No. _____

In the

Supreme Court of the United States

IN RE JOHN E. DRUMMOND,

PETITIONER.

PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE WITH AN EXECUTION DATE OF MARCH 15, 2028

STEPHEN C. NEWMAN
Federal Public Defender

ALAN C. ROSSMAN*
Capital Habeas Unit, Director
Counsel of Record

TIANA S. BOHANON
Research and Writing Specialist
Office of the Federal Public Defender,
Northern District of Ohio
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856
alan_rossman@fd.org
tiana_bohanon@fd.org

COUNSEL FOR PETITIONER

*Member of the Bar of the Supreme Court

CAPITAL CASE

QUESTIONS PRESENTED

If, after carefully weighing all the reasons for accepting a state court's judgment, an Article III habeas court is convinced that a prisoner's custody and death sentence violate the Constitution, and if, after an independently-rendered interpretation of the state court adjudication, the Article III court finds it an erroneous structural Constitutional violation with no factual foundation to support the erroneous state court interpretation, must that Article III court interpret section 2254(d)(1) in a manner that avoids an unconstitutional infringement of the Article III court's mandated powers and duties and grant relief?

Alternatively, if, in adjudicating a capital case, an Article III court denies any remedy for a Constitutional claim it has independently adjudicated to be meritorious and with no factual basis in support such that the Article III court defers to that "clearly erroneous" interpretation of the Constitution in applying section 2254(d)(1), does that "deference" violate Article III and the Supremacy Clause, thereby effectively suspending the Writ?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATMENT

This is a petition for an extraordinary writ of habeas corpus. The petitioner is John Drummond. The respondent is Bill Cool, the Warden of Ross Correctional Institution, which has custody over Mr. Drummond.

Pursuant to Rule 29.6, no parties are corporations.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

The Supreme Court of Ohio's 4-3 Opinion that denied relief on the merits for the trial court's structural error of closing the courtroom during the testimony of three essential State witnesses without any record supporting a balancing of interests is reported at *State v. Drummond*, 854 N.E.2d 1038 (Ohio 2006).

The Memorandum of Opinion and Order of the district court, in which the district court granted Drummond relief on his public trial claim, finding structural error in the trial court's closure of the courtroom, is reported at *Drummond v. Houk*, 761 F.Supp.2d 638 (N.D. Ohio 2010).

The Opinion of the Court of Appeals for the Sixth Circuit, which affirmed the district court's grant of habeas relief, and which was vacated and remanded by this Court in *Robinson v. Drummond*, 572 U.S. 1084 (2014) (Mem.), is reported at *Drummond v. Houk*, 728 F.3d 520 (6th Cir. 2013).

The post-remand Opinion of the Court of Appeals for the Sixth Circuit, reversing its previous decision to uphold habeas relief based on the public trial claim is reported at, *Drummond v. Houk*, 797 F.3d 400 (6th Cir. 2015).

The Order of the Court of Appeals for the Sixth Circuit denying Petitioner-Appellant John Drummond's request for rehearing and suggestion of rehearing *en banc* regarding the public trial claim is unreported, at Case Nos. 11-3024/3039, Doc. No. 136-1, 09/14/2015.

The Memorandum denial of certiorari by this Court is reported at *Drummond v. Robinson*, 578 U.S. 979 (2016). (Mem.)

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES

FEDERAL STATUTES AND RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

JURISIDICTIONAL STATEMENT

Mr. Drummond invokes the Court's jurisdiction under 28 U.S.C. §§ 1651 and 2241, as well as Article III of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which read in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. VIII

> . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const., amend. XIV, § 1.

INTRODUCTION

Fourteen years ago, in *Berghuis v. Thompkins*, 560 U.S. 370, 389-90 (2010), this Court acknowledged it had never properly addressed the constitutionality of "AEDPA deference." In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), this Court overturned *Chevron*'s now clearly unconstitutional requirement that Article III judges give "deference" to federal agencies' interpretation of the law. In overruling *Chevron*, *USA, Inc. v. Natural Resources Defense Counsil, Inc.*, 467 U.S. 837 (1984), this Court described "the responsibility and power" that Article III "assigns to the Federal Judiciary" to decide cases and controversies. *Id.* at 2257. Only Article III courts are equipped to "exercise that judgment independent of influence from the political branches" and to "construe the law with '[c]lear heads . . . and honest hearts,' not with an eye to policy preferences that had not made it into the [law]." *Id.* at 2257, 2268 (quoting The Federalist No. 78). As such, "[s]ince the start of our Republic," federal courts "have 'decide[d] questions of law' and 'interpret[ed] *constitutional* and statutory provisions' by applying *their own legal judgment*." *Id.* at 2261 n.4 (quoting 5 U.S.C. § 706) (emphasis added.)

Loper's clarification of the scope of the mandatory Article III judiciary's authority has Constitutional implications for the application of AEDPA's "deference" as it was specifically applied in Drummond's habeas litigation to a properly exhausted claim based upon the unconstitutional closing of the courtroom during his criminal trial. This meritorious claim, was deemed by both the District Court and the Sixth Circuit Court of Appeals to warrant habeas relief. The only reason Drummond sits

on death row is because this Court ordered the Sixth Circuit to abandon "their own legal judgment." *Loper* now admonishes this very action.

Drummond asks this Court to grant this extraordinary writ, or in the alternative, order the Sixth Circuit panel to reconsider and properly adjudicate its decision denying Drummond relief, consistent with the panel's Article III authority. That is because, consistent with *Loper*, AEDPA "deference" as it was specifically applied in Drummond's case was interpreted in a manner that reflects an unconstitutional relinquishment of the panel judges' Article III mandated authority to independently interpret the constitution.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. The Trial Court's Closing of the Courtroom During Trial

On February 4, 2004, after the court's luncheon recess, the trial judge closed the courtroom during the trial testimony of three critical state witnesses. The judge surprised everyone announcing in open court:

> Ladies and gentlemen that are here to watch the trial, the Court is going to clear the courtroom for the remainder of the afternoon. You are invited back tomorrow at 9 o'clock in the morning. Okay? Deputies, clear the courtroom. And leave the building, not only leave the courtroom but leave the building.

(RE 35-13, Tr. Trans. Vol. 14, PageID 7274-7275).

The judge made the decision without discussion or input from defense counsel. Only *after* the courtroom was cleared and before ordering the state to call its next witness did the judge inform counsel of her reasons for closing the courtroom. These were broadly based conclusory reasons, based upon no factual basis indicated from

the record, and which revealed the judge neither considered nor weighed any available alternatives:

> It's come to the attention of the Court that some of the jurors - - or witnesses feel threatened by some of the spectators in the court. The Court's making a decision that until we get through the next couple of witnesses, I'm going to clear the courtroom. That includes the victim's family, the defendant's family and all other spectators. The Court had two incidents yesterday involving one of the spectators where he showed total disrespect to the Court in chambers and gave the deputies a very hard time. I didn't hold him in contempt of court, but just after that then another individual - - there was a physical altercation between that individual who also came to watch the trial.

(*Id.*)

Defense counsel objected to the trial court's action, noting Drummond was "entitled to a public trial," that nothing the trial court referenced had been attributable to Drummond, and that "we therefore, don't think that he should be punished in terms of not having the support people– his family. . ." (*Id.* at PageID 7276.)

The judge stated she was of the belief that the one individual she had referenced "who was *not* charged with contempt of court yesterday, … is in fact John Drummond's brother." (*Id.* at PageID 7276-7277) (emphasis added). The prosecutor corrected the judge, indicating that the gentleman was not Drummond's brother. (*Id.*) The trial court conducted no evidentiary hearing specific to any alleged basis for the court's closing. The record lacked any support for the judge's allegations. All public spectators, including Drummond's family members, were excluded from the courtroom, removed from the building, and banned from hearing the testimony of these key witnesses.

