No. 13-1507

In The Supreme Court of the United States

JACKIE RAY KING,

Petitioner,

v.

MARY BERGHUIS, WARDEN,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. What standard should federal courts apply in determining whether a habeas petitioner "fairly presented" the "substance" of a federal claim in state court?

2. Is a habeas petitioner required to name the Supreme Court decision on which his federal claim is based in order to fairly present that claim in state court, as the Sixth Circuit held below?

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INTEREST OF AMICUS[1]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing *pro bono* legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. The writ of habeas corpus is the cornerstone of individual liberty in the United States, and ensuring its continued viability is central to the Institute's mission. Towards that end, the Institute has filed multiple briefs *amicus curiae* with this Court in cases addressing habeas issues. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Wilson v. Flaherty*, No. 12-986, 133 S. Ct. 2853 (2013).

This case is of particular concern to the Institute because it has broad implications for prisoners' access to the writ. A decision reversing the Sixth Circuit and refining the Court's "fair presentation" standard would foster uniformity in the lower courts, reduce uncertainty for habeas petitioners and their counsel, and, most importantly, ensure that habeas corpus proceedings are not rendered inaccessible to deserving petitioners solely on the basis of inflexible procedural traps.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this *amicus* brief are being filed concurrently with the Clerk of Court.

REASONS FOR GRANTING THE WRIT

This case concerns a threshold requirement faced by literally every federal habeas petitioner challenging a state court conviction or sentence—the rule announced in *Picard v. Connor*, 404 U.S. 270, 275 (1971), that a petitioner must "fairly present" the "substance" of his claims to the state courts prior to applying for federal review. Interpretation of *Picard*'s "fairly presented" requirement has split the circuit courts, which have adopted a variety of often-incompatible standards implementing the rule. The unfortunate result of these widely varying exhaustion requirements is that a petitioner's access to habeas relief may be determined not by the merits of his arguments, but instead by where he is imprisoned. Such a scenario undermines the rationale of the exhaustion doctrine and erodes the overall legitimacy of the writ. The Rutherford Institute submits that the current case provides an ideal vehicle for the Court to clarify the *Picard* standard and ensure consistent application of the fair presentation requirement by the lower courts.

I. THE COURT'S FAIR PRESENTATION CASELAW DEMANDS REFINEMENT.

A. Lower courts are deeply split over the proper application of the "fairly presented" standard.

Federal courts may not grant habeas relief to petitioners who have failed to "exhaust[] the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). This means that a petitioner must do more than simply present *some* federal claim to the state courts; rather, he must exhaust the available

state remedies on the *particular* federal claim on which he is seeking habeas relief. 17B Charles Allen Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4264.3 (3d ed. 2014) (hereinafter "Wright & Miller"). Although straightforward in theory, in practice it is far from clear how similar the claim asserted in state court appellate or postconviction proceedings must be to the one advanced in the federal habeas petition in order to satisfy this requirement.

The Court added some substance to the exhaustion doctrine for the first time in *Picard*, where it held that the doctrine required that a petitioner must have "fairly presented" the federal habeas argument to the state court. 404 U.S. at 277-78. This means that it is not enough merely to recite to the state court the underlying *facts* of the case, because the constitutional implications of those facts may not be readily apparent. *Id.* at 277. Instead, although a petitioner need not cite "book and verse on the federal constitution," *id.*, he must present the legal "substance" of the federal claim to the state court, *id.* at 278.

Unfortunately, "as a legion of . . . cases attest," application of the *Picard* standard has "much bedeviled courts." *Nadworny v. Fair*, 872 F.2d 1093, 1096-97 (1st Cir. 1989); *see also Clark v. Pennsylvania*, 892 F.2d 1142, 1146 (3d Cir. 1989) ("how this requirement is satisfied is not so readily ascertainable"). The determination of when, exactly, a case is "fairly presented" has led to widespread "uncertainty and a split among the circuit courts," which has been percolating for over thirty years. Todd Phillip Leff, *Clarification of the "Fairly Presented" Exhaustion Requirement: an Intelligible Standard for Prisoners, Practitioners, and Judges*, 56 TEMP. L.Q. 1073, 1074

