

No. 25-726

IN THE
Supreme Court of the United States

ALAN LANE HICKS,
Petitioner,

v.

JONATHAN FRAME, SUPERINTENDENT,
MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.

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

**BRIEF OF THE INNOCENCE NETWORK AND
THE MIDWEST INNOCENCE PROJECT AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

The Innocence Network is an association of independent organizations providing pro bono legal and/or investigative services to prisoners for whom post-conviction evidence can compellingly prove innocence. The current president of the Innocence Network is Anna Vasquez of the Texas Innocence Project. The Innocence Network’s 73 current members—including the Midwest Innocence Project, among others—represent hundreds of prisoners with innocence claims in 50 states, the District of Columbia, and Puerto Rico. The Innocence Network also works to improve the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from wrongful convictions, the Innocence Network advocates reform to enhance truth-seeking, as well as to ensure that future wrongful convictions are prevented and that courts provide meaningful post-conviction review of colorable claims of innocence.

SUMMARY OF THE ARGUMENT

Amici curiae respectfully requests that this Court grant Alan Hicks’ petition and hold that the exhaustion requirement of federal habeas relief is excusable when extraordinary delays in state post-conviction proceedings are attributable to the state and, therefore, render the state process ineffective under 28 U.S.C. § 2254(b)(1)(B)(ii). The Fourth Circuit’s narrow

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No one other than the Innocence Network and the Midwest Innocence Project funded preparation of this brief. *Amici curiae* certify that, pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief.

interpretation undermines the historical and constitutional principles of habeas corpus and due process by disregarding past delays once a state belatedly acts.

Section 2254(b)(1)(B)(ii)'s applicability turns on ineffectiveness, not endless delay. When a state's inaction lasts decades, depriving individuals of a meaningful opportunity to vindicate their constitutional rights, the process is ineffective, regardless of whether the state acts at the eleventh hour. Limiting the exception to interminable delay allows states to immunize themselves from federal review through strategic (and undesirable) conduct. This Court should reject that approach and hold that federal courts may excuse exhaustion when state processes, in practice, fail to protect individual rights through extraordinary delay.

ARGUMENT

I. Historical Context of Habeas Corpus and Exhaustion.

A. Anglo–American Roots.

Habeas corpus traces its roots to the Magna Carta of 1215, namely, the requirement that any deprivation of one's freedom be supported "by the lawful judgment of his equals or by the law of the land." Magna Carta, 1215, 17 John (Eng.). Constitutional clashes in the seventeenth century, however, compelled Parliament to enact the Habeas Corpus Act of 1679, transforming the writ of habeas from a common-law remedy into a statutory guarantee of liberty. *See* Habeas Corpus Act 1679, 31 Car. 2, c. 2 (Eng.). In addition to curbing royal abuse, this Act became the blueprint for protecting individual rights and liberties. *See Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

The Framers of the U.S. Constitution were profoundly influenced by this Act. *See* Merritt James, *Exhaustion of State Remedies before Bringing Federal Habeas Corpus: A Reappraisal of U.S. Code Section 2254*, 43 NEB. L. REV. 120, 133 n.71 (1964); *see also* THE FEDERALIST No. 84 (Alexander Hamilton) (calling the Habeas Corpus Act “the bulwark of the British Constitution” against the “dangerous engine of arbitrary Government” and the “remedy” for the “fatal evil” of letting a prisoner’s “sufferings” become “unknown or forgotten”). This Act and subsequent interpretations by English courts naturally became “authoritative guides” for the American legal system, “defining the principles which control the use of the writ in the federal courts.” *McNally v. Hill*, 293 U.S. 131, 136 (1934).

B. Early Treatment in the United States.

Congress enacted the Federal Judiciary Act in 1789, authorizing federal courts to issue writs of habeas corpus to those subject to federal confinement “for the purpose of an inquiry into the cause of commitment.” Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 81 (1789). In the years that followed, Congress gradually expanded the scope of habeas relief. *See* Act of April 3, 1800, ch. 18, § 40, 2 Stat. 19, 32; Force Bill of 1833, ch. 57, § 7, 4 Stat. 632, 634–35; Act of August 29, 1842, ch. 257, 5 Stat. 539, 539. Meanwhile, this Court’s statutory interpretations tempered the notion of state-court supremacy and highlighted the writ’s role in a dual-sovereignty system. *See Ex Parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 514 (1858).

