No. 23-2531

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Kevin Johnson,
***Appellant*,**

v.

Superintendent Mahanoy, et al.,
***Appellees*.**

On Appeal from the July 24, 2023, Order of the United States District Court for the Eastern District of Pennsylvania (Robreno, J.), No. 13-cv-03197, Denying Petition for Writ of Habeas Corpus

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PENNSYLVANVIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENTS

National Association of Criminal Defense Lawyers (NACDL) is not a subsidiary of any other corporation, and no publicly-held corporation owns any portion of NACDL.

Pennsylvania Association of Criminal Defense Lawyers (PACDL) is not a subsidiary of any other corporation, and no publicly-held corporation owns any portion of PACDL.

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INTEREST OF THE AMICI CURIAE

National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL harnesses the perspectives of its members to advocate for policy and practice improvements in the criminal legal system. Pertinent to this filing, NACDL understands that prosecutors who

honor their duty to "do justice," which extends to post-conviction proceedings, are an important component of achieving due process for every accused person. NACDL also believes that the proper functioning of the adversary system requires courts to exercise judicial restraint impartially, even when deferring to a prosecutor's discretionary decision that appears to favor the defense. The panel opinion in *Johnson v. Mahanoy SCI*, 1244 F.4th 178 (2025), implicates these issues.

Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice in Pennsylvania and actively engaged in criminal defense representation. Founded in 1988, PACDL is the Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. PACDL membership includes approximately 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

As amicus curiae, PACDL represents the experience and perspective of Pennsylvania's professional criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for defendants and thus for all

citizens and residents of the Commonwealth. PACDL shares NACDL's perspective on the importance of the issues addressed in the panel opinion in *Johnson*, and notes the Pennsylvania-specific legal and factual context in which they arise.[1]

[1] NACDL and PACDL both certify that no counsel for a party authored any portion of this Brief; no party nor party counsel contributed money toward preparing or submitting this Brief; and no person other than counsel to the amici curiae contributed money toward funding or preparing this Brief.

ARGUMENT

In 1975 a Philadelphia police officer shot and killed a civilian in a restaurant. Philadelphia's elected District Attorney declined prosecution. Objecting that the DA's widely-known "steadfast refusal … to prosecute police shootings of civilians" created "public mistrust" in local law enforcement, Pennsylvania's Attorney General attempted to supersede the DA's decision. *Commonwealth v. Schab*, 383 A.2d 819, 829 (Pa. 1978). The Supreme Court of Pennsylvania blocked supersession. *Id.* 824. The lead opinion emphasizes the importance of a local District Attorney's accountability "to the [local] electorate," which would be undermined by elevating the Attorney General's discretion above the DA's. *Id.* 822.

Today, a different Philadelphia District Attorney is making different choices—perceived by some as hostile to, rather than unduly protective of, the police. The DA who refused to prosecute police officers in 1975 was not reelected. The current DA has won two elections and is widely expected to win a third. His supporters applaud his commitment to lowering barriers to securing justice in cases that warrant it—a

prosecutor's highest duty—over simply securing and defending convictions.[2]

Of course, electoral support does not allow elected officials to contort the machinery of justice. But here, Congress gave state petitioners a federal forum for constitutional claims, and allowed state prosecutors the same discretion to waive affirmative defenses that all counsel for defendants enjoy. *See* 28 U.S.C. §§2254(a), (b)(3); §2254 Rule 5; discussion below at 7–13. AEDPA constrains habeas access, but it did not re-write fundamental principles of judicial restraint, waiver, and comity. And federal courts lack discretion to limit habeas petitioners' access to relief when Congress has spoken. *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996).

Yet the panel majority coins a novel "extraordinary circumstances" exception that does exactly that. 144 F.4th at 186.

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[2] *See generally F. Emmett Fitzpatrick*, Wikipedia, https://en.wikipedia.org/wiki/F._Emmett_Fitzpatrick; Associated Press, *Philadelphia DA Larry Krasner prevails over Democratic Challenger Pat Dugan in Primary Election*, Spotlight PA (May 20, 2025), https://www.spotlightpa.org/news/2025/05/pennsylvania-election-results-larry-krasner-philadelphia-da-patrick-dugan/; Working Families Party, *WFP Statement on District Attorney Larry Krasner's Primary Election Win* (May 20, 2025), https://workingfamilies.org/2025/05/wfp-statement-on-district-attorney-larry-krasners-primary-election-win/.

Worse, its sweep is not limited to the habeas arena. It contravenes binding Supreme Court and Circuit precedent, undermining core aspects of the adversary system it wishes to protect. It overrides Pennsylvania's delegation of authority to local district attorneys while nullifying the Philadelphia electorate's selection of a DA to represent the community's best interests, rejecting his exercise of prosecutorial discretion. And it does all of this while carving an exception out of a Supreme Court holding that "seems categorical," creating a conflict with other circuits. *Id.* 185.