The record in Drummond's case clarifies the trial court made no specific inquiries on the record as to who was feeling threatened or by whom, the court's order closing the courtroom, (which was issued the following day), never identified who was threatening whom, and nowhere in the trial record is it discussed by any party which witnesses were frightened or which spectators were threatening witnesses. There is no indication of whose interests were substantial enough to ban all spectators at Drummond's trial from the courthouse. Nothing occurred before, during, or after the trial that would have led the trial court to believe that some omnipresent security problem existed.

B. State Court Appeals.

Drummond's appeal, which included a merits consideration of the courtroom closure was denied relief in a 4-3 split decision by the Ohio Supreme Court. *State v. Drummond*, 854 N.E.2d 1038 (Ohio 2006).

C. Habeas Litigation in the District Court Provides Drummond a Remedy for an Obvious Constitutional Violation.

Drummond filed a timely habeas petition in federal district court, arguing that the closure of the courtroom to the public, including the removal of his immediate family, during the testimony of key witnesses, violated his right to a public trial and that the Supreme Court of Ohio unreasonably applied clearly established Supreme Court law when it held otherwise. The claim was properly exhausted for AEDPA review. The District Court granted a conditional writ of habeas corpus based on this public-trial claim. *Drummond v. Houk,* 761 F.Supp.2d 638 (N.D. Ohio 2010).

D. On Appeal to the Sixth Circuit Court of Appeals the Remedy for the Constitutional Violation was Properly Upheld.

On appeal to the Sixth Circuit Court of Appeals, the District Court's grant of habeas relief was affirmed, deciding that the Ohio Supreme Court had unreasonably applied the clearly established federal law. *Drummond v. Houk,* 728 F.3d 520, 534 (6th Cir. 2013), referencing *State v. Drummond*, 854 N.E.2d 1038 (Ohio 2006). One judge (Judge Kethledge) dissented. *Id.* at 543–45.

In upholding that grant of habeas relief, the Circuit panel recognized that as applied in Drummond's case, the "proper inquiry" under AEDPA was "whether the state court decision was objectively unreasonable and not simply erroneous or incorrect." *Drummond*, 728 F.3d at 525 (citation omitted.) The panel acknowledged the adjudicatory limitations of AEDPA deference, noting that "in applying the 'unreasonable application' clause, a reviewing court must be careful *not to substitute its own judgment for that of the state court*." *Id.* (citing *Harris v. Haeberlin,* 526 F.3d 903, 910 (6th Cir. 2008)) (Emphasis added.). The Circuit panel acknowledged the deference to be afforded to the state court decision. *Drummond*, 728 F.3d at 530 ("It is not enough for us to determine that we would have reached a different result than the Supreme Court of Ohio, habeas relief is granted only where the state court's decision is objectively unreasonable.") Yet, the Circuit panel ruled the Ohio Supreme Court had misapplied *Waller v. Georgia*'s 4-prong test for closing the courtroom.

The Sixth Circuit's decision noted it was "uncontested" by the Warden that the relevant Supreme Court law here is *Waller v. Georgia,* 467 U.S. 39 (1984), and that

"the Supreme Court of Ohio applied this case to Drummond's appeal." *Drummond*, 728 F.3d at 526 (referencing *Drummond,* 854 N.E.2d at 1054–56.)

For over eight (8) pages, *id.* at 526-534, the Circuit panel presented an explained and meticulously reasoned analysis as to how the Ohio Supreme Court misapplied federal constitutional law. *See i.e., Drummond*, 728 F.3d at 530 (accepting the correctness of the district court's finding that the Supreme Court of Ohio unreasonably applied *Waller* in closing the courtroom because "the trial court made no specific inquiries on the record about who was feeling threatened by whom," and "nowhere in the trial record is it discussed by any party which witnesses were frightened or which spectators were threatening witnesses." (Citing *Drummond,* 761 F.Supp.2d at 674)); *id.* (noting that while the trial court mentioned witnesses feeling "threatened," "it did not identify the witnesses nor did it identify who threatened them or why," and finding that the record itself "is completely silent as to whether the witnesses had a 'substantial' reason for feeling threatened or if they had any grounds whatsoever for any ostensible concerns" and that it is "not even clear that the witnesses referenced were those who testified during the time of the closure.") (References to Trial Transcript omitted); *id.* at 531 (finding there were "no findings on the record to support the Supreme Court of Ohio's conclusion that there were "substantial reasons" for the closure," and indicating that the Warden "has not presented any arguments in the alternative."); *id.* (indicating that upon review of the record it did "not show the closure itself to be necessary, and even if it was necessary, the trial court did not justify clearing the entire courtroom with the exception of the

press as opposed to choosing a more narrow approach"); *id.* (noting there were no findings that "any particular witness felt threatened by any particular spectator" and "[l]ikewise, there were no findings that Drummond's family [who were removed by the trial court over objection from defense counsel] posed any threat" such that "a reviewing court cannot assess whether the trial court's closure was narrowly tailored"); *id.* (indicating that upon review of the Ohio Supreme Court's adjudication, it remained "entirely unclear why this particular closure was necessary in the first place"); *id.* (indicating that "[t]he prosecutor acknowledged on the record that Drummond's family had not been involved in any of the 'disturbances' cited by the court" and it was "[f]or reasons only the trial court knows, the family was removed from the courtroom anyway" such that as a matter of law "the closure was broader than necessary and it was unreasonable for the Supreme Court of Ohio to find otherwise"); *id.* at 532 (finding that "[a]t best, the Supreme Court of Ohio implied that, in ordering a partial closure, the trial court must have considered and rejected the more rigid alternative of a complete closure' but noting there was "[n]othing in the trial record [that] reflects that the trial court considered any alternatives."); *id.* (indicating that [t]he Supreme Court of Ohio noted that no alternatives to closure were considered, even though at least one alternative was proposed by Drummond's counsel—that Drummond's family be permitted to remain in the courtroom"); *id.* (noting that the physical altercation referred to by the Supreme Court of Ohio as a legitimate basis for closing the courtroom "did not occur on the day of the closure and there is no apparent connection between those incidents or the instigators and the

witnesses testifying on [the date of the closure] February 4th"); *id.* (indicating that a review of the record "provides no indication as to which witness felt threatened" to warrant the closure and that there was "not even an oblique reference to some characteristic of a threatened witness"); *id.* at 533 (indicating "Drummond's family was removed from the courtroom after objection without any explanation regarding the scope of the closure from the court"); *id.* (reiterating that upon review of the record, "the [trial] court, as acknowledged by the Supreme Court of Ohio, failed to consider any alternative options [to closing the courtroom and denying Drummond's family members the right to attend the ongoing proceedings].")

Simply put, there was no factual basis in the record to support any argument or theory supporting any state interest in closing the courtroom to the public, including Drummond's family. *See Wetzel v. Lambert*, 565 U.S. 520, 524 (2012) (per curiam) ("Under § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision." (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)); *cf. Miller-El v. Dretke,* 545 U.S. 231, 240 (2005) (concluding that error had occurred based on the overwhelming facts of record and the outcome reached by the state court, implicitly rejecting as unreasonable any hypothetical argument that "could have supported" denying the claim.)

The trial court closed the courtroom in a factually unsupported and clearly erroneous application of Constitutional law. It was this detailed recitation of the trial record upon which the Circuit panel's initial grant of habeas was rendered.

