No. 22-431

In the Supreme Court of the United States

GIGI JORDAN,
Applicant,
v.
AMY LAMANNA,
Respondent.

On Application for Emergency Relief

EMERGENCY APPLICATION FOR A RULE 36.4 ORDER REINSTATING THE DISTRICT COURT'S INITIAL ORDER RESPECTING CUSTODY PENDING APPEAL, OR IN THE ALTERNATIVE FOR A RULE 23 STAY OF THE SECOND CIRCUIT'S ORDER RECALLING THE MANDATE AND VACATING THE DISTRICT COURT'S ORDER

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Pursuant to this Court's Rule 36.4, applicant Gigi Jordan respectfully requests that the Circuit Justice enter an "independent order respecting custody" that reinstates the district court's initial custody order pending appeal, thus allowing Jordan (who is presently released, subject to a secured bond and court-imposed curfew) to remain at liberty pending the disposition of her petition for a writ of certiorari, which was filed November 4, 2022 and has been distributed for the Court's January 6, 2023 conference.

In the alternative, and pursuant to Rule 23, Jordan requests a stay the Second Circuit's December 19 order revoking her liberty, again pending disposition of her petition for a writ of certiorari before this Court.

Because the Second Circuit has ordered Jordan to surrender forthwith, she also respectfully requests an immediate administrative stay of the Second Circuit's order pending resolution of this application.

INTRODUCTION

This case is presently on appeal from the district court's grant of a writ of habeas corpus under 28 U.S.C. § 2254(a) following a stunning courtroom closure in the middle of petitioner's state-court criminal trial. See Pet. 17a-62a.

Federal Rule of Appellate Procedure 23(c) "creates a presumption of release from custody" pending the State's appeal from the district court's grant of habeas relief. *Hilton* v. *Braunskill*, 481 U.S. 770, 774 (1987). *Accord O'Brien* v. *O'Laughlin*, 557 U.S. 1301, 1302 (2009) (Breyer, J., in chambers) ("There is a presumption of release pending appeal where a petitioner has been granted habeas relief."). Consistent with that presumption, the district court issued a thorough opinion ordering Jordan released from custody pending the

State's appeal. Dist. Ct. Dkt. 60. In so doing, the court imposed a substantial bond requirement and other conditions of release enforced by the court's Pretrial Services Office.

According to this Court's Rule 36.4, the district court's "initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals *and in this Court*." S. Ct. Rule 36.4 (emphasis added). An initial order may be modified or revoked pending appeal only by means of an "independent order respecting custody" entered by "the court of appeals, this Court, or a judge or Justice of either court" "for reasons shown." *Ibid.*; FRAP 23(d).

At the outset of the appellate proceedings below, the Second Circuit denied the State's motion to revoke district court's initial order respecting custody. App. D. Some months later, the court of appeals reversed the district court's grant of habeas corpus relief on the merits. See Pet. App. 1a-16a. But the court of appeals did not then order Jordan's immediate return to custody. Nor did the State request any such relief in the 42 days that elapsed between the Second Circuit's merits decision and the issuance of the appellate mandate. In the time since, Jordan has filed a petition for a writ of certiorari, which was circulated last week for the Court's January 6, 2023 conference.

Yet just yesterday afternoon, December 19, 2022—more than six weeks after Jordan filed her petition for a writ of certiorari in this Court, and more than *five months* after the Second Circuit issued its mandate—the Second Circuit stunningly recalled its mandate and vacated the district court's initial order granting Jordan's release pending appeal, requiring her immediate surrender and return to state custody while proceedings are ongoing in this Court. It did so in a two-line, unreasoned order entered in response to motions from the State that lacked almost any argument at all.

If the Circuit Justice does not now enter "an independent order respecting custody" pursuant to Rule 36.4 reinstating the district court's order or, pursuant to Rule 23, staying the court of appeals' intervening order, this Court's ability to undertake a meaningful review of Jordan's petition will be directly undermined. The question whether Jordan should be in custody or at liberty is *the* question posed in the appeal. If she is made to return to custody now, before the Court has had a chance to decide her petition—and, if the petition is granted, to issue a merits decision—the purpose of the Court's review will have been undercut. What's more, the Second Circuit's order is altogether indefensible on its merits: The court recalled its mandate without any demonstration by the State that such extraordinary relief was appropriate. And it revoked Jordan's liberty despite that she has been a model releasee and there is zero public interest in returning her to prison before these appellate proceedings have run their course. The Circuit Justice accordingly should grant the modest relief requested in this application.