Congress eventually enacted the Habeas Corpus Act of 1867, authorizing federal courts to issue writs

in all cases. Ch. 28, 14 Stat. 385. Habeas was no longer a narrow and formalistic form of relief but instead demanded a broad, holistic consideration of the totality of the circumstances. Indeed, as this Court recognized, “an investigation into the case of a prisoner held in custody by a state on conviction of a criminal offense must take into consideration *the entire course of proceedings in the courts of the state, and not merely a single step in those proceedings.*” *Frank v. Mangum*, 237 U.S. 309, 331–32 (1915) (emphasis added). The scope of habeas relief continued to expand with this Court later recognizing that habeas “extends * * * to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, *and where the writ is the only effective means of preserving his rights.*” *Waley v. Johnston*, 316 U.S. 101, 105 (1942) (emphasis added).

By the mid-twentieth century, habeas finally “evolved” into what it is today: “a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction.” *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). Otherwise, “[t]he name of liberty * * * would be a mockery of common sense,” and “no man can be safe, nor know when he may be the innocent victim.” *United States v. Brown*, 381 U.S. 437, 444 (1965) (citation omitted). This makes sense. Federal habeas review vindicates individual rights that secure the integrity of judicial proceedings and “the most probative information bearing on the guilt or innocence of the defendant.” *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986) (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)). This Court accordingly “afford[s] broad

habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling *an innocent man* to suffer an unconstitutional loss of liberty.” *Stone*, 428 U.S. at 491 n.31 (emphasis added).

C. The Codification of Exhaustion.

Petitions surged as habeas relief focused on preserving constitutional rights, creating logistical burdens nationwide. *U.S. v. Hayman*, 342 U.S. 205, 212 (1952); *see also* Hon. Louis E. Goodman, Address at the Annual Conference of the Ninth Circuit: *Use and Abuse of the Writ of Habeas Corpus* (1947), in 7 F.R.D. 313, 314 (1948) (“Instances of abuse of the right to the writ * * * are legion.”). These challenges raised concerns about balancing access to the “great writ” with judicial efficiency. Goodman, *supra*, at 314–17.

In response, Congress amended the Habeas Corpus Act in 1948, codifying the exhaustion requirement: petitioners must first exhaust state remedies unless (1) no corrective process exists or (2) there are “circumstances rendering such process ineffective to protect the rights of the prisoner.” 28 U.S.C. § 2254 (1948 ed.). But this was not a *new* requirement. As Congress made clear, § 2254 “is declaratory of existing law as affirmed by the Supreme Court.” Reviser’s Notes to 28 U.S.C. § 2254, at 1564 (Supp. IV 1946) (citing *Ex Parte Hawk*, 321 U.S. 114 (1944)).²

In its initial form—dating back to at least the 1800s—exhaustion was rooted in principles of comity,

² Reviser’s notes are “authoritative” in construing statutes. *See United States v. Nat’l City Lines, Inc.*, 337 U.S. 78, 81 (1949).

offering state courts the first opportunity to correct their own constitutional violations. *Ex Parte Royall*, 117 U.S. 241, 251–53 (1886); *see also Cook v. Hart*, 146 U.S. 183, 194–95 (1892); *Minnesota v. Brundage*, 180 U.S. 499, 500–02 (1901). In *Ex Parte Royall*, for example, this Court advised that although federal restraint may be desirable, federal courts nevertheless were empowered to discharge prisoners even before trial if the detention was unconstitutional. 117 U.S. at 251–53. This Court stressed that any notion of discretion may transform into a duty depending on the circumstances:

[W]here a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion whether it will discharge him upon *habeas corpus*, in advance of his trial in the court in which he is indicted; *that discretion, however, to be subordinated to any special circumstances requiring immediate action.*

Id. at 252–53 (second emphasis added). Thus, since the 1800s, the availability of habeas corpus has depended not upon a rote application of the exhaustion requirement, but upon consideration of the entire set of circumstances underlying the petition.