E. The Warden's Appeal to the Supreme Court

On the Warden's appeal to the Supreme Court, the Sixth Circuit's decision was vacated and remanded under the recently decided *White v. Woodall*, 572 U.S. 415 (2014). *Robinson v. Drummond*, 572 U.S. 1084 (2014). Relevant for Drummond's litigation, the holding of *Woodall* was a reiteration of AEDPA's deference standard specific to granting habeas relief based upon a federal constitutional violation. *Woodall*, 572 U.S. at 419–20.

F. Upon Remand from the Supreme Court

Upon remand and reconsideration, and with no additional briefing, the Circuit panel reversed itself and revoked the habeas relief. *Drummond v. Houk*, 797 F.3d 400 (6th Cir. 2015). The decision referenced its earlier decision as citing the underlying "relevant facts." *Id.* at 401. The decision recognized there was clearly established Sixth Amendment federal law specific to the closure of a courtroom, *both* full and partial. *Id.* at 402. Now rejecting its original reasoning, the Sixth Circuit panel yet noted that "Drummond's arguments are by no means frivolous." *Id.* at 403.

The panel recognized that despite *Waller*'s "cluster of more specific rules," 797 F.3d at 403, the clearly established law upon which relief was granted was the general principle that "the trial court must balance the interests favoring closure against those opposing it." *Id.* at 404. *See also Drummond v. Houk*, 728 F.3d 520, 534 (6th Cir. 2013), *judgment vacated sub nom. Robinson v. Drummond*, 572 U.S. 1084 (2014) (Kethledge, C.J., dissenting) (noting that although the Supreme Court's decision in *Waller v. Georgia,* 467 U.S. 39 (1984), concerned "a full, rather than

partial, closure of the courtroom to the public" "any fair reading of the opinion makes it obvious that even a partial closure requires some balancing of the interests for and against closure.") As the Circuit panel noted in granting habeas relief, there is *no* record at all of that balancing ever having been undertaken by the trial court. The panel noted, however, that this Court's remand itself inferred the reversal of the habeas grant. *See Drummond v. Houk*, 797 F.3d 400, 409 (6th Cir. 2015) ("Accordingly, *we must assume* that the remand in the present case was directed at the AEDPA standard of review language contained within the majority opinion," and that "in light of and the decision by the Supreme Court to vacate our previous judgment, *we are compelled to reverse* the district court and deny Drummond's petition for a writ of habeas corpus.") (Emphasis added.)

THE EXCEPTIONAL CIRCUMSTANCES

"Drummond's habeas relief, if any, lies not with our court, but with the Supreme Court." *Drummond v. Houk*, 797 F.3d 400, 409 (6th Cir. 2015) (Griffin, J., concurring). The power of this Court echoes through its decisions and speaks loudly to the courts below. Specific to this case, when applying clearly established federal law, this Court's ruling with such supreme authority has itself created a legal conundrum within the habeas forum that cannot go unaddressed. A conundrum that took back relief from Drummond, relief to which he was legally entitled, and kept him on death row, thus allowing for his execution, despite an independently assessed structural constitutional error that was determined to be unreasonable under AEDPA.

Drummond remains on death row because specific to his case, this Court vacated and remanded a decision such that AEDPA deference thereafter trumped the independent judgement of Article III judges. At every stage before vacating and remanding the Circuit panel's grant of habeas relief, the Circuit judges exercised their Article III authority and independently determined that a public trial violation occurred. *Drummond v. Houk*, 761 F.Supp.2d 683 (N.D. Ohio 2010); *Drummond v. Houk,* 728 F.3d 520 (6th Cir. 2013). This Sixth Amendment violation was the basis for the both the district court granting a conditional writ and the Sixth Circuit's decision to affirm granting relief. Upon remand, the panel followed what it perceived to be a direct order from this Court to reverse that grant and effectively abdicate its Article III duty.

After affirming the district court's grant of habeas relief, the Warden filed a petition for writ of certiorari and this Court granted the petition. A remand order was issued vacating the panel's previous decision and remanding "for further consideration in light of *White v. Woodhall*, 572 U.S. ----, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014)." *Robinson v. Drummond*, 572 U.S. 1084 (2014). The Sixth Circuit panel assumed this Court took issue not with the merits of Drummond's claim but was admonishing the panel majority's review of the claim as adjudicated under AEDPA. The panel reversed their grant of a remedy without asking for further briefing. In doing so the panel surrendered its independent adjudication and deferred to the state court's errors that warranted reversal.

In vacating and remanding, this Court reminded the Sixth Circuit how "difficult" it was to meet AEDPA's standards in granting relief, *Woodall*, 572 U.S. at 419, and discussed the deferential standard of review. *Id.* at 419-421. On remand, the Sixth Circuit surmised that "*we must assume* that the remand in the present case was directed at the AEDPA standard of review language contained within the majority opinion."[1] *Drummond v. Houk*, 797 F.3d at 409 (emphasis added.)

This Court's directive to the Sixth Circuit resulted in the panel giving such deference to the state court's decision that the availability of any habeas remedy was denied. In reversing the previous grant of habeas relief, the Circuit decision *now* reasoned the Ohio Supreme Court *could* have found that the trial court *did* balance the parties' interests despite there being no factual record. This was possible the panel reasoned, asserting the state court "did so reasonably, in the "capacious" sense of "reasonable" as used for purposes of the habeas statute." *Id.,* 797 F.3d at 404. That deference to the state court's adjudication is the same deference that Court, in *Loper*, has determined to be impermissible. "This case is close to an 'extreme malfunction' in the state criminal justice system, *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011), for which habeas relief is mandated." *Drummond v. Houk*, 797 F.3d at 409.

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[1] That the Sixth Circuit's understanding of this Court's remand order was premised upon the panel's interpretation and application of the AEDPA statute rather than based on a concern that a clearly established legal principal was improperly extended to cover the constitutional violation raised by Drummond is reflected in the Sixth Circuit's same day application of the same clearly established federal law to adjudicate another closure claim. *See United States v. Simmon,* 797 F.3d 409 (6th Cir. 2015). Similarly, this Court denied certiorari in *United States v. Mendonca*, 88 F.4th 144 (2nd Cir. 2023), where the Second Circuit applied the same clearly established federal law to a closure claim. *Mendonca v. United States*, 144 S.Ct. 2531 (2024) (Mem.)

John Drummond would not be on death row had the Sixth Circuit been able to exercise its independent Article III judgement. This is an extraordinary case in which the Sixth Circuit's interpretation of "reasonableness" in a "capacious" manner to deny relief as ordered by this Court, effectively suspends the Writ of Habeas Corpus.

RELIEF CANNOT BE OBTAINED ELSEWHERE.

"Drummond's habeas relief, if any, lies not with our court, but with the Supreme Court." *Drummond v. Houk*, 797 F.3d 400, 409 (6th Cir. 2015) (Griffin, J., concurring).

This Court vacated the Sixth Circuit's decision that affirmed the district court's grant of Drummond's habeas petition. It was that order to vacate and remand that led to the Sixth Circuit relinquishing their Article III authority and duty. The Sixth Circuit does not have an avenue to reconsider its 2015 decision, in light of *Loper,* since its was predicated on the remand order by this Supreme Court, nor is there any procedural vehicle that would allow Drummond to return to the district court. There is no forum available within which Drummond can seek a re-adjudication of that decision or get habeas relief pursuant to the claim raised, thereby suspending the Writ of Habeas Corpus, by improperly denying Drummond a remedy to which he remains Constitutionally entitled.