(1983); *see also* Matthew L. Anderson, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting,* 79 MINN. L. REV. 1197, 1232 (1995) ("The circuit courts' attempts to create a process for determining whether to hear a state prisoner's petition for federal habeas relief has resulted in confusion."); Kirk J. Henderson, *Thanks, But No Thanks: State Supreme Courts' Attempts to Remove Themselves from the Federal Habeas Exhaustion Requirement*, 51 CASE W. RES. 201, 201 (2000) ("The details of what constitutes an exhausted claim . . . have been and continue to be unclear."). The post-*Picard* landscape is accordingly littered with a variety of often-incompatible legal standards, of which the Sixth Circuit's below is the newest and most formalistic.

1. The most widely cited of these standards is that of *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (en banc). Prior to *Daye*, the Second Circuit had generally taken a more restrictive approach to exhaustion questions. *See* Lawrence D. Levit, *Habeas Corpus and the Exhaustion Doctrine:* Daye *Lights Dark Corner of the Law,* 50 BROOKLYN L. REV. 565, 573 (1984) (discussing cases). The en banc *Daye* court, however, departed from this line of cases, emphasizing the importance of establishing "a consistent and workable" exhaustion standard. 696 F.2d at 190. It held that a petitioner must present his challenge in terms that are "likely to alert the [state] court[s] to the claim's federal nature," *id.* at 192, a requirement that could be satisfied by citing a specific constitutional provision, or in one of four other ways:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state

> cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, or (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. at 194. The Rutherford Institute agrees with petitioner that the *Daye* test has been adopted in its entirety by the Third, Seventh, and—until the ruling below—Sixth Circuits. *See Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231-32 (3d Cir. 1992); *Verdin v. O'Leary*, 972 F.2d 1467, 1473-74 (7th Cir. 1992); *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987).

2. Other circuits have implemented their own tests in reaction to *Daye*. The First Circuit, while crediting *Daye* as a "laudable effort to give specific guidelines to assist district courts," *Nadworny*, 872 F.2d at 1097 (internal quotation marks and ellipses omitted), expressed wariness towards adopting it wholesale. Instead, it developed a set of four guidelines for establishing fair presentation: (1) citing a specific constitutional provision, (2) relying on a federal constitutional precedent, (3) claiming a determinate right that is constitutionally protected, or (4) presenting the substance of a federal constitutional claim "in such a manner that it must have been likely to alert the court to the claim's federal nature." *Id.* (citation omitted).

As petitioner rightly explains, this test adopted the first and third *Daye* elements, but excluded the second and fourth—"reliance on a state case employing relevant constitutional analysis (*Daye*'s (b)), and allegation of a pattern of facts well within the mainstream of constitutional litigation (*Daye*'s (d)). *Id.* at

1098. The court declined to "pass[] upon" or "adopt[]" these alternatives, instead holding only that *Daye*'s alternatives (b) and (d) "inform an understanding of the mischievous fourth aspect" of its test. *Id.* The *Nadworny* test also differs from *Daye* in that meeting one of the court's self-described "guidelines" does not automatically establish exhaustion. Rather, "meeting a guideline must be understood not as the actual embodiment of fair presentation, but only as a possible proxy for it." *Id.* at 1097.

3. *Daye* also inspired the related, but narrower, test employed by the Eighth Circuit. That court "requires that the applicant for a writ of habeas corpus refer to '[1] a specific federal constitutional right, [2] a particular constitutional provision, [3] a federal constitutional case, or [4] a state case raising a pertinent federal constitutional issue' in a claim before the state courts." *Kelly v. Trickey*, 844 F.2d 557, 558 (8th Cir. 1988) (quoting *Martin v. Solem*, 801 F.2d 324, 330-31 (8th Cir. 1986)). This test excludes the fourth *Daye* element of "asserting a pattern of facts that is well within the mainstream of constitutional litigation." 696 F.2d at 194. Indeed, the Eighth Circuit has explicitly declined to adopt what it characterized as the "more lenient" *Daye* test. *Kelly*, 844 F.2d at 559.