This Court carried these principles well into the twentieth century, explaining that “where resort to state court remedies has failed to afford a full and fair

adjudication * * * because *in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate*, * * * a federal court should entertain his petition for habeas corpus.” *Hawk*, 321 U.S. at 118 (emphasis added) (citations omitted); see also *Fay v. Noia*, 372 U.S. 391, 401, 411 (1963), *overruled by Wainwright v. Sykes*, 433 U.S. 72 (1977). Without malleable exceptions to exhaustion, the prisoner oftentimes “would be remediless.” *Hawk*, 321 U.S. at 118.

Courts continued to apply a flexible approach even after Congress codified the exhaustion requirement. In *Frisbie v. Collins*, this Court explained that exhaustion was “not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances.” 342 U.S. 519, 521 (1952). This Court recognized the importance of habeas as a safeguard of “fundamental rights of personal liberty” and emphasized its close connection to constitutional protections, including the right to due process of law. *Fay*, 372 U.S. at 401. Quoting Justice Holmes, this Court held that “habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.” *Id.* (quoting *Frank*, 237 U.S. at 346 (Holmes, J., dissenting)). This Court was “not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ.” *Id.*

Courts in the following decades continued to balance principles of comity against principles of habeas

corpus, tipping more so to either side at different junctures. Eventually, renewed judicial and legislative efforts for habeas reform began to take shape. For example, when debating and refining the Habeas Corpus Reform Act of 1982, the Senate Judiciary Committee emphasized the need to “conserv[e] our judicial resources at both the State and Federal levels for truly meritorious claims” by “attempt[ing] to resolve the unanswerable question of, when has justice been done.”³ While legislators considered and debated certain provisions that would have significantly restricted habeas relief, those efforts failed. *See id.*

In June 1988, Chief Justice Rehnquist convened an ad hoc committee to determine whether legislation was necessary given the inadequacy of the then-existing collateral review system.⁴ When the so-called “Powell Committee” addressed exhaustion, some members questioned whether strict exhaustion rules contributed to inefficiency, prompting members to obtain data of time consumed in state and federal court, time consumed from failure to comply with exhaustion requirements, and each state’s willingness to waive exhaustion requirements, among other things.⁵

³ *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the S. Comm. on the Judiciary, 97th Cong. 2* (1982) (statement of Sen. Howell Heflin), <https://heinonline.org/HOL/P?h=hein.cbhear/habecoract0001&i=6>.

⁴ REPORT OF THE PROC. OF THE JUD. CONF. OF THE UNITED STATES, 7–8 (Mar. 13, 1990), <https://www.uscourts.gov/file/1651/download>.

⁵ *Judicial Conference Ad Hoc Committee on Habeas Corpus Review of Capital Sentences: Minutes of the Meeting of September 16, 1988*, 5–6, (Sept. 16, 1988), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1019&context=habeascorpus>.

Citing a mountain of evidence,⁶ the Committee acknowledged the gravity of capital punishment and the need to “advance the fundamental requirement of a justice system -- fairness.”⁷ The Committee’s recommendations culminated in the enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which preserved § 2254 from the 1948 Habeas Corpus Act. *See* Pub. L. 104-132, 110 Stat. 1214 (1996).

Section 2254 of AEDPA authorizes federal courts to consider habeas petitions from individuals in state custody when their custody purportedly violates the U.S. Constitution, federal laws, or treaties. 28 U.S.C. § 2254(a). Section 2254’s exhaustion requirement states that an applicant must first exhaust state court remedies before petitioning for federal habeas relief unless “(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.” *Id.* § 2254(b)(1)(B)(i)–(ii).