The writ of habeas corpus is the "highest safeguard of liberty," *Smith v. Bennett*, 365 U. S. 708, 712 (1961), and "a bulwark against convictions that violate fundamental fairness," *Engle v. Isaac*, 456 U.S. 107, 126 (1982) This Court has jurisdiction to grant original writs, *see* 28 U.S.C. §§ 2241 and 1651; Supreme Court Rule 20, and has exercised that jurisdiction when necessary to prevent injustice. *See,*

e.g. In_re Davis, 130 S.Ct. 1 (2009); *Ex Parte Grossman*, 267 U.S. 87 (1925); *Ex Parte Hudgings*, 249 U.S. 378, 385 (1918); *Matter of Heff*, 197 U.S. 488 (1905); *Ex parte Wilson*, 114 U.S. 417 (1885); *Ex Parte Lange*, 85 U.S. 163 (1873). While the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate he is being held under "the erroneous application or interpretation" of relevant law, "the habeas court *must have the power* to order the conditional release of an individual unlawfully detained." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (emphasis added.)

RELIEF IS WARRANTED

A. Drummond's Meritorious Closure of the Courtroom Claim

The right to a public trial is guaranteed by both the Sixth and First Amendments to the United States Constitution. Specific to the Sixth Amendment, violating such a fundamental right constitutes structural error. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997). *See also Arizona v. Fulminante*, 499 U.S. 279, 294–95 (1991) Because the "defect affect[s] the framework within which the trial proceeds," *Id.* at 310, it "def[ies] analysis by 'harmless-error' standards." *Id.* at 309.[2]

In *Waller v. Georgia*, 467 U.S. 39 (1984), the Supreme Court noted that while "the right to an open trial" is not absolute, and "may give way in certain cases to other rights or interests […]," *Id.* at 45, there is a "presumption of openness" and, therefore, the "balance of interests must be struck with special care." *Id.* Before ordering either

[2] Modern Supreme Court cases concerning the First Amendment right to a public trial included *Press-Enterprise Co. v. Superior Court of Cal., Riverside County*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982).

a full or partial closure of a public trial, a trial court must balance the competing interests and render "'findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Waller*, 467 U.S. at 45 (quoting *Press-Enterprise*[3], 464 U.S. at 510). As indicated, this original writ speaks not to the clearly established federal law upon which there was no disagreement. Rather this original writ speaks to Circuit panel's "reasonable," ("capaciously" speaking), application of the AEDPA deference standard to the state court tribunal's factually unsupported balancing of interests that the trial court asserted in support of that closure.

Upon remand from the Supreme Court, the Sixth Circuit panel wrongly understood they lacked the authority "to order the conditional release" of Drummond, after having independently conducting a "proper inquiry" and assessing that "the state court decision was objectively unreasonable and not simply erroneous or incorrect." *Drummond*, 728 F.3d at 525, *judgment vacated sub nom. Robinson v. Drummond*, 572 U.S. 1084 (2014), (citing *Keith v. Mitchell,* 455 F.3d 662, 669 (6th Cir. 2006) (citing *Williams,* 529 U.S. at 409–11.))

In reversing the previous grant of habeas relief, the Circuit decision *now* reasoned the Ohio Supreme Court *could* have found that the trial court *did* balance

[3] Specific to the First Amendment "the tests set out in *Press-Enterprise* and its predecessors" invoke a similar holding that "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced" if the courtroom remains open and "the closure must be no broader than necessary to protect that interest," "the trial court must consider reasonable alternatives to closing the proceeding[;]" and "it must make findings adequate to support the closure." *Waller,* 467 U.S. at 47, 48 (citation omitted).

the parties' interests despite there being no factual record. And this was possible the panel reasoned, re-adjudicating that the state court "did so reasonably, in the "capacious"[4] sense of "reasonable" as used for purposes of the habeas statute." *Drummond*, 797 F.3d at 404. The "capacious" application of what "reasonable" means when interpreting the AEDPA statute was the basis for the dissenting judge's reasoning in the panel's initial grant of the habeas remedy. *See Drummond*, 728 F.3d at 535, *judgment vacated sub nom. Robinson v. Drummond*, 572 U.S. 1084 (2014) (Kethledge, C.J., dissenting):

> In summary, then, the only principle from *Waller* that was clearly established at the time of the limited closure here was the general one that the trial court must balance the interests favoring closure against those opposing it. The Ohio courts applied that principle; and they did so reasonably, *in the capacious sense* of "reasonable" as used for purposes of the habeas statute. (Emphasis added.)

In reversing the habeas grant, in his concurring opinion Judge Griffin clarified this was yet a case in which the federal Constitution *was* violated:

> In the present case, Ohio death-row inmate John Drummond petitions for the Great Writ of Habeas Corpus on the grounds his *fundamental and paramount right to a public trial was violated*. For the reasons stated in our previous opinion, *Drummond v. Houk*, 728 F.3d 520 (6th Cir.2013), *vacated and remanded sub nom. Robinson v. Drummond*, — U.S. —, 134 S.Ct. 1934, 188 L.Ed.2d 957 (2014), *he is correct in his claim of error*. During Drummond's trial, the state judge *summarily* ordered a portion of Drummond's trial closed to the public. In doing so, the trial judge failed to consider any alternatives to the public closure and

[4] It is ironic that in the Supreme Court's initial interpretation of the AEDPA statute as amended in 1996, unlike the "capacious" reference used by the Sixth Circuit to expansively interpret the "reasonable" application of clearly established federal law in denying Mr. Drummond relief, the Supreme Court used the same "capacious" reference to inform as to the expansive nature in which the habeas statute is to be interpreted in order to *grant* relief. *See Williams v. Taylor*, 529 U.S. 362, 388–89 (2000) (reasoning that specific to how the federal courts are to interpret the "contrary to" language of AEDPA, "we think the phrase surely capacious enough to *include* a finding that the state-court "decision" is simply "erroneous" or wrong.")

> neglected to acknowledge or apply the factors required by the holding of *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).
>
> *Drummond*, 797 F.3d at 406 (Griffin, C.J., concurring) (emphasis added.)

The Judge, in a footnote noted that "[t]he framers of our Constitution acknowledged the fundamental importance of the Great Writ when they provided in Article 1, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require." it." *Id.,* at 406, fn.1.

Acknowledging there to be no factual on record to support any balancing of interests before closing the courtroom, the panel revoked its grant of habeas relief occasioned only by a "capacious" application of what was "reasonable" within the meaning of the AEDPA habeas statute. That reasoning reflects that upon remand, the Sixth Circuit panel reneged upon its Article III authority and unconstitutionally "deferred" to the state court's interpretation of clearly established Constitutional law

For the reasons articulated in *Loper,* this Court should exercise its original habeas jurisdiction and grant Drummond's instant extraordinary writ of habeas or in the alternative, re-direct the Circuit panel to re-adjudicate its decision following this Court's original remand. And consistent with Article III authority, the Circuit panel should be re-directed to independently reassess whether there was a structural error and a Constitutional violation during Drummond's capital trial warranting habeas relief consistent with a Constitutional interpretation of the AEDPA statute.

B. Acting as Ordered Upon Remand the Sixth Circuit Panel Acted Contrary to their Lawful Authority to Grant Drummond Habeas Relief

and Applied AEDPA "Deference" in a Manner Resulting in an Abdication of their Mandatory Article III Authority.

It is not surprising that upon remand the Circuit panel acted contrary to their lawful authority to grant Drummond habeas relief resulting from their interpreting AEDPA deference "capaciously." Over the years, within the Sixth Circuit, applications of "deference" in the habeas context have come to be consistent and routine. *See e.g., Moore v. Mitchell*, 708 F.3d 760, 789 (6th Cir. 2013) (Applying "the AEDPA standard of *deference*," and concluding that the Ohio Supreme Court was not objectively unreasonable); *Stermer v. Warren*, 959 F.3d 704, 721 (6th Cir. 2020) (discussing AEDPA standard and reasoning "This *deference* applies even when the state court fails to explain its reasoning," in which case "the federal court 'must determine what arguments or theories ... could have supported the state court's decision' and afford those theories *AEDPA deference*"); *Jordan v. Warden, Lebanon Corr. Inst.*, 675 F.3d 586, 592 (6th Cir. 2012) (noting the state-court decision "is entitled to *deference"* under AEDPA); *Abby v. Howe*, 742 F.3d 221, 226 (6th Cir. 2014); *Brooks v. Bagley*, 513 F.3d 618, 624 (6th Cir. 2008); *Haight v. Jordan*, 59 F.4th 817, 832 (6th Cir. 2023); *Montgomery v. Bobby*, 654 F.3d 668, 698 (6th Cir. 2011) (Clay, Circuit Judge, dissenting); *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012).