4. Finally, unlike the First and Eighth Circuits, the Eleventh Circuit has implemented a test that is wholly unrelated to the *Daye* test. That court has held that a petitioner has exhausted a federal claim if "'the reasonable reader would understand [the] claim's particular legal basis and specific factual foundation' to be the same as it was presented in state court." *Pope v. Secretary for Dep't of Corr.*, 680 F.3d 1271, 1286 (11th Cir. 2012) (quoting *Kelley v.*

Secretary for Dep't of Corr., 377 F.3d 1317, 1344-45 (11th Cir. 2004)), *cert. denied*, 133 S. Ct. 1625 (2013).

5. The remaining circuits with active habeas caseloads have not formally adopted specific presentation tests of their own. The only common denominator in these courts' fair presentation opinions is a generalized recitation of the *Picard* standard or other Supreme Court decisions quoting it. *See, e.g.*, *McCandless v. Vaughn,* 172 F.3d 255, 261 (3d Cir. Pa. 1999) (citing *Picard* and *Anderson v. Harless*, 459 U.S. 4, 6 (1982), for the propositions that a petitioner must present the "factual and legal substance" of a federal claim to state courts, and that it is not sufficient that a "somewhat similar state-law claim was made," but that the petitioner need not have cited "book and verse" of the federal constitution); *Pethtel v. Ballard*, 617 F.3d 299, 306 (4th Cir. 2010) (quoting *Picard* and *Harless*, and explaining that "the substance of the claim requires that the claim be presented face-up and squarely; the federal question must be plainly defined"); *Lewis v. Quarterman*, 541 F.3d 280, 285 (5th Cir. 2008) (citing *Picard* and *Williams v. Taylor*, 529 U.S. 420 (2000), for "fairly presented" standard); *Murray v. Schriro*, 746 F.3d 418, 447 (9th Cir. 2014) (citing *Picard* and *Baldwin v. Reese*, 541 U.S. 27 (2004) for same); *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) (citing *Picard* and *Duncan v. Henry,* 513 U.S. 364 (1995), in explaining that "the crucial inquiry is whether the 'substance' of the petitioner's claim has been presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim").

B. The Court's post-*Picard* exhaustion precedents have only added to the confusion.

To be sure, as illustrated by numerous citations elsewhere in this brief, *Picard* was not this Court's last word on fair presentation. But the Court's post-*Picard* jurisprudence offers only case-by-case guidance; the Court has yet to articulate a workable standard for defining what it means to "fairly present" the "substance" of a federal claim. Lower courts have thus been left to read between the lines of this Court's cases for clues as to the proper analysis, but they have repeatedly come up short.

1. The Court has held, for example, that "[i]t is not enough [for exhaustion purposes] that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam). What is enough, however, remained undefined: The Court in *Harless* held simply that, based on the facts before it, the petitioner did not exhaust his state remedies through the direct appeals process, even though the circuit court had found that prisoner's constitutional arguments "were self-evident" to the state courts. *Id.* at 7-8 (quoting *Harless v. Anderson*, 664 F.2d 610, 612 (6th Cir. 1982)). Later, the Court made a similarly fact-specific holding in *Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam), reasoning generally that "if a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." *Id.* at 366. But the Court did not explain what was required to "alert[]" the state court to

the federal claim, *see id.*, and in dissent, Justice Stevens observed that the Court had seemingly departed from *Picard* and "set[] forth a new," but unspecified, "rule of law," *id.* at 367 (Stevens, J., dissenting). Then, in *Baldwin v. Reese*, 541 U.S. 27 (2004), the Court repeated *Duncan*'s language about properly "alert[ing]" the state court to the federal claim—again without explaining what this means—and held that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Id.* at 32. The Court declined in *Baldwin* to be any more specific, refusing, for instance, to express an opinion on the necessity of indicating a claim's federal nature when a petitioner has argued a state claim with an identical analysis. *Id.* at 33 (the petitioner in *Baldwin* had argued that in Oregon the standards for adjudicating state and federal ineffective assistance claims were identical). Finally, in *Dye v. Hofbauer*, 546 U.S. 1 (2005), the Court appeared to shift its analysis—but without specifying what had changed. Once more relying on facts particular to the case rather than any identifiable definition of the "substance" of a federal claim, the Court summarily reversed the Sixth Circuit and held: "The state-court brief was clear that the prosecutorial misconduct claim was based, at least in part, on a federal right. It was error for the Court of Appeals to conclude otherwise." *Id.* at 4.