II. Delay Renders State Processes Ineffective to Protect Individual Rights.

Petitioner started seeking post-conviction relief in West Virginia state court in 1989. *Hicks v. Frame*, 145

⁶ *See generally Powell Papers: Habeas Corpus Committee*, WASH. & LEE SCH. L., https://scholarlycommons.law.wlu.edu/habeascorpus/?utm_source=scholarlycommons.law.wlu.edu%2Fhabeascorpus%2F29&utm_medium=PDF&utm_campaign=PDFCoverPages (last accessed Jan. 21, 2026).

⁷ *Testimony of Justice Lewis F. Powell, Jr. on Federal Habeas Corpus in Capital Cases the H. Subcomm. on Cts.*, 101st Cong. 7 (1990), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1022&context=habeascorpus>.

F.4th 408, 413–15 (4th Cir. 2025). But his petitions were largely ignored. Despite a revolving door of counsel and presiding judges, Petitioner’s case did not meaningfully advance for more than 30 years. *See id.*

After spinning his wheels in state court for decades, Petitioner filed a federal habeas petition, which the district court dismissed for failure to exhaust. *Id.* at 412–15. It was only after Petitioner appealed the dismissal to the Fourth Circuit—indeed, it was after the matter was fully briefed and argued—that the state court suddenly and summarily dismissed his state petition for post-conviction relief. *Id.* The Fourth Circuit then affirmed the dismissal, holding that Petitioner could not use “past delay” to show “that the state process is presently ineffective.” *Id.* at 420.

The Fourth Circuit notably reached its decision only after acknowledging that the state processes *were* ineffective. *Id.* at 418. The court’s reason: because § 2254(b)(1)(B)(ii) is “written in the present tense,” “past delay,” even “decades of delay,” is “insufficient to excuse exhaustion[.]” *Id.* at 418–20.

But that decision ignores both history and reason. The state trial court’s dismissal came nearly *28 years* after Petitioner first filed his post-conviction petition—which he filed after waiting *8 years* for the trial court to rule on his sentence-reduction motion, and which the trial court did not decide until the West Virginia Supreme Court nudged it to do so in 2019. *Id.* at 413–14. Curiously, the post-conviction petition’s dismissal suspiciously was made “summarily” just after oral argument before the Fourth Circuit. *Id.* at 415. With over 36 years spanning between Hicks filing his first collateral attack and the belated dismissal, even

the Fourth Circuit could not help but scold West Virginia by giving it “no credit for its narrow victory” after treating Petitioner in a way that “no doubt offends basic notions of how a state should treat its prisoners.” *Id.* at 420. The Fourth Circuit’s decision to allow that same treatment to bar Petitioner’s access to federal habeas relief makes no sense.

In fact, it defies the settled precedent of this Court. For example, this Court previously emphasized in *O’Sullivan v. Boerckel* that exhaustion requires a prisoner to fully exhaust *all* state remedies. 526 U.S. 838, 848 (1999). This Court also emphasized, however, that the requirement to “*properly* exhaust[]” asks whether the prisoner “has *fairly* presented his claims to the state courts.” *Id.* (second emphasis added). So, what is then to be made of a case in which a petitioner has *properly* and *fairly* presented his claims in a state court that spends more than three decades ignoring those claims? As this Court held, “the exhaustion doctrine is designed to give the state courts a full and fair *opportunity* to resolve” claims before they “are presented to the federal courts.” *Id.* at 845 (emphasis added). Surely, by waiting 32 years from his first collateral attack before seeking federal habeas relief, Petitioner afforded West Virginia ample opportunity to weigh in.

The upshot is that the exhaustion requirement assumes a fully functional state process. But if state-orchestrated delays render the state process illusory, federal courts must be allowed to step in to provide the review of the prisoner’s post-conviction claims that the state court has failed to provide. State gamesmanship should not be permitted to prevent federal courts from considering the merits of the unexhausted

claims and, if appropriate, granting habeas relief. If states could control the clock without even a chance of federal oversight, the natural result would be indefinite delay, transforming exhaustion from a shield affording state courts the first chance to review their own decisions into a sword that all but eviscerates federal habeas relief.