Specific to Drummond's case, in the year before its reversal upon remand, the Circuit panel acknowledged *Woodall* and recognized that although AEDPA deference restricted the court's authority to grant habeas relief, the court retained independent authority to grant relief. *See Gumm v. Mitchell*, 775 F.3d 345, 360 (6th Cir. 2014) (discussing AEDPA, noting that under *White v. Woodall*, 572 U.S. 415, 426-27 (2014):

> "[R]elief *is available* under § 2254(d)(1)'s unreasonable-application clause if, and only if, *it is so obvious* that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question" and analyzing that "[t]his *deference* reflects the view that § 2254 is only to be used to "guard against extreme malfunctions in the state criminal justice systems.") (Emphasis added.)

Before the remand, Circuit precedent acknowledged the mandatory responsibility of the federal habeas court, holding that "we *must* conduct an independent review" of the constitutional issue "unconstrained by 28 U.S.C. § 2254(d)(1)," which "mandates *deference* to state-court proceedings unless they 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Black v. Bell*, 664 F.3d 81, 97 (6th Cir. 2011) (citing *Fulcher v. Motley,* 444 F.3d 791, 799 (6th Cir. 2006)).

In reversing the grant of Drummond's habeas remedy, the Circuit panel's application of AEDPA as an imperative, now required giving AEDPA "deference" even to a state court's opinion that misinterpreted and misapplied the federal constitution as egregiously as the Sixth Circuit panel's independent assessment realized. Such "deference", as applied in Drummond's case, like the evolution of the *Chevron* doctrine, has thus evolved to where its interpretation and application is rendered Constitutionally inadequate to meet the Founding Fathers' expectations.

C. This Misunderstanding was Based Upon and Consistent with the Supreme Court's Repeated References to AEDPA "Deference" in the Context of Adjudicating Habeas Corpus Cases, Even Though the Court Has Not Previously Held That Interpretation to Be Constitutional.

Sixth Circuit precedent specific to AEDPA "deference" did not evolve in a vacuum. In *Harrington v. Richter*, 562 U.S. 86, 101 (2011), this Court spoke directly

to federal habeas concerns in its analysis of § 2254(d)(1), holding that a state court "must be granted a *deference* and latitude," principles that "are not in operation when the case involves review under the *Strickland* standard itself." (Emphasis added.) *See also id.* at 104 (analyzing that "the Court of Appeals gave § 2254(d) no operation or function" which "illustrates a lack of deference to the state court's determination," which the Court ruled to be "contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system.")

In *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011), this Court criticized the lower court's analysis of *Strickland*'s prejudice prong in a habeas context distinguishing its own habeas rulings from the state court's and clarifying that "[b]ecause this [lower] Court did not apply AEDPA deference to the question of prejudice" the lower court's adjudication was in error as it did not comport with the "doubly deferential" standard of *Strickland* and AEDPA. And in *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), this Supreme Court, again adjudicating a case under AEDPA, spoke of how "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" reasoning that a federal court's collateral review of a state-court decision "must be consistent with the *respect* due state courts in our federal system," and where 28 U.S.C. § 2254 applies, "our habeas jurisprudence embodies this *deference*." *See also Kernan v. Hinojosa*, 578 U.S. 412, 413 (2016) (per curiam) ("If the state courts adjudicate the prisoner's federal claim 'on the merits,' § 2254(d), then AEDPA mandates *deferential*, rather than de novo, review."); *Coleman v. Johnson*, 566 U.S. 650, 656 (2012) (per curiam) ("The state court

of last review did not think so, and that determination in turn is entitled to considerable *deference* under AEDPA.").

In *Loper,* the Court recognized that *Chevron* "deference" needed to be reconsidered by the Supreme Court in part because it had been utilized and considered by federal courts in contexts beyond the APA. *Loper*, 144 S.Ct. at 2269 (noting that the Supreme Court itself has "sent mixed signals on whether *Chevron* applies when a statute has criminal applications." (Comparing *Abramski v. United States*, 573 U.S. 169, 191 (2014), with *Babbitt v. Sweet Home Chapter, Communities for Great* Ore., 515 U.S. 687, 704, n. 18 (1995).) As the *Loper* Court acknowledged: "Experience has also shown that *Chevron* is unworkable." *Loper*, 144 S.Ct. at 2270. As applied to Drummond's case AEDPA "deference" was similarly "unworkable."

D. AEDPA "Deference" and *Loper*: Overview of the Constitutional Principles in Support of Granting this Original Writ.

In June 2024, the Supreme Court addressed the constitutionality of mandated federal court deference to non-Article-III actors' legal determinations. In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)[5], (*Loper*), the Supreme Court overturned what has become known these past forty years as "*Chevron* deference." The discussion and ruling were specific to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) — a foundational precedent in administrative law that an Article III reviewing court must "defer" to a federal

[5] In *Loper*, the owners of Atlantic fisheries challenged federal courts' invocation of *Chevron* to deny relief from Commerce Department fees covering the cost of onboard government monitors without making an independent judgment whether the fees violated the statutes under which the Department claimed to act. *Id*. at 2256-57.

agency's "reasonable" interpretation of an ambiguous statute that the agency administers. The Supreme Court took in two cases on limited to the question whether *Chevron* should be overruled or merely clarified. *Chevron* is now overruled.

The *Loper* Court considered challenges to the constitutionality under Article III of giving "*Chevron* deference" to federal executive agencies' decisions that it had applied "at least 70 times" without addressing its constitutionality. 144 S.Ct. at 2307 (Kagan, J., dissenting). *Loper*, overturned *Chevron*'s now clearly unconstitutional requirement that Article III judges give deference to federal agencies' interpretations of the law. In overruling *Chevron*, the Court's reasoning insisted upon a contextual foundation that acknowledged "the responsibility and power" that Article III "assigns to the Federal Judiciary" to decide cases and controversies. *Id*. at 2257. The Framers insisted that the "final 'interpretation" even of "'obscure and equivocal'" laws was "'the proper and peculiar province of the courts.'" *Id*. (quoting The Federalist Nos. 37, 75). *Only* Article III courts are equipped to "exercise that judgment independent of influence from the political branches" and to "construe the law with '[c]lear heads . . . and honest hearts." *Id*. at 2257, 2268 (quoting The Federalist No. 78). As a result, "[s]ince the start of our Republic," federal courts "have 'decide[d] questions of law' and 'interpret[ed] *constitutional* and statutory provisions' by applying their own legal judgment." *Id*. at 2261 n.4 (quoting 5 U.S.C. § 706) (emphasis added); *see also id*. at 2257 ("In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'") (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

Thus, *Loper*'s fundamental reasoning has Constitutional implications specific to the way Article III judges have mis-interpreted and misapplied AEDPA's deference in Drummond's habeas litigation to his properly exhausted claim based upon the unconstitutional closing of the courtroom during his criminal trial.

Given the Circuit panel's initially rendered independent analysis of the state court's clearly erroneous interpretation of clearly established federal law, if the Article III judges within the Sixth Circuit reversed the grant of habeas relief upon the belief the AEDPA statute, as interpreted by the Supreme Court, rendered them lacking the authority to remedy Drummond's illegal incarceration, then the Great Writ of Habeas Corpus has been suspended. Only this court can order a reassessment.

