his certiorari petition or, in the alternative, until an opinion has been issued in *Grants Pass*.

Respectfully submitted this 20th day of February 2024.

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