These concerns are magnified when prolonged delay consigns innocent individuals to unlawful custody. The writ of habeas “protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.” *Boumediene v. Bush*, 553 U.S. 723, 745 (2008). It guarantees a meaningful opportunity to challenge unlawful restraint and detention. That guarantee is hollow if the state, through inordinate and unjustified delay, effectively withholds timely access to a remedy. And each passing day of unjustified confinement degrades the petitioner’s (and the public’s) confidence in justice and the legitimacy of the judicial system. Section 2254(b) does not compel such an unjust result.

Courts should not reward strategic or negligent delays by the states, particularly where decades of inaction and procedural failures reduce the state process to an empty formality. When it comes to habeas relief, federal courts should not look at each stage in isolation, but rather “look beyond forms and inquire into the very substance of the matter * * * [and] take into consideration the *entire* course of proceedings in the courts of the state.” *Frank*, 237 U.S. at 331 (emphasis added).

Habeas corpus was born out of the need to protect the rights of the incarcerated. *See supra* Part I. Excessive and unreasonable delays in state post-conviction proceedings do not comport with federal due process guarantees. Indeed, “the Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings.” *Doggett v. United States*, 505 U.S. 647, 666 (1992) (Thomas, J., dissenting). And due process demands fair and reliable adjudication—as well as a fair opportunity to vindicate constitutional rights when that adjudication goes awry.

“The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting). Those rights “have historically been vindicated by the writ of habeas corpus.” *Id.* at 557. But that relief is available only if state-designed delays, like the one created by West Virginia here, cannot be weaponized to short-circuit the entire federal habeas process.

Practical considerations reinforce this view. As this Court has recognized, the “[p]assage of time * * * may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.” *United States v. Marion*, 404 U.S. 307, 322 (1971). This concern is paramount where “the passage of time has frustrated [an individual’s] ability to establish his innocence of the crime charged.” *United States v. MacDonald*, 435 U.S. 850, 860 (1978). While not every delay will excuse the exhaustion requirement, what matters is whether

the delay is unreasonable. *Dickey v. Florida*, 398 U.S. 30, 51 (1970) (Brennan, J., concurring). Deliberate, purposeful, or oppressive delay “is unjustifiable,” as is delay caused by negligence. *Id.* It deprives the individual of the very “principles of procedural fairness required by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 39 (Harlan, J., concurring). And without this promise of procedural fairness, it hardly can follow that a state’s process is anything except “ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(ii).

Petitioner’s case is one of the most recent (and egregious) examples of delay in state courts jeopardizing and nullifying post-conviction rights. To deprive Petitioner of federal review under these extraordinary circumstances is to empower states to use indefinite delay followed by summary denial to subvert the entire habeas process. That is not an effective process.

III. Past, Present, and Future Delays Evidence Circumstances that Establish an Ineffective State Process and Pose a Nationwide Concern to Innocent Individuals.

Unfortunately, Petitioner is but one stitch in a pattern of prolonged state-inaction cases. The uncertainty surrounding § 2254(b)(1)(B)(ii) has created a circuit split. Although there is uniformity that ongoing delays can excuse exhaustion, some circuits have nonetheless restricted their review to whether *currently* “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(ii). But these courts credit the statute with words Congress never uttered.

This was precisely the Fourth Circuit’s reason for affirming dismissal, even as it acknowledged “past ineffectiveness is not irrelevant in considering present ineffectiveness.” *Hicks*, 145 F.4th at 419. The problem with this view is that the statutory text includes no such limitation. *See* 28 U.S.C. § 2254(b)(1)(B)(ii). This strained construction instead undermines federal habeas relief while dampening the express language of Congress in § 2254(b)(1)(B)(ii).

The sounder interpretation of § 2254(b)(1)(B)(ii) considers all circumstances that may evidence an ineffective process, including past delay. For example, the Sixth Circuit has recognized that although “[t]he exhaustion requirement is based on principles of comity and federalism,” it necessarily “is based on the presumption that states maintain adequate and effective remedies to vindicate federal constitutional rights.” *Turner v. Bagley*, 401 F.3d 718, 724 (6th Cir. 2005). There, the state court had failed to act on the petitioner’s direct appeal for more than eight years before a federal habeas petition was filed. *Id.* at 723. Because “state courts did not give prompt consideration to Turner’s claims,” the habeas petition “defeated the presumption of adequate and effective remedies at the state level.” *Id.* at 724. Even more, despite the state court’s “subsequent decision” to affirm the petitioner’s conviction, the court determined that this “decision was too late,” and “exhaustion should be excused as to all issues raised.” *Id.* at 725. The post-conviction relief sought in state court “languished for years without adjudication.” *Id.* Thus, “[a]t the time he filed his federal *habeas corpus* petition, Turner was without recourse in state court.” *Id.* at 726.