Drummond remains incarcerated on Ohio's death row and would otherwise be entitled to a remedy for the Constitutional violation in the form of a new trial. The result, however, is that Drummond has been denied *any* remedy for the state's unconstitutional incarceration and imposition of a death sentence. Consistent with *Loper*'s fundamental holding, the panel's "capacious" interpretation of AEDPA deference specific to what was "reasonable" violated the Article III judges' responsibilities to interpret the constitutional law and, in this case, provide a remedy for Drummond. Reconsideration and re-adjudication of the claim is warranted.

Alternatively, *if*, upon remand, *Loper*'s reasoning leads inevitably to the conclusion that the panel's "capacious" statutory interpretation of AEDPA was accurate as applied and the panel's application of that interpretation properly

supports the denying of relief in this specific case, there exists no remedy, and never was a remedy for Drummond and the Writ of Habeas Corpus has been suspended.

1. The Heart of *Loper*: The Constitutional Limitations of Article III Judges' Authority and the Separation of Powers

At the heart of *Loper,* was the "traditional conception of the judicial function," which compelled the Court to overrule *Chevron* deference because the doctrine required Article III judges to disregard their responsibility to interpret and apply the law. 144 S. Ct. at 2262, 2270 (noting that *Chevron* deference "required courts" to "yield[] to an agency the express responsibility, vested in 'the reviewing court,' to 'decide all relevant questions of law' and 'interpret constitutional and statutory provisions'") (quoting 5 U.S.C. § 706). When the 1946 Administrative Procedure Act (APA) directed federal courts reviewing agency action to "decide all relevant questions of law," those courts were expected to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id.* at 2273.

Federal agencies, about which *Loper*'s discussion focused, are created by Congress, to which it may appropriately delegate some of its authority to make the law that federal courts must then apply. The reasoning behind the *Loper* majority's ruling, and forcefully articulated in the concurring opinions of Justices Thomas and Gorsuch, anchored in a discussion of the breadth and scope of this delegation of law-making authority. The specific context was the "deference" to be given by Article III judges and the limitations of Article III judges' authority when considered alongside their Article III responsibilities to interpret those laws.

The first lines of *Loper* invoke the Constitutional authority bestowed upon Article III judges. "Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved." 144 S.Ct. at 2257. Citing to The Federalist, No. 78, the Court noted the Framers "envisioned" that the final "interpretation of the laws" was "the proper and peculiar province of the courts." *Id.*

The explanation underlying that Constitutional premise, which would characterize all reasoning supporting overturning the concept of "*Chevron* deference," was straight forward: "Unlike the *political* branches, the courts would by design exercise 'neither Force nor Will, but merely judgment.'" 144 S. Ct. at 2257 (citing The Federalist, No. 78, at 523 (A. Hamilton).) (emphasis added.) Article III authority was implemented to insulate the Article III judges from political influences endemic to elected officials of all kinds. It was only by insulating federal judges from these public influences that this country was "ensure[d] the 'steady, upright and impartial administration of the laws,'" *Id.* As such, the Framers purposely structured the Constitution "to allow judges to exercise that judgment independent of influence from the political branches." *Id.* (quoting The Federalist, No. 78, at 522-24.) The Court understood "'interpret[ing] the laws, in the last resort,' to be a 'solemn duty' of the Judiciary." *Id.* (citing *United States v. Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court)). There was a separation of powers purposefully mandated by the Constitution to ensure the integrity of the entire Article III judiciary.

2. Article III Independence: Respect for the Executive and Legislative Branches of Government is *Not* Deference

The above reasoning was the foundation of the Court's overturing *Chevron* and its required "deference," and the Court clarified that any "respect" owed to the any agency or Executive interpretation of the law "was just that." While the views of the elected Executive Branch "could inform the judgment of the Judiciary," those views could not "supersede it." 144 S.Ct. at 2258. Whatever respect to any such interpretation of law was due, in practical terms a judge "certainly would not be bound to adopt the construction given by the head of a department." *Id.* (citing *Decatur v. Paulding*, 14 Pet. 497, 515, 10 L.Ed. 559 (1840)). *See also Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932).

From the beginning of this country's judicial processes, regardless of any "respect" that the courts naturally displayed to the Executive Branch's interpretations of federal statutes, Article III judges bore the responsibility to "exercise[e] independent judgment" when interpreting the law. *Id.* at 2258.

Similarly, the Legislative Branch admittedly has the power to grant or withdraw Article III courts' jurisdiction to decide cases arising under the Constitution. U.S. Const. art. III, § 2. However, in exercising that power, Congress may not encroach upon the Judicial Branch's power to interpret and maintain the supremacy of the Constitution. *See Loper*, 144 S. Ct. at 2261 n. 4; *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (declaring that "[w]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is" and that any contrary expectations from the

legislative branch "must be disappointed"); *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) ("Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired.").

The Article III courts' independent power and duty to interpret Constitutional law, re-enforced by the Court in *Loper*, forecloses the Executive and Congress's ability to mandate that courts defer to the interpretation of any other branch of government.

3. Article III Independence: Mixed Questions of Fact and Law

The analysis of the Constitutionally mandated independence of the judiciary is substantive and goes beyond mere interpretation of the law. Historically, it has been applied to the application of arbitrary or unreasonably rendered fact findings to the law. Those concerns recognize that like Constitutional and legal determinations, factual determinations are often made by government agents subject to political influences. The Court, while recognizing that the legislature, for example, as a matter of discretion, could make "conclusive" findings, the federal courts could still not defer to those conclusions when "the requirements of due process" were not met "as in according a fair hearing" or, as in Drummond's case, when those findings were "arbitrarily" rendered with no discussion or hearing. 144 S.Ct. at 2258 (citing *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936)). The judiciary ultimately bore the responsibility to make the final determination specific to interpreting the law, noting that determination was based upon facts and factors that

reflected "the thoroughness evident in its consideration" and all those factors which give it "power to persuade" *Id.* (citing to *Skidmore*, 323 U.S. at 140).

As the Circuit panel made abundantly clear in Drummond's case, there was no factfinding at all to factor into the trial court's decision to close the courtroom. The *Loper* Court reaffirmed a principle it had affirmed in early case precedents that dated back to the early twentieth century. *See Kansas City S. Ry. v. C. H. Albers Comm'n Co.,* 223 U.S. 573, 591 (1912) (discussing *de novo* review of situations where "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question to analyze the facts."); *See also, Brown v. Allen,* 344 U.S. 443, 507-08 (1953) (holding while a federal habeas court could "look to the State proceedings for whatever light they shed on the historical facts," it was "for the federal judge to assess" the claim's legal merits, without giving "binding weight" to the state court's decision.)

Thus, *Loper* clarified that judicial independence in interpreting both "constitutional and statutory provisions" extended to mixed factual and legal applications of law, situations where agency actions made factual findings considered "arbitrary, capricious, [or] an abuse of discretion." 144 S.Ct at 2272. (referencing Section 706(2)(A)).

4. The Separation of Powers Discussion Specific to *Chevron* Deference Speaks to Both Constitutional and Statutory Law

Having articulated the Constitutional scope of the judiciary's independent role in interpreting the law, the *Loper* Court turned to the APA statute upon which *Chevron* itself was focused. The *Loper* Court again acknowledged the legal context

within which the APA was itself to be understood, a discussion specific to the Constitutional separation of powers.