Accordingly, rather than clarify the fair presentation analysis, these subsequent decisions have only muddied the waters. As scholars have recognized, "[t]he few subsequent Supreme Court decisions that

discuss this issue have not added much by way of workable guidelines." Wright & Miller § 4264.3. Uncertainty prevails, leaving courts of appeals to constantly reevaluate their own, divergent, circuit-specific standards applying *Picard*, all without any solid indications as to *what* should be driving the analysis.

2. For instance, district courts inside and outside the Second Circuit have expressed confusion, based in part on this Court's uncertain guidance, about whether *Daye*'s fair presentation standard remains valid. *See Carter v. McGinnis*, 2005 U.S. Dist. LEXIS 43281, at *18 n.12 (W.D.N.Y. July 29, 2005) (speculating that *Baldwin* "calls into question" *Daye*'s "within the mainstream of constitutional litigation" element); *Johnson v. Mechling*, 541 F. Supp. 2d 651, 665 (M.D. Pa. 2008) (applying *Daye* but noting that its statement that the "allegation of a pattern of facts that is well within the mainstream of constitutional litigation" element may be "somewhat suspect" in light of this Court's decisions in *Harless* and *Duncan*). The Second Circuit has acknowledged the calls to reconsider *Daye*, noting that the task "might well have to be pursued by the court *en banc*." *Samuel v. LaValley*, 551 F. App'x 614, 615 n.1 (2d Cir. 2014), a procedure that court has shown historical reluctance to use, *see* Mario Lucero, *The Second Circuit's En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32, 33 (2013) (noting that the Second Circuit "hears the fewest cases en banc of any circuit by a substantial margin"). In the meantime, however, the *Daye* standard remains intact and routinely employed. *See, e.g.*, *Lowe v. Bradt,* 2014 U.S. Dist. LEXIS 94542, at *8-9 (E.D.N.Y. July 8, 2014) (applying four-part *Daye* standard); *Wright v. Lee*, 2014

U.S. Dist. LEXIS 88089, at *16 (S.D.N.Y. June 26, 2014) (same).

3. Meanwhile, the Seventh Circuit has considered and rejected a challenge to its own adoption of the *Daye* standard. The respondent argued in *Harrison v. McBride*, 428 F.3d 652 (7th Cir. 2005), that "the intervening decision of the Supreme Court . . . in *Baldwin v. Reese* establishes that 'more' is required to preserve a claim for habeas review than we had articulated in [*Verdin*]." *Id.* at 660. The court rejected this argument, noting that the *Daye/Verdin* standard "closely resembles the introductory language employed by the Supreme Court in [*Baldwin v.*] *Reese*." *Id.* at 661.

4. The First, Fifth, and Ninth Circuits have also reexamined aspects of their fair presentation jurisprudence in light of subsequent Supreme Court cases. In *Clements v. Maloney*, 85 F.3d 158 (1st Cir. 2007), the First Circuit conceded that its prior practice of allowing, under certain circumstances, the examination of so-called "backdrop materials"—the pleadings and filings submitted to state trial and intermediate appellate courts—to be included in the exhaustion analysis "may be incompatible with *Baldwin*." *Id.* at 163-64. The court has not, however, ruled on the issue. *See Hart v. MCI Concord Superintendent*, 2012 U.S. Dist. LEXIS 170358, at *7 (D. Mass. Nov. 27, 2012) (noting that "the First Circuit has not decided whether *Baldwin* overruled all of the 'backdrop' exception"). Yet in a stark demonstration of the confusion prevalent among the circuits regarding the post-*Picard* decisions, the Fifth Circuit has characterized *Baldwin* as *loosening* the presentation requirements. It recently observed in *Johnson v. Cain*, 712 F.3d 227 (5th Cir. 2013), that

"[f]ollowing *Baldwin,* we have demanded less of state habeas petitioners seeking to raise a federal claim . . . ." *Id.* at 232 n.4.[2]