The situation in *Turner* tragically was not an aberration. See *Lee v. Stickman*, 357 F.3d 338, 341 (3d Cir. 2004) (“This ping-pong game the state court was playing with Lee’s petition would almost be comical if Lee had not been in custody this entire time awaiting resolution.”). Numerous prisoners have been victimized by inordinate delays and forced to petition for federal habeas relief only for the state process to then suddenly spring back to life. See, e.g., *Harris v. Champion*, 938 F.2d 1062, 1066–67 (10th Cir. 1991) (considering “the two-year delay that has already occurred” to hold that “an unreasonably delayed state” proceeding excuses exhaustion); *Lee*, 357 F.3d at 342 (excusing exhaustion because “it is difficult to envision any amount of progress justifying an eight-year delay in reaching the merits of a petition”).

In such cases, deference (or indifference) should not be blindly given to the same state actor that bears responsibility for the delay—no matter whether that delay *occurred*, *occurs*, or *will occur*. As the Third Circuit put it, delay may be forgiven “[i]f only finite lifespans would permit.” *Lee*, 357 F.3d at 342. Accordingly, assessing whether circumstances render the state process ineffective, such as through excessive delay, is measured “at the time [petitioner] filed his federal habeas corpus petition.” *Id.* at 343. This makes sense because “the exhaustion requirement is neither ironclad nor unyielding.” *Evans v. Wills*, 66 F.4th 681, 682 (7th Cir. 2023).

Here, the fact that West Virginia state courts ignored Petitioner’s various forms of post-conviction relief for approximately *three decades* is striking. Courts have easily called much shorter delays as rendering the state process ineffective. See, e.g., *Lindsey v. Neal*,

138 F.4th 1039, 1043 (7th Cir. 2025) (finding a delay of more than six years—including a three-year delay without any action—is “troubling”); *Morton v. Dir. Virgin Islands Bureau of Corr.*, 110 F.4th 595, 604 (3d Cir. 2024) (emphasizing that a ten-year “delay erodes confidence in the judiciary and its ability to dispense justice, and it is unacceptable absent a compelling reason”); *Carter v. Buesgen*, 10 F.4th 715, 716 (7th Cir. 2021) (finding a four-year delay is “extreme and tragic”); *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990) (calling a four-year delay “alarming”); *Mathis v. Hood*, 851 F.2d 612, 613–14 (2d Cir. 1988) (holding a six-year delay “is shocking” but, “unfortunately, it is not unusual”). Indeed, the Fourth Circuit itself previously excused exhaustion and called West Virginia’s state process “troubling” and ineffective due to an “inordinate delay” of “over 20 years.” *Plymail v. Mirandy*, 671 F. App’x 869, 870–71 (4th Cir. 2016).

Simply put, “[t]he exhaustion doctrine does not apply * * * when the state system inordinately and unjustifiably delays review so as to impinge upon a petitioner’s due process rights.” *Johnson v. Roberts*, 1996 WL 405773, at *1 (5th Cir. Jul. 1, 1996) (unpublished). “It would make no sense to require a petitioner to exhaust the very procedures that he claims are being unconstitutionally protracted before he can raise that issue in the federal court. Habeas relief would be rendered ineffective.” *Harris*, 938 F.2d at 1069. This is precisely Petitioner’s situation. Before being nudged by higher courts on multiple occasions, West Virginia was content to let Petitioner’s post-conviction proceedings linger in limbo for the indefinite future. Since those proceedings were first initiated, individuals

have been born, earned bachelors' degrees, become *juris doctors*, and assimilated into myriad law firms.⁸ As the legal system has progressed, Petitioner's applications—and his rights—remained stunted.

The Seventh Circuit recently called delays of “twenty years and counting” “beyond the pale and indefensible.” *Evans*, 66 F.4th at 682 (excusing exhaustion). This rings equally true here. West Virginia's treatment of Petitioner “is a travesty of justice.” *Pope v. Taylor*, 100 F.4th 918, 921 (7th Cir. 2024) (excusing exhaustion for 28-year delay). Worse yet, this is not the first time that West Virginia has treated the incarcerated in such a way. *See Plymail*, 671 F. App'x at 870–71 (excusing exhaustion). Regardless how one cuts it, “what [Petitioner] experienced was nothing short of a breakdown in state processes.” *Evans*, 66 F.4th at 687. It makes no meaningful difference whether the delay occurred, is occurring, or will occur—what matters is that the state process has been, is, and will continue to be ineffective as a means of protecting the rights of West Virginians. Exhaustion must be excused under these circumstances.

Additionally, ignoring delay poses significant harm to the post-conviction rights of innocent petitioners. In *Lindsey v. Neal*, for example, the petitioner's post-conviction efforts stalled for six years. 138 F.4th at 1041. During that time, the petitioner maintained his innocence and challenged his convic-

⁸ In fact, the very same prosecutors in Petitioner's 1988 trial would go on to become state-court judges, presiding over the very same post-conviction proceedings involving Hicks that remained dormant for approximately 30 years. *See Hicks*, 145 F.4th at 412–15.

tion. *Id.* But as his case “sat idle,” his pleas went unheard in state court. *Id.* at 1042. The petitioner in *Evans v. Wills* experienced similarly unfortunate circumstances, maintaining he was “not only innocent but also that the prosecution had engaged in serious misconduct.” 66 F.4th at 683. But for more than 20 years, the state paid no heed to the petitioner’s post-conviction conduct. *Id.*

Or consider the petitioner from *Plymail v. Mirandy*, whose direct appeal went unanswered for decades. 8 F.4th 308, 311 (4th Cir. 2021). Forced to petition for habeas relief before his direct appeal resolved, the court held this egregious delay excused exhaustion. *Plymail*, 671 F. App’x at 871; *see also id.* at 870 (noting that West Virginia finally decided his appeal *after* the habeas petition was filed). Years later, evidence proved the prosecution had acted improperly during the original trial and violated the petitioner’s due process rights. *Plymail*, 8 F.4th at 320. As a result, federal habeas review resulted in his underlying conviction being overturned and his liberty restored almost 30 years after his improper conviction. *See Judgment Order*, DE 145, *Plymail v. Mirandy*, No. 3:14-cv-06201 (S.D. W. Va. Sept. 16, 2021).

These are just a few recent examples that demonstrate the profound prejudice of years-long inaction—prejudice that may foreclose opportunities to challenge a wrongful conviction. Without federal oversight, idle state courts can effectively deny justice through delay alone. Indeed, in these cases, the only process to effectively vindicate the petitioners’ innocence is to seek federal habeas relief. But if such delay did not evidence dysfunctional state processes and ex-

cuse exhaustion, then states could obstruct federal review by delaying post-conviction proceedings indefinitely. Even more, this would perpetuate wrongful incarceration. Innocent individuals may languish in prison without meaningful review, losing critical evidence and witnesses as time passes. Under that framework, the innocent would be unfairly harmed not only through an improper conviction, but again (and again) through improper delay. Standing alone, neither is acceptable. But together, legal remedies become illusory.

Finally, the Fourth Circuit's restrictive reading of § 2254(b)(1)(B)(ii) to only consider present and future delay is unsound. "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992) (Thomas, J.). And "modern legislative drafting manuals teach that, except in unusual circumstances, all laws * * * should be written in the present tense." *Carr v. United States*, 560 U.S. 438, 463–64 (2010) (Alito, J., dissenting) (citing various legislative aids and manuals).