Section 706, which was the primary APA statutory provision foundational to the *Chevron* deference analysis, speaks directly to *both* constitutional and statutory interpretations of the law. Section 706 reads that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, *interpret constitutional and statutory provisions*, and determine the meaning or applicability of the terms of an agency action." 144 S.Ct at 2261 (citing APA, 5 U.S.C. § 706) (emphasis added.) *See also, id*. at 2269-70 (rejecting *Chevron* deference as directing the violation of the APA by yielding to an agency despite the APA's "express" acknowledgment it is "the reviewing *court*," to "decide all relevant questions of law" and "interpret [constitutional and] statutory provisions") (citing § 706) (emphasis added)); also, *id.*, at 2272 (discussing APA Section 706, rejecting demands for deference, recognizing federal courts' duties under the APA to 'decide all relevant questions of law' and 'interpret [constitutional and] statutory provisions.'").

Thus, on the way towards overturning *Chevron*, the Supreme Court began with the assertion that the APA, whether referencing "constitutional" or "statutory provisions" had codified what was clear from the time "dating back to *Marbury*": Article III courts were to apply their own independent judgments as to "*all* relevant questions of law" arising on review of agency action, *id.*, and within this consideration there was "no prescri[ption]" for those courts of any "deferential standard for [Article III] courts to employ in answering those legal questions." 144 S.Ct at 2272.

5. The Responsibility to Independently Interpret Constitutional and Statutory Law is Mandatory

As per the APA, the reasoning that overturned *Chevron*, came with the understanding that courts were "directed" to "interpret constitutional and statutory provisions *without differentiating between the two*," and as Section 706 clarified, "agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference." 144 S.Ct. at 2261. (Emphasis added.)

Under the APA, it "remains the responsibility of the court to decide whether the law means what the agency says." 144 S.Ct. at 2261 (citing *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment)). *See also Id.* at 2263 (Noting the role of the federal courts under the APA is "as always, to independently interpret the statute.")

Applying those principles, the Supreme Court then considered the "law of deference" that misinformed the historical interpretations of law upon which the reasoning in *Chevron* was platformed. The *Loper* Court critically concluded that such deference has been implemented "[h]eedless of the original design" of the APA. *Id.* at 2265 (again citing *Perez*, 575 U.S. at 109) (Scalia, J., concurring in judgment). As a Constitutional matter, there is to be *no* deference demanded of federal judges that "mechanically afford[s] *binding* deference to agency interpretations." *Id.* at 2265. (Emphasis in original.) Yet, that is precisely what occurred when, upon remand from the Supreme Court, the Circuit panel reversed its previous grant of a habeas remedy to Drummond to give binding deference to the state court's interpretation of clearly established federal Constitutional law.

6. *Loper*'s Holding Mandates Federal Courts Interpret AEDPA in a Way that Does Not Defer To "Political" and "Elected" Actors. Those Concerns are Specific to Both Congressionally Appointed Agency Actors and The State Court Judiciary.

When the case originates with state judges and reaches a federal court on habeas review, Article VI obliges the federal court to assure that "the Judges in [the] State" were "bound" in their decision by the "Constitution" as the "supreme Law of the Land," "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, para. 2.

Loper's originalist reasoning negates *Chevron* deference when applied to any interpretation of Constitutional authority that posits Article III judges must give way to legal interpretations by persons, whether agency persons or otherwise, who were "indirect[ly] accountabl[e] to the people." 144 S.C. at 2264. "[I]t is especially mistaken" to conflate "policymaking suited for political actors" with the judicial role of interpreting the law. *Id.* at 2269. "It is reasonable to assume that Congress intends to leave policymaking to political actors," but "[i]ndeed, the Framers crafted the Constitution to ensure that federal judges *could* exercise judgment free from the influence of the political branches." *Id.* (referencing The Federalist, No. 78, at 522–525). "Judges have always been expected to apply their judgment *independent* of the political branches when interpreting the laws those branches enact." *Id.* at 2273 (referencing APA statute.) (Emphasis in original.)

Relevant then is the truth that like those agency persons who are not "free from the influence of the political branches," state judges are also political beings who run for election, run political campaigns and are elected by the public. The above

concerns by the *Loper* majority were analyzed making no less than three references to the precedential *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 121–22 (2015). *See Loper* 144 S. Ct. at 2261, 2265, 2270. The reasoning in *Perez* renders *Loper*'s reasoning relevant to how the federal judiciary applies the AEDPA statute.

In *Perez,* the Supreme Court referenced the qualitative differences between Article III judges and the state court judiciary. The Court gave substantive explanation as to why Article III judges carry lifetime tenured appointments. Recognizing that the Framers put in place within the Constitution "structural protections" "to free [Article III] judges from external influences." Those protection logically resulted in federal judges' lifetime appointments. Those external influences came inherent within the context of officials who are subject to the political ramifications of being elected by the public. Thus, they provided that our federal judges should "hold their Offices during good Behaviour" and receive "a Compensation, which shall not be diminished during their Continuance in Office." *Perez*, 575 U.S. at 121 (referencing Art. III, § 1) (Thomas, J., concurring).

Perez addressed these concerns in the context of state actors themselves. The court noted the "external pressures" that might be improperly placed upon Article III judges and referred to state actors in their discussion of those concerns. Justice Thomas noted that the necessary insulation from outside influences for Article III judges was driven by concerns brought on by the states themselves. He noted that the experience of the states during the period between the War of Independence and the ratification of the Constitution "confirmed the wisdom" of the reasoning that

insulated Article III judges from any interference from state actors with their Article III responsibilities of interpreting the law. *Perez*, 575 U.S. at 117 (Thomas, J., concurring.)

The Article III judicial power, "as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 117 (Thomas, J., concurring.) Thus, *Loper*'s repeated references to *Perez*, so supportive of the APA's own statutory acknowledgment that federal courts "interpret *constitutional* and statutory provisions," carry relevance for any situation in which the Article III court is responsible for saying what the law is, or interpreting how it is to be applied.

Referencing state courts specifically, it was reiterated by the *Loper* Court that "[s]ince the start of our Republic," courts have "decide[d] ... questions of law" and "interpret[ed] constitutional and statutory provisions" by "applying their own legal judgment." 144 S. Ct. at 2261, fn.4. In James Madison's words, the cardinal causes of any risk to the proper enforcement of the Constitution's provisions were "*improper Verdicts in State tribunals* obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1911) (emphasis added.) *Loper*'s holding specific to the authority of federal judges to interpret the Constitution remains consistent with the understanding that the power of federal courts to enforce federal law "presupposes some authority to order state officials to comply." *New York v. United States*, 505 U.S. 144, 179 (1992).

E. *Loper* Invoked References to the Relevancy of AEDPA. Consideration of *Chevron* in The Interpretation of AEDPA and in the Adjudication of Habeas Corpus Litigation Has Not Been a Rare Occurrence

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) amended the habeas statute's section 2254(d) to mandate what the Supreme Court has since interpreted as a "'highly *deferential* standard for evaluating state court rulings.'" *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (emphasis added.) It is noteworthy that the Respondent in both *Loper* and *Relentless*, (the second case adjudicated alongside *Loper*), asserted AEDPA deference as a practical analogy and legal basis for why the Supreme Court should uphold *Chevron* deference. *See* Brief for the Respondents, *LOPER BRIGHT ENTERPRISES, et al., Petitioners, v. Gina RAIMONDO, Secretary of Commerce, et al.*, 2023 WL 6144758, at *40:

> Congress itself has prescribed a similarly deferential approach in imposing limits on federal habeas corpus. See 28 U.S.C. 2254(d)(1) (federal-court review limited to asking whether state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law"). An Article III court does not surrender its authority to say what the law is when it answers legal questions that are themselves framed in terms of reasonableness.

Also, Brief for the Respondents, *RELENTLESS, INC., et al., Petitioners, v. DEPARTMENT OF COMMERCE, et al.*, 2023 WL 8812790, at *39 (same.)