5. Finally, unlike the First Circuit, the Ninth Circuit has formally repudiated a standard it had occasionally employed prior to *Duncan*. It had previously held in *Tamapua v. Shimoda,* 796 F.2d 261 (9th Cir. 1986), that, although the petitioner had not "invoke[d] the talismanic phrase 'due process of law' in his state proceedings," but instead framed his argument in insufficient evidence terms, his argument was "essentially the same" as the argument presented to the state court and thus exhausted. *Id.* at 263. A decade later, in *Johnson v. Zenon*, 88 F.3d 828 (9th Cir. 1996), the court reasoned that *Duncan* had "impliedly disapprov[ed] the 'essentially the same' standard suggested by *Tamapua*." *Id.* at 830. The court accordingly held that the "essentially the same" formulation was "no longer viable." *Id.* This characterization of *Duncan*, however, runs directly contrary

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[2] The Fifth Circuit cited as an example of this trend its opinion in *Taylor v. Cain*, 545 F.3d 327 (5th Cir. 2008), where it deemed a claim fairly presented although the petitioner "did not label his claim as a federal constitutional one," because "his brief made the type of arguments that support a Confrontation Clause claim" and he cited two Louisiana cases mentioning the federal confrontation right. *Johnson,* 712 F.3d at 232 n.4 (citing *Taylor*, 545 F.3d at 333-34). Confusion about the applicable presentation standard appears to run rampant in the Fifth Circuit. Both *Johnson,* 712 F.3d at 231, and *Taylor,* 545 F.3d at 332, quote the "well within the mainstream of constitutional litigation" language without attribution to *Daye*. They appear to have derived the quotation from another Fifth Circuit case, *Kittelson v. Dretke*, 426 F.3d 306, 315 (5th Cir. 2005), that wrongly attributes the language to this Court's decision in *Baldwin v. Reese*.

to that of the Eastern District of Pennsylvania, which held that "the Court in *Duncan* did not create new strict pleadings requirements for federal habeas corpus cases." *Johnston v. Love*, 940 F. Supp. 738, 760 (E.D. Pa. 1995) (explaining that "[t]he pleading requirements as set forth in *Picard* and *Harless* continue to control").

The end result: this Court's *ad hoc* approach to fair presentation has confounded the lower courts. A uniform standard is sorely needed to guide these courts on what is required to "fairly present" the "substance" of a federal claim.

C. The results of lower courts' exhaustion analyses are varied and unpredictable.

The inevitable result of these widely varying circuit standards (or lack thereof), along with flat-out confusion over the impact of this Court's post-*Picard* fair presentation decisions, is unpredictable case outcomes. Depending on the test employed, fair presentation analyses can result in starkly different treatment of borderline cases—all in the absence of any intervening directive from this Court.

1. For instance, had the petitioner in *Daye* himself filed his habeas petition a year or two earlier, he would have faced almost certain dismissal under the Second Circuit's then-existing precedents. After all, in *Johnson v. Metz,* 602 F.2d 1052 (2d Cir. 1979), the Second Circuit had held that, even though the petitioner had asserted in state court that his "fair trial" rights had been violated by the trial judge's excessive interventions and cited ten federal cases in support of his argument, his claim was unexhausted because he had not specifically cited the federal constitution. *Id.* at 1054.

Daye's exhaustion argument was in fact weaker than Johnson's: although *Daye* had also argued that the state court had deprived him of a "fair trial" through the judge's hostile interventions, he had not mentioned the Constitution or cited any federal cases. 696 F.2d at 189. Nonetheless, in departing from its earlier cases, the *en banc* Second Circuit held that Daye had exhausted his claim [because] he had cited state cases that, in the context of his factual assertions, "were sufficient to give the state courts notice that he asserted a constitutional claim." *Id.* at 196. The court further held that Daye had exhausted his claim because the facts he alleged were within "the mainstream of due process adjudication." *Id.* at 196-97. Daye's exhaustion, in short, was simply the product of fortuitous timing and organic developments in Second Circuit doctrine rather than any intervening ruling of this Court.