The majority says that "context tells us" its exception is permissible, deriding the waiver as "anything but ordinary," "not … normal," a "novel stratagem" to "dodge … hurdles" and "slip" federal constitutional claims "through a more favorable entrance," representing a "break-down in the adversarial process." *Id.* 182, 185-87.[3] But waivers are nothing new. And what the majority deems "ordinary"—"tactical" waivers to focus on "stronger" claims to uphold a conviction—is telling. *Id.* 185.

[3] *See also Id.* 182, 184-86 ("maneuvers" to "wriggle out of [a] bind"; an attempted "bankshot" to "circumvent" the law).

The majority fashioned an atextual rule to block a local district attorney from using his prosecutorial discretion in a way the majority believes breaks with the "ordinary." But whether the "ordinary" serves the Commonwealth's best interests is a deeply nuanced question no court—and certainly no *federal* court—has a basis to judge.

I. The Panel's "extraordinary circumstances" exception is novel and unsupported.

The principle that appellate courts are barred from considering on appeal issues and arguments intentionally waived below is a bedrock of the judicial restraint that undergirds the adversary system, reaching every type of litigation. *E.g.*, *Wood v. Milyard*, 566 U.S. 463, 472 (2012). The waiver rule also bars consideration of an affirmative defense the defendant did not plead. *Id.*; *Trest v. Cain*, 522 U.S. 87, 89–92 (1997); *Gray v. Netherland*, 518 U.S. 152, 165–66 (1996); *see generally In re Sterten*, 546 F.3d 278, 284–85 (3d Cir. 2008). In the habeas context and beyond it, every circuit—including this one, until this opinion—reads the historic waiver rule reaffirmed in *Wood* to mean that courts cannot

upset a deliberate waiver of an affirmative defense.[4] The schism the opinion creates will be far-reaching.

This Court has previously taken great care to distinguish waiver from forfeiture, allowing an appellate court to resurrect a forfeited defense but never a waived one.[5] Because applying these rules consistently is essential to public trust, the Court also emphasized that it "enforce[s] waiver and forfeiture against criminal defendants and the government equally"—no matter how unpalatable an individual judge may find the result. *E.g.*, *Dowdell*, 70 F.4th at 140 (enforcing

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[4] *E.g.*, *Nunez-Perez v. Escobar-Pabon*, 133 F.4th 33, 42–43 (1st Cir. 2025); *Flinton v. Comm'r of SoC. Sec.*, 143 F.4th 90, 95–96 (2d Cir. 2025); *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146, 156 n.23 (2d Cir. 2016); *United States v. Dowdell*, 70 F.4th 134, 140 (3d Cir. 2023); *Stokes v. Stirling*, 64 F.4th 131, 140 (4th Cir. 2023); *Ficher v. Bickham*, 70 F.4th 257, 260 (5th Cir. 2023); *Maslonka v. Hoffner*, 900 F.3d 269, 276 (6th Cir. 2018); *Williams v. United States*, 879 F.3d 244, 248 (7th Cir. 2018); *Jimerson v. Payne*, 957 F.3d 916, 928 (8th Cir. 2020); *Alvarez v. Lopez*, 835 F.3d 1024, 1027 (9th Cir. 2016); *Robinson v. Lewis*, 795 F.3d 926, 934 (9th Cir. 2015); *McCormick v. Parker*, 821 F.3d 1240, 1245–46 (10th Cir. 2016); *United States v. Campbell*, 26 F.4th 860, 872–73 (11th Cir. 2022). (The panel majority cites just three of these opinions, which address procedural default. 144 F.4th at 185).

[5] *E.g.*, *United States v. Henderson*, 64 F.4th 111, 116 (3d Cir. 2023); *United States v. Mariano*, 729 F.3d 874, 881 (3d Cir. 2013) (internal quotations omitted); *Gov't of Virgin Islands v. Rosa*, 399 F.3d 283, 292–93 (3d Cir. 2005).

government's waiver and allowing suppression of a fully-loaded semi-automatic firearm seized from gang-involved defendant).

The "context" (144 F.4th at 185) of this case does not allow a different answer. It militates against it. First, Congress wrote and amended the habeas statute against the backdrop of these longstanding rules. That is why the Supreme Court has long barred lower courts from overriding a state's deliberate waiver of a threshold defense to a habeas claim—as with all issues a party deliberately waived. *Wood*, 566 U.S. at 466, 472–73; *Day v. McDonough*, 547 U.S. 198, 201, 206, 209 (2006); *Granberry v. Greer,* 481 U.S. 129, 135–36 (1987).

The panel majority quotes *Wood* and acknowledges this rule, yet carves an "extraordinary circumstances" exception anyway. 144 F.4th at 185. But the Supreme Court's categorical bar is even clearer than the majority recognizes. Every time the Court acknowledges a narrow exception allowing appellate courts to resurrect *forfeited* defenses, it takes pains to contrast forfeiture with waiver and reaffirm that courts may *never* consider a defense the prosecution deliberately withheld or relinquished. *Wood*, 566 U.S. at 472-73; *Day*, 547 U.S. at 202; *Granberry