That AEDPA was referenced by both Respondents in *Loper*'s briefing and arguments is not surprising given that in *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court's first in depth interpretation of revised section 2254(d), the *Chevron* case provided a precedential context within which the discussion as to AEDPA's statutory interpretation was engaged.

Justice Stevens' rejected analysis addressed the concern as to how federal habeas judges were to adjudicate state court decisions consistent with their Constitutional Article III authority. He analogized the statute's potential application to different modes of deferential review the Court had used in reviewing administrative decisions. *Williams*, 529 U.S. 362, 386 (2000). Justice Stevens read AEDPA to require what administrative lawyers called "*Skidmore*[6] deference": "'Section 2254(d) requires us to give state courts' opinions a *respectful* reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law "as determined by the Supreme Court of the United States" that prevails.'" *Williams*, 529 U.S. at 386 (2000) (Stevens, J., concurring) (citation omitted) (emphasis added.) Recognizing Article III authority, Justice Stevens reasoned that "[w]hatever 'deference' Congress had in mind" in section 2254(d), "it surely is *not* a requirement that federal courts actually defer to a state court application of the federal law that is, in the independent judgment of the federal court, in error," *id*. at 387, "'as if the Constitutions means one thing in Wisconsin and another in Indiana.'" *Id.* Had that interpretation been accepted by the majority there would be no current implications for AEDPA given *Loper*.

[6] *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). In the *Loper* Court's reasoning for overturning *Chevron*, it quoted favorably Justice Jackson in *Skidmore*, to the extent that *Skidmore* did not suggest that federal courts *defer* when interpreting the law. *Skidmore*, "[e]cho[ed] themes" in the Supreme Court's precedents present "from the start." *Loper*, 144 S.Ct. at 2284 (quoting *Skidmore*, 323 U.S. at 140). Article III judges are directed to "extend respectful consideration to another branch's interpretation of the law, but the weight due those interpretation must always 'depend upon the[ir] thoroughness . . ., the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade." *Id.*

Justice Stevens' rejected concerns with the way the AEDPA statute was to be implemented and his analogized reference to "administrative review" in *Williams,* was presciently reinforced by his specific reference to *Chevron*. As Justice Stevens explained,

> Deference after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council* depends on delegation. Congress [in enacting AEDPA] *did not delegate either interpretive or executive power to the state courts.* They exercise powers under their domestic law, constrained by the Constitution of the United States. 'Deference' to the jurisdictions bound by those constraints is not sensible.

Williams, 529 U.S. at 387. That reasoning, although not accepted by five of the Justices, is now validated consistent with *Loper*'s recent overruling of *Chevron* deference as it has come to be applied over the years. The reasoning of the *Loper* Court also vitiates the Court majority's interpretation of section 2254(d) in *Williams.*

F. Consideration Of *Chevron* by Lower Federal Courts in Adjudicating Habeas Cases is Common.

Consideration of *Chevron* by lower federal courts, both pro and con, in the adjudication of habeas corpus litigation has not been a rare occurrence. *See e.g., Tyler v. Anderson*, 749 F.3d 499, 510 (6th Cir. 2014) (adjudicating habeas "judgments, not opinions" and referencing *Chevron,* 467 U.S. at 842); *Sandoval v. Reno*, 166 F.3d 225, 240 (3d Cir. 1999) (adjudicating claim and "[a]ssuming arguendo that *Chevron* does apply"); *Van Tran v. Lindsey*, 212 F.3d 1143, 1151 (9th Cir. 2000) (discussing AEDPA's reasonableness and unreasonableness standards and noting federal courts have applied a "reasonableness" test when reviewing certain legal questions under *Chevron*); *Jackson v. Dretke*, 181 F. App'x 400, 415 (5th Cir. 2006) (Dennis, Circuit

Judge, concurring) (disagreeing with "the majority's broad, . . . suggestions that AEDPA requires that federal courts apply a "deferential standard of review," and reasoning that "deference" is not articulated in the statute and noting that "[d]eference after the fashion of *Chevron* [], depends on delegation" and "Congress did not delegate either interpretive or executive power to the state courts."); *Johnson v. Gonzales*, 478 F.3d 795, 799 (7th Cir. 2007) (holding on habeas review "deference to agency interpretations of the law it administers" as properly citing *Chevron*, and reasoning "[t]hat deference has been seen as particularly appropriate in the immigration context.").

Thus, *Loper*'s ruling, not unexpectedly, has relevance for the adjudication of Drummond's case seeking the habeas remedy under the AEDPA statute.

G. The Circuit Panel's Application of AEDPA Deference to Drummond's Case to Deny the Habeas Remedy for a State Court's "Arbitrary" Interpretation of the Constitution Effectively Suspended the Writ.

The Article III panel's revoking of the habeas remedy upon remand frustrated all available collateral remedies for Drummond, and with no means to litigate his substantial claim, the Writ was effectively suspended. *See Davis v. Adult Parole Authority*, 610 F.2d 410 (6th Cir. 1979) (permitting "a court to dismiss an action for habeas relief without any consideration of the equities presented renders the habeas corpus process inadequate to test the legality of a person's conviction and, thereby, constitutes a prohibited suspension of the writ.")

The trial court's courtroom closure adjudication was "arbitrary." "From the record, the timing and breadth of the closure appears completely arbitrary and

without any justification." *Drummond v. Houk*, 728 F.3d 520, 531 (6th Cir. 2013), *judgment vacated sub nom. Robinson v. Drummond*, 572 U.S. 1084 (2014). That adjudication is significant. The description of the Suspension Clause stated that habeas corpus was "provided for in the most ample manner" to guard against "[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions" and that, together with the right to a jury trial, habeas corpus provided comprehensive protection against "judicial despotism" in criminal cases. The Federalist, No. 83, at 499 (A. Hamilton).

This request is an "as applied" challenge. *Loper*'s articulations impact habeas litigation and its remedial processes and cannot be arbitrarily ignored, given how extensively AEDPA "deference" has been utilized. The Supreme Court has long recognized, the writ may be suspended indirectly and by repeal. *See Ex parte Bollman*, 8 U.S. (4 Cranch.) 75, 95 (1807). That has occurred in Drummond's case.

CONCLUSION

Because this is a capital case, "there is a corresponding difference in the need for reliability." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This Court must assure the habeas remedy is yet available. *Martinez-Villareal v. Stewart*, 118 F.3d 628, 631-32 and nn. 3-5 (9th Cir. 1997), *aff'd on other grounds,* 523 U.S. 637 (1998). The Circuit panel's denial of habeas relief as applied in Drummond's case upon remand conflicts with all of *Loper*'s reasoned analysis. This Court should order the panel to re-adjudicate and revise its decision upon remand that revoked the habeas relief previously granted by the Circuit panel by construing section 2254(d) in

accordance with Justice Stevens' interpretation in *Williams*[7], (and avoid deciding a constitutional question, *see I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001)). In the alternative, this Court should conclude that requiring a "capacious" interpretation of AEDPA deference as the Circuit panel did in Drummond's case upon remand violates Article III and the Supremacy Clause.

Respectfully submitted,

STEPHEN C. NEWMAN
Federal Public Defender

/s/ Alan C. Rossman
ALAN C. ROSSMAN*
Capital Habeas Unit, Director
Counsel of Record

TIANA S. BOHANON
Research and Writing Specialist
Office of the Federal Public Defender,
Northern District of Ohio
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856
alan_rossman@fd.org
tiana_bohanon@fd.org

COUNSEL FOR PETITIONER

*Member of the Bar of the Supreme Court

[7] "In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment should prevail." *Williams*, 539 U.S at 389-90 (Stevens, J., concurring).