STATEMENT

The background of this case is set forth in detail in Jordan's petition for a writ of certiorari. Pet. 5-12. For convenience, a summary follows.

1. Jordan was indicted in connection with the untimely death of her severely autistic son. Pet. 5. Her jury trial garnered significant media attention. *Ibid.* Around halfway through the trial and four days before Jordan was set to testify in her own defense, the prosecution approached the judge to discuss a matter off the record. Pet. 6. The judge determined that he "ha[d] to close the courtroom without any spectators in the audience" temporarily. *Ibid.* All of the spectators in the packed gallery—including many members of the press—were escorted out of the courtroom over Jordan's strenuous objections. *Ibid.* While the courtroom was closed, the judge heard the prosecution's request for a jury in-

struction, admitted materials as exhibits, and admonished Jordan's counsel concerning Jordan's constitutionally protected publication of evidence and commentary on a website. *Id.* at 6-7. The content of this proceeding preoccupied the judge throughout the rest of the trial; indeed, it was the last thing he mentioned before sentencing Jordan to 18 years' imprisonment.

After exhausting her direct appeals, Jordan filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254(d)(1), challenging her conviction on the ground that the courtroom closure had violated her constitutional right to a public trial. *Id.* at 10.

2. The district court granted the petition. Pet. App. 17a-62a. The court held that the closure implicated the Sixth Amendment because the closed proceeding was a substantive component of the judicial proceedings comprising Jordan's trial (Pet. App. 42a-44a) and Jordan was not required to point to a Supreme Court opinion "holding that the public trial right applied to the *specific type* of Closed Proceeding that occurred during her trial" (Pet. App. 41 (emphasis added)). Because this Court's clear requirements for courtroom closures had not been satisfied (Pet. App. 45a), the district court granted the petition.

3. After it granted Jordan's petition, the district court ordered Jordan released from state custody while the State's appeal was pending, consistent with Appellate Rule 23(c). See App. B. The release order was thoroughly reasoned and meticulously executed. The district court initially gave the State time to seek relief from the Second Circuit. App. C. Shortly after the Second Circuit denied the motion to vacate the release order (App. D), the court issued a writ of *habeas corpus ad prosequendum* requiring Jordan to be transferred from the State's custody to custody of the federal marshals. Dist. Ct. Dkt. 56. After the transfer, the court held a bond hearing (Dist. Ct. Dkt. 58) in which it imposed thirteen enumerated conditions for release, including a $250,000 secured bond and 24/7 GPS

ankle-monitoring (App. B). Later, at the suggestion of the court's Pretrial Services Office in light of Jordan's cooperative behavior, the condition requiring 24/7 GPS ankle-monitoring was modified to require only telephonic curfew check-ins. Dist. Ct. Dkt. 68.

4. The Second Circuit ultimately reversed the grant of habeas corpus relief. See Pet. App. 1a-16a. In doing so, the court of appeals did not address the question whether Jordan should remain at liberty pending this Court's consideration of any petition for a writ of certiorari. Nor did it order the mandate to issue forthwith or otherwise indicate an expectation that Jordan should return immediately to custody.

Jordan filed a petition for rehearing en banc, tolling the issuance of the mandate. C.A. Dkt. 77. The Second Circuit denied the rehearing petition on June 9, 2022, and issued the mandate on June 16, 2022. At no point during the 42-day period between the court's merits decision and the issuance of the mandate did the State ask the court to revoke or modify the district court's initial order granting Jordan release pending appeal.

5. Some time after the mandate issued, the State moved the district court to vacate its order granting release pending appeal. *See* Dist. Ct. Dkt. 72. In opposing the motion, Jordan argued that the case was then pending before this Court, where Jordan had since commenced proceedings. Thus, she argued, the district court was deprived of authority to modify the initial order respecting custody by Appellate Rule 23(d) and this Court's Rule 36.4, both of which specify that an initial order respecting custody may be modified only by the court of appeals, this Court, or a judge or Justice of either. Because the Second Circuit's mandate had long since issued, Jordan took the position that the State had to seek relief, if at all, from the Circuit Justice.

The district court denied the State's motion. Dist. Ct. Dkt. 86. At bottom, the court agreed it was "preclude[d]" by Appellate Rule 23(d) and Supreme Court Rule 36.4 from

modifying or revoking the release order "while Jordan seeks Supreme Court review." *Id.* at 7. It thus declined to reach the merits of the State's motion. *Id.* at 10.

But the State did not then file an application for relief from the Circuit Justice. Instead, another 46 days after the district court denied relief, it filed a motion in the Second Circuit, despite that the mandate had issued five months earlier. C.A. Dkt. 85. Alerted by the clerk's office to the lack of jurisdiction, the State then spent a single afternoon hastily preparing a motion to recall the mandate. C.A. Dkt. 87. The motion to recall the mandate laid out the procedural history and contained *just one sentence* of argument, which asserted without explanation that "the recall of the mandate would be nothing more than a ministerial action." *Id.* at 3.

Meanwhile, proceedings before this Court continued. The first filings in the case were docketed in this Court on July 14, 2022, when Jordan requested an extension of time within which to file her certiorari petition. The Circuit Justice granted that application on July 20, 2022. Jordan in turn filed a petition for a writ of certiorari on November 4, 2022. The State waived response, and the petition was distributed on December 14, 2022 for the Court's January 6, 2023 conference.

On December 19, 2022—a mere 18 days before the Court is scheduled to consider Jordan's petition at conference, and just six days before Christmas—the Second Circuit issued an order recalling the mandate and granting the State's motion to vacate the district court's bail orders. Ex. A. The order requires Jordan to surrender to State authorities "forthwith." It contains no reasoning.

REASONS FOR GRANTING THE APPLICATION

The Second Circuit's order is indefensible. It grants the extraordinary relief of recalling the mandate, but without a word of argument from the State or a word of reasoning

to explain its action. This Court has said that to recall of the mandate is an "extraordinary" form of relief that may be granted only "sparingly" upon a specific and detailed showing that it is necessary to prevent injustice. *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998). There is nothing like that here. Having granted this wholly unwarranted form of extraordinary relief, the court of appeals then revoked Jordan's liberty without any regard for the presumptions in favor of release pending appeal or in favor of maintaining the district court's initial order. And it did so despite that the case is pending before this Court, and granting such relief seriously undermines this Court's review.

Pursuant to the Circuit Justice's authority to enter "an independent order respecting custody" under Rule 36.4, it should vacate the Second Circuit's December 19 order and reinstate the district court's initial order requiring Jordan's release on conditions. There has been no change in factual circumstances warranting a change in Jordan's custody status prior to the conclusion of the proceedings before this Court, and the State has no interest in rushing her needlessly back to state custody at this juncture.

At minimum, the Circuit Justice should enter a Rule 23 stay the Second Circuit's order. All the traditional requirements for a stay are met, and to return Jordan to prison now, just days before the winter holidays and a decision from this Court on her petition, would be grossly unjust. Either way, the application should be granted.

I. THE CIRCUIT JUSTICE SHOULD VACATE THE SECOND CIRCUIT'S ORDER AND REINSTATE THE DISTRICT COURT'S ORDER

A. There are strong presumptions in favor of Jordan's release pending all stages of the appeal and of maintaining the district court's initial order

The analysis begins with the applicable rules, which create a strong presumption in favor of release pending appeal from a grant of habeas relief, including in proceedings before this Court. This Court's Rule 36.3(b) specifies that "[p]ending review of a decision

ordering release," as occurred here, "the prisoner *shall* be enlarged on personal recognizance or bail" unless the district court or an appellate judge or Justice orders otherwise. S. Ct. Rule 36.3(b) (emphasis added). Appellate Rule 23(c) similarly provides that "[w]hile a decision ordering the release of a prisoner is under review, the prisoner *must*—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety." FRAP 23(c) (emphasis added). This Court has explained that these rules "undoubtedly create[] a presumption of release from custody" pending an appeal from an order granting habeas corpus relief. *Hilton* v. *Braunskill*, 481 U.S. 770, 774 (1987); accord *O'Brien* v. *O'Laughlin*, 557 U.S. 1301, 1302 (2009) (Breyer, J., in chambers) (affirming the "presumption of release pending appeal where a petitioner has been granted habeas relief" and denying State's application to revoke bail).

The same rules likewise create a presumption that the district court's "initial order respecting custody," no matter whether it grants or denies relief, should remain in place undisturbed throughout the appellate process. Rule 36.4 states, in particular:

> An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

By its plain terms, the rule requires that the initial custody order "shall" remain in effect pending all stages of appellate review (including "in this Court") unless for "reasons shown" the State can demonstrate that a superseding order is warranted. Appellate Rule 23(d) is to the same effect, requiring the movant to come forward with "special reasons" warranting a change in the petitioner's custody status pending appeal. Thus, any appellate

court asked to alter the custody status of a habeas petitioner on appeal "must accord a presumption of correctness to the initial custody determination made" by the district court. *Hilton*, 481 U.S. at 777.

Both of those presumptions work in Jordan's favor in this case: She was granted habeas relief by the district court, presumptively entitling her to release during all stages of appeal, including in this Court. And the district court granted release pending appeal—a decision that must be accorded a presumption of correctness.

B. There has been no change in circumstance warranting a revocation of liberty prior to the conclusion of this Court's review

To determine whether the Circuit Justice should reinstate the initial order pursuant to Rule 36.4—which expressly "empowers" the "an individual Justice" to decide "an application respecting the custody or release of any prisoner involved in a federal habeas corpus appeal" (Shapiro et al., *Supreme Court Practice* 921-922 (10th ed. 2013))—the Circuit Justice must evaluate the same factors that the district court applied when first ordering Jordan's release, including the prospect of injury to either party and where the public interest lies. *Hilton*, 481 U.S. at 776. The State has now moved both the district court and the court of appeals to revoke Jordan's liberty, but in all its filings, it has not offered any factual basis to overcome the presumptively-correct initial release order.

1. As the district court explained in the opinion (App. C) accompanying its initial release order (App. B), the State has an extremely limited interest in holding Jordan in custody pending appeal because Jordan already "has served over 70% of her sentence." App. C, at 10. This undercuts any alleged harm to the State's custodial and rehabilitative interests, which "will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served." *Hilton*, 481

U.S. at 777. Courts across the Nation uniformly agree. See, *e.g.*, *Pouncy* v. *Palmer*, 168 F. Supp. 3d 954, 970 (E.D. Mich. 2016); *Waiters* v. *Lee*, 168 F. Supp. 3d 447, 454 (E.D.N.Y. 2016).

On the other side of the scale, a habeas petitioner's interest in release is "always substantial," especially when the claim is sufficiently strong that the district court grants relief. *Hilton*, 481 U.S. at 777. Thus, "having succeeded on her habeas claim, Jordan has a strong interest in her release from custody." App. C, at 11 (cleaned up) (quoting *Pouncy*, 168 F. Supp. 3d at 969). There is also no question that a stay would *not* cause any irreparable harm to the State. The district court granted Jordan's initial motion for release in December 2020 because there was no evidence demonstrating that she posed a threat to the public or was a flight risk, and the injury to her from further incarceration would have been great. Dist. Ct. Dkt. 65. When the State moved the Second Circuit for relief from that order, the court declined the request for the same reasons. App. D.

Two years later, nothing has changed to support a different outcome. Jordan has been a model bailee. Pretrial Services has confirmed to the district court (and to the State upon its separate email request) that she has abided all instructions and respected fully the terms of her release. *See* Dist. Ct. Dkt. 77-2. There was no ground to find Jordan a safety or flight risk in December 2020, and there is none now. *See O'Laughlin*, 557 U.S. 1303 (denying the State's motion to stay a release order where it "has made no showing that he poses an especial flight risk or danger to the public"). As this Court has acknowledged, the arguments in favor of release pending appeal "will be strongest where" the State's interests "are weakest." *Hilton*, 481 U.S. at 777. This factor, too, points in favor of release.

2. The only *Hilton* factor that the State has ever even attempted to address (albeit briefly, and while improperly attempting to put the burden on Jordan) is whether there is a

"reasonable probability" that this Court would grant certiorari and reverse. It has not shown and cannot show the absence of such a probability.

Jordan's petition for a writ of certiorari was filed on November 4 and docketed on November 8, 2022. The strength of that document, which was distributed last week for consideration at the January 6, 2023 conference, speaks for itself. In summary, the question presented in the petition is whether a federal habeas petitioner seeking relief on the basis of a violation of the Public Trial Clause can demonstrate an "unreasonable application of clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1) in the absence of Supreme Court precedent involving analytically indistinguishable facts.

The answer to that question is what drove the outcome in this case. The district court granted relief because it expressly resolved it in Jordan's favor: "Jordan was not required to find a Supreme Court opinion holding that the public trial right applied to the specific type of Closed Proceeding that occurred during her trial in order to prevail on [her] claim." Pet. App. 41a (quotation marks omitted). The Second Circuit reversed because it answered the question presented differently: "Neither *Waller* nor *Presley* clearly establishes whether the Sixth Amendment extends to the Closed Proceeding" (Pet. App. 12a), and "it was not unreasonable for the Appellate Division to deny Jordan's claim" given the absence of Supreme Court precedent addressing "this sort of wholly ancillary proceeding." Pet. App. 14a-15a. Thus, the disparate resolutions of the question presented manifestly drove the different outcomes.

Moreover, the Second Circuit's resolution of the question conflicts with decisions of several other courts of appeals, which have held that a habeas petitioner need not point to a prior decision of the Supreme Court resolving the constitutional questions on an identical or nearly identical fact pattern. *See* Pet. 13-20. The question is also undeniably im-

portant: Federal habeas petitions under Section 2254(d)(1) are among the most frequently litigated requests for relief in the federal judicial system, and the question presented here (whether petitioners must show that the Supreme Court has previously found a constitutional violation on identical or nearly identical facts) goes to the heart of how federal habeas review works.

Finally, the Second Circuit's resolution of the question presented was patently wrong. Section 2254(d)(1) authorizes habeas relief when the last reasoned state-court decision is *either* "contrary to" *or* "an unreasonable application of" this Court's precedents. If a petitioner had to identify a factually identical decision of this Court (or nearly so) to show an unreasonable application within the meaning of 2254(d)(1), the two prongs would collapse into one, and a crucially important backstop against constitutional transgressions in state-court criminal trials would be eliminated. That is not what Congress intended when it guaranteed relief for "unreasonable applications" of this Court's precedents.

3. Any doubt concerning the strength of the petition (there should be none) is resolved by the Circuit Justice's own recent vote in favor of certiorari "to provide much needed guidance to the lower courts" in habeas cases involving courtroom closures like this. See *Smith* v. *Titus*, 141 S. Ct. 982, 989 (2021) (mem.). In *Smith*, the state criminal trial judge had "cleared all members of the public from the courtroom before issuing a key evidentiary ruling." *Id.* at 982. Precisely like the state appellate court in Jordan's case, the state supreme court "found no constitutional error because it concluded that defendants have no public-trial right in so-called administrative proceedings" where the issues addressed are "similar to what would ordinarily and regularly be discussed in chambers or at a sidebar conference." *Id.* at 982-983. Just like the Second Circuit here, the Eighth Circuit subsequently ruled that habeas relief was unwarranted "because this Court has

never specifically addressed whether 'administra-tive' proceedings implicate the Sixth Amendment right to a public trial." *Id.* at 984 (cleaned up).

When Smith later sought this Court's review, the Circuit Justice voted to grant the petition and summarily reverse. She described the state court's decision as a "direct[] contradict[ion] [of] *Waller* and *Presley*." *Smith*, 141 S. Ct. at 987. She dismissed as "inapt" the court's "analogy between the closed proceeding in Smith's case and sidebar-like proceedings such as 'private bench conferences or conferences in chambers.'" *Id.* at 986. The Circuit Justice thus concluded that the Eighth Circuit's rejection of habeas relief was error. Like the Second Circuit here, it had "artificially cabin[ed] *Waller* and *Presley* to their facts," effectively requiring Smith to identify a Supreme Court case addressing the same kind of proceeding. *Id.* at 987. But that is not what AEDPA requires: "When this Court announces a legal principle and applies it to a particular factual situation, it is the legal principle itself, not the factual outcome, that becomes clearly established federal law." *Id.* There, just as here, *Waller* and *Presley* "unequivocally hold that courtrooms may not be closed (absent sufficient justification) during any phase of a criminal proceeding," calling for habeas relief. *Id.*

Against this background, Jordan's prospects before the this Court are reasonably strong. The facts in this case are far more egregious than those in *Smith*—the closure here was for substantive proceedings in the midst of the parties' cases-in-chief. It involved substantial exchanges between the parties and the judge, and not merely the announcement of an evidentiary ruling. In addition, the defendant was present and was admonished by the judge just days before taking the stand in her own defense. Given the presence of a circuit split and the Circuit Justice's strongly-worded opinion in favor of hearing the question pre-

sented, there is at least a reasonable probability that certiorari would be granted and that petitioner would have a fair prospect of prevailing.

Considering all of these factors together, it would be impossible to say the presumption in favor of release has been overcome here. It certainly cannot be the case that the Second Circuit's reversal of the district court *alone* suffices to defeat the presumption, as the State argued below. Such a conclusion would render the first half of Rule 36.4 inoperative in every case involving a reversal of a grant of habeas relief—an "initial order respecting the custody *** of the prisoner" would never "continue in effect pending review *** in this Court" in such cases. If that is what the Court had intended with Rule 36.4, it would have been a simple matter of saying so. It did not. Given that the reversal is the only changed circumstance that the State has ever presented as justification for revoking the release order, it has not overcome the presumption of release.

4. Rule 36.4 expressly empowers the Circuit Justice to enter the relief requested. See S. Shapiro et al., *Supreme Court Practice* 921-922 (10th ed. 2013) (Rule 36 "empowers" the "court or an individual Justice" to decide "an application respecting the custody or release of any prisoner involved in a federal habeas corpus appeal," and collecting cases). No other court or judge can grant relief. Indeed, the relief requested *was* initially granted by the district court. See App. B, C. When the State later sought an order from the district court vacating its initial release order, the district court denied relief on the ground that it lacked authority under Appellate Rule 23(c) and this Court's Rule 36.4 to alter Jordan's custody status pending appeal. See App. E. When the State then sought an intervening order from the Second Circuit requiring Jordan's remand to custody pending the remainder of the appeal, the Second Circuit recalled its mandate for the limited purpose of deciding the State's motions, rejected Jordan's arguments, and granted the State's motion. See App.

A. The Circuit Justice (or the full Court by referral) is thus the final remaining authority with power enter an "independent order respecting custody" (Rule 36.4) vacating the court of appeals' December 19 order and reinstating the district court's initial order of release during this Court's review of the appeal.

C. The Second Circuit's recall of the mandate was an abuse of discretion

The Circuit Justice should vacate the Second Circuit's order pursuant to Rule 36.4 for the independent reason that to recall the mandate in these circumstances was an abuse of discretion. For the Second Circuit even to have entertained the State's motion was therefore improper and a basis for a Rule 36.4 vacatur of the December 19 order.

To be sure, it is generally accepted that "the courts of appeals *** have an inherent power to recall their mandates." *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998). But that power is "subject to review for an abuse of discretion." *Ibid.* And because issuance of the mandate is a jurisdictional event that "ends the jurisdiction of the circuit court" (21 Moore's Federal Practice § 341.02 (2022)), it is settled that the power "can be exercised only in extraordinary circumstances," as a "last resort" to prevent "grave, unforeseen contingencies" not addressed in initial appellate proceedings. *Calderon*, 523 U.S. at 550 (citing 16 Federal Practice and Procedure § 3938 (2d ed. 1996)).

Authorities thus uniformly agree that the mandate is appropriately recalled only when necessary to rectify frauds upon the Court; to fix scriveners' errors that, if left uncorrected, would produce miscarriages of justice; or to address "a supervening change in the governing law that affects the correctness of the court's judgment." 21 Moore's Federal Practice § 341.15[2] (2022). Accord 16 Federal Practice and Procedure § 3938 (3d ed. 2022). Limiting recalls of the mandate to circumstances like those, where the "very legitimacy of the [appellate] judgment" is called into question, is essential to respecting "the

profound interests in repose attaching to the mandate of a court of appeals." *Calderon*, 523 U.S. at 550 (quotation marks omitted).

None of that was remotely present here. The State moved to recall the mandate *five months* after the mandate's issuance. But it did not cite any change in circumstance that might render such extraordinary relief appropriate. Indeed, it did not even cite the applicable standard for decision, wrongly describing a recall of the mandate as a merely "ministerial" act of no substance. That could not be more incorrect.

Nor is the Second Circuit's unreasoned decision defensible on its own terms. This case assuredly does not involve the kind of extraordinary circumstances necessary to justify a recall of the mandate. Jordan has been released for the past two years; continuing her release for the short period of time needed for the Court to resolve her petition for a writ of certiorari hardly constitutes a miscarriages of justice—not least because the Court may grant the petition and reverse the Second Circuit.

Nor did the Second Circuit recall the mandate as a matter of "last resort." *Calderon*, 523 U.S. at 550. Again, the State had 42 days between the Second Circuit's merits decision and the issuance of the mandate within which to seek an immediate revocation of Jordan's release. Its decision not to do so is unexplained. And if the State believed an immediate revocation was imperative at this later juncture, it could have sought relief from the Circuit Justice. Its decision to go to the Second Circuit, instead, smacks of forum shopping. Either way, it certainly was not a bid for exceptional relief as a matter of last resort.

Making matters worse, the Second Circuit took the extraordinary step of restoring its own jurisdiction so that it could upset the status quo concerning Jordan's liberty in the midst of this Court's review of the appeal. It is the general rule of federal litigation that

litigants seeking relief should turn to the tribunal before which their case is currently pending. For the Second Circuit to grant relief to the State on a matter that touches the core of the case (Jordan's custody) threatens to undermine this Court's appellate review. It also leads to the potentially absurd result by which Jordan returns to custody in the near term, but the Court orders Jordan released again in a matter of just a few weeks or months, after (if) it grants Jordan's certiorari petition.

There is no justification for the Second Circuit's extraordinary actions here. As we have noted, Jordan has already served more than 70% of her provisional sentence. App. D. The State no longer argues that Jordan poses a public danger or is a flight risk, because she does not. And Jordan's certiorari petition is already filed and pending before the Court. This is hardly the kind of pressing, exceptional case in which one might imagine a court of appeals taking the extraordinary steps of recalling its mandate and entering a separate order remanding a defendant to custody. Because the Second Circuit's restoration of its own jurisdiction under these circumstances was an "abuse of discretion" (*Calderon*, 523 U.S. at 550), its order concerning Jordan's custody should be vacated under Rule 36.4.

II. IN THE ALTERNATIVE, THE CIRCUIT JUSTICE SHOULD ENTER A STAY OF THE SECOND CIRCUIT'S INTERVENING CUSTODY ORDER

For all of the reasons that the Circuit Justice should enter an order vacating the Second Circuit's December 19 order and reinstate the district court's original release order, it may alternatively enter a stay of the December 19 order. All of the traditional stay factors are satisfied here: As we have explained, returning Jordan to custody before the conclusion of proceedings before this Court would inflict irreparable injury, while maintaining her liberty would not significantly undermine the State's interests. The public has little interest in Jordan's renewed incarceration because she is not a threat to the public and has already

served the great majority of her sentence. The public's interest lies, instead, in seeing constitutional rights vindicated. And as we demonstrate at length in the petition for a writ of certiorari, Jordan has a strong chance of success before this Court.

What is more, the relief sought is not available from any other court or judge. See Rule 23.3. The district court "lacks authority" under Appellate Rule 23(c) and this Court's Rule 36.4 to alter Jordan's custody status pending appeal. See App. E, at 6. And, although the court of appeals (improperly) recalled its mandate, it did so only for the limited purpose of deciding the State's motion to vacate the district court's release order. The mandate otherwise remains in place, and the Second Circuit lacks jurisdiction to grant relief. What is more, relief under Appellate Rule 23 and this Court's Rule 36 has been sought (variably by one party or the other) repeatedly in both the district court (App. B, C, E) and the court of appeals (App. A, D). The conditions for a grant of a stay pursuant to this Court's Rule 23 are therefore fully satisfied.

Additionally, an administrative stay is warranted in this case. Absent such a stay, Jordan must surrender to State authorities "forthwith." An administrative stay would ensure that the State cannot and does not moot this application while the Circuit Justice or Court decides how to rule.

CONCLUSION

For the foregoing reasons, the Circuit Justice should enter an immediate administrative stay pending resolution of this application. Thenceforth, the Circuit Justice (or the full Court upon referral) should enter a Rule 36.4 order vacating the Second Circuit's December 19 order and reinstating the district court's initial order respecting custody. In the alternative, the Circuit Justice (or the full Court upon referral) should enter a Rule 23

stay the Second Circuit's December 19 order pending the disposition of Jordan's petition for a writ of certiorari and resolution of the merits in the event the petition is granted.

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Respectfully submitted.

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