2. The disparate outcomes between the courts of appeals show that the particular test used by the court is frequently outcome-determinative. In *Jackson v. Scully*, 781 F.2d 291 (2d Cir. 1986), the petitioner's pro se state habeas petition characterized a key witness's testimony as both hearsay and "illegal, incompetent and prejudicial evidence," but made no mention of the Sixth Amendment right to confrontation. *Id.* at 295. The court held that the petitioner had nonetheless satisfied "at least the fourth, and perhaps the third, method of exhaustion enunciated in *Daye*." *Id.* The Eleventh Circuit took a similar approach in another confrontation clause case, *Hutchins v. Wainwright,* 715 F.2d 512 (11th Cir. 1983). The petitioner in *Hutchins* argued that the prosecutor relied on out-of-court statements of an unidentified informant as evidence of guilt, but had

never used the words "confrontation clause" in his state court pleadings. The court held that these arguments, "albeit obliquely stated, did sufficiently alert the state court to a confrontation issue." *Id.* at 518-19.

In sharp contrast to these cases, the Eighth Circuit held under very similar facts in *Ashker v. Leapley*, 5 F.3d 1178 (8th Cir. 1993), that the petitioner had *not* exhausted his confrontation clause argument. Citing its test from *Kelly v. Trickey*, *supra,* the court held that the petitioner's failure to mention the confrontation clause, the Sixth Amendment, or a federal or state case addressing the issue meant that he had not exhausted his claim. *Id.* at 1179-80.

3. As one would expect, the variation is even more marked in those circuits that have not adopted any particular test for applying *Picard*. Some courts, for instance, have held that the mere mention of a federal constitutional provision is enough for exhaustion despite an otherwise complete focus on state-law arguments. In *Nichols v. Sullivan*, 867 F.2d 1250 (10th Cir. 1989), the Tenth Circuit held that, although the petitioner did not refer to "due process" in his brief, his mention of the Fifth Amendment due process clause in the docketing statement he filed with the New Mexico Supreme Court was sufficient to put the state court on notice of the claim. *Id.* at 1252-53. Yet the same court seemingly reversed course in a later case, *Knapp v. Henderson*, 1998 U.S. App. LEXIS 28232, at *13-14 (10th Cir. 1998), where the petitioner's state habeas brief asserted a Fourteenth Amendment due process violation and alleged that Colorado had waived jurisdiction over him. *Id.* at *14-15 (Holloway, J., dissenting) (citing *Nichols*). Nonetheless, the court held that because the peti-

tioner had "framed his claim in terms of abandonment of jurisdiction, not in terms of due process," and his discussions of long arm statutes did not implicate fundamental rights, he had failed to his exhaust his claim. *Id.* at *7-10. *Nichols* also stands in sharp distinction with *Woodfox v. Cain,* 609 F.3d 774 (5th Cir. 2010). There, the Fifth Circuit held that "[a]lthough Woodfox mentioned the Confrontation Clause, he presented no coherent argument on confrontation" and thus failed to exhaust the claim. *Id.* at 791.

Given that the fair presentation question impacts each and every federal habeas petition by a state prisoner challenging a conviction or sentence, examples of contradictory rulings arising from factually similar petitions are simply too numerous to summarize here. The cases above are but a small window into the confusion and inconsistency that plagues the courts' applications of the doctrine. It is an understatement, to say the least, that "the Supreme Court's application of the 'fairly present' standard *invites further refinement*." *Jackson v. Edwards*, 404 F.3d 612, 621 (2d Cir. 2005) (emphasis added). This case presents the Court with an ideal opportunity to do so.

II. THE SIXTH CIRCUIT'S RIGID APPLICATION OF THE FAIR PRESENTATION REQUIREMENT UNDERMINES THE RATIONALE OF *PICARD* AND UNNECESSARILY BURDENS HABEAS PETITIONERS.

The writ of habeas corpus is the essential remedy to safeguard a citizen against unlawful imprisonment. "Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democra-

cy and totalitarian governments." *Brown v. Allen,* 344 U.S. 443, 512 (1953) (Frankfurter, J., separate opinion). Nonetheless, administration of the writ is bounded by notions of federalism. The exhaustion requirement codified by 28 U.S.C. § 2254(b) is intended to promote comity between the states and the federal government by allowing the states the first opportunity to correct any potential constitutional or legal errors that may occur within their jurisdiction before the federal courts intervene. *See Picard*, 404 U.S. at 277, 278 (noting that exhaustion requires that "the substance of a federal habeas corpus claim must first be presented to the state courts" and that the substance may be the same "despite variations in the legal theory or factual allegations urged in support of the claim"). Thus *Picard*'s fair presentation requirement. *Id.* at 275. But the exhaustion doctrine was not intended to be a substantial barrier to habeas review. As the Court noted in *Hensley v. Municipal Court,* 411 U.S. 345 (1972),

> We have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. The demand for speed, flexibility, and simplicity is clearly evident in our decisions concerning the exhaustion doctrine . . . .

Id. at 250.

Yet the Sixth Circuit's decision—and others taking a similar restrictive approach, *see, e.g.*, *Woodfox*, *supra*—amount to just the sort of "stifling formalism" the Court has warned against. As discussed in the petition for certiorari, the court's holding that King's petition was unexhausted rested largely on his fail-

ure to cite a specific Supreme Court case, *Boykin v. Alabama*, 395 U.S. 238 (1969), for the proposition that a guilty plea must be knowing, voluntary, and intelligent. Pet. at 23-24. But *Boykin* is simply one of a long line of cases cited by King standing for that widely accepted proposition. *Id.* at 21 (citing cases). The Sixth Circuit's holding simply ignores *Picard*'s exhortation that a petitioner need not cite "book and verse" on the federal constitution, but instead must simply present the substance of the federal claim. 404 U.S. at 277. It also contradicts the Sixth Circuit's own recent admonition that, "[f]or fair presentation purposes, the cited federal authority need not strongly support the federal constitutional claim, as long as it makes clear the federal law basis for the claim." *Houston v. Waller*, 420 F. App'x 501, 515 (6th Cir. 2011) (citation and internal punctuation omitted); *see also McCandless*, 172 F.3d at 261 ("We read *Duncan* as reaffirming the teaching of *Harless* and *Picard* that the absence of explicit reference to federal law does not resolve the issue of whether a federal claim was fairly presented.").

Overly formalized exhaustion requirements such as the Sixth Circuit's below have significant practical implications. Roughly one out of every fourteen cases filed in federal district court is a habeas corpus petition by a state prisoner. Joseph L. Hoffman and Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 815 (2009). Even without erecting additional barriers, the exhaustion doctrine is "one of the most difficult procedural obstacles for state prisoners to overcome when seeking federal habeas corpus relief." Karen M. Allen et al., *Federal Habeas Corpus and its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 690 (1982).

And many of the constitutional claims commonly raised in habeas petitions—such as *Brady* violations, ineffective assistance of counsel, forensic science challenge, and police and prosecutorial misconduct—must typically be raised during state postconviction proceedings where the defendant does not have the right to counsel. Tiffany R. Murphy, *Futility of Exhaustion: Why Brady Claims Should Trump Federal Exhaustion Requirements*, 47 U. MICH. J.L. REFORM 697, 707-08 (2014) (citing *Coleman v. Thompson*, 501 U.S. 722 (1991) (holding there is no right to effective assistance of counsel in state post-conviction)).

With the great majority of habeas petitioners lacking access to counsel, state postconviction briefs and federal habeas petitions are often drafted by illiterate or poorly educated prisoners. *See* Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 973 (2012) (describing the difficulties pro se inmates have in properly litigating their claims in state postconviction proceedings in order to avail themselves of substantive review in federal habeas corpus). Imposing rigid and exacting exhaustion standards will arbitrarily bar a substantial portion of these petitioners from consideration of their habeas claims on the merits. And even those petitioners who do have access to counsel will typically be represented by public defenders or appointed counsel. Yet the crushing workloads of public defenders, along with the minimal compensation provided to private appointed counsel, mean that these attorneys can often provide only the bare minimum of representation. ABA Standing Comm. on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 7 (2004). Expecting these lawyers to painstakingly present every

conceivable federal claim at the state level is simply unrealistic in most cases.

Applying the Sixth Circuit's exacting fair presentation standard would effectively turn the exhaustion doctrine into a "blunderbuss" used to "shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and called it into existence. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973). Because "[t]he proper search is a search for the heart of the matter, not for ritualistic formality," *Nadworny*, 872 F.2d at 1097, the Court take this opportunity to restore the proper focus of substance over form in application of the exhaustion doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, or, alternatively, summarily reverse the decision below.

Respectfully submitted,

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