Consistent with modern legislative preference, § 2254(b)(1)(B)(ii)'s exhaustion exception is framed in the present tense: "circumstances exist that render such process ineffective to protect the rights of the applicant." However, this exception does not expressly or impliedly impose any requirement that circumstances must exist and continue to exist that causally render

the state process ineffective. This makes sense. Otherwise, any state can do what West Virginia did: refuse to act for *decades* on various forms of post-conviction relief only to resume state proceedings and *summarily* dismiss once a federal habeas petition has been filed, decided, and appealed. Such an empty process is ineffective, regardless of whatever is promised by the state. *Cf. Harris*, 938 F.2d at 1066 (“a promise of future action does not require us to blind ourselves to past inaction”).

To allow West Virginia’s conduct is to grant *carte blanche* to the states to confine prisoners to endless delay while simultaneously authorizing them to immunize federal habeas review in buzzer-beater fashion. This outcome makes no sense. *Cf. Carr*, 560 at 470 (Alito, J., dissenting) (“When an interpretation of a statutory text leads to a result that makes no sense, a court should at a minimum go back and verify the textual analysis is correct.”).

Further, it is true that “*unless the context indicates otherwise* * * * words used in the present tense include the future as well as the present.” 1 U.S.C. § 1 (emphasis added). However, this only confirms that “the context” or relevant circumstances matter in construing a statute. *Id.* The historical and legal context of habeas relief is highly relevant to understanding the exhaustion exception. As explained above, habeas relief is an essential aspect of the Anglo–American legal system. *See, e.g., Hicks*, 145 F.4th at 420; *see also* Part I. This context stands at odds with the restrictive view taken by the Fourth Circuit. *See, e.g., Frank*, 237 U.S. at 331–32 (1915) (explaining “that an investigation into the case of a prisoner held in custody by a state

on conviction of criminal offense must take into consideration *the entire course of proceedings in the courts of the state, and not merely a single step in those proceedings*)” (emphasis added); *Hawk*, 321 U.S. at 118 (noting “where resort to state court remedies has failed to afford a full and fair adjudication * * * because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, * * * a federal court should entertain his petition for habeas corpus”) (citations omitted).

Indeed, Congress broadly “envisioned circumstances, however rare,” to guide whether exhaustion should be excused. *Evans*, 66 F.4th at 682. Accordingly, to ensure habeas relief is not watered down, and to ensure that historical context and all circumstances are considered, past delay is an essential inquiry for evaluating habeas corpus and its exhaustion requirement. *See id.* at 686 (declining “to turn § 2254(b)(1)(B) into a mechanical accounting exercise”).

State-caused delays are not merely procedural defects; they prolong unlawful confinement and compound its human cost. In *Lindsey*, for example, the six-year delay jeopardized the petitioner’s ability to challenge his conviction and seek remedies for due process violations. 138 F.4th at 1042. That harm does not vanish once a state stirs; the lost time has already constrained investigation, narrowed evidentiary options, and impaired memories, compromising the petitioner’s ability to vindicate his rights. That enduring prejudice is itself a present “circumstance.” When delay has hollowed out the remedy, the process *is* presently ineffective, no matter the state’s eleventh-hour act.

The exhaustion exception, therefore, is not so restricted as to consider only ongoing and future delay but instead captures each form of injustice along the way. *Cf. Brown v. United States*, 602 U.S. 101, 120 (2024) (Alito, J.) (noting “legislative drafters were instructed” to often use present tense, so the mere “[u]se of the present tense, as opposed to the past, was likely a stylistic rather than a substantive choice”); *see also Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992) (“The present tense is commonly used to refer to past, present, and future all at the same time.”); *Abercrombie v. Clarke*, 920 F.2d 1351, 1359 (7th Cir. 1990) (“Yet, it is abundantly clear that Congress intended the present tense language to apply to past acts.”). Against a backdrop of longstanding habeas and due-process principles, all forms of delay—including past delay—constitute “circumstances [] that render such [state] process[es] ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(ii). Thus, this Court should grant the Petition and ultimately reverse the Fourth Circuit’s decision affirming the lower court’s dismissal of Petitioner’s federal habeas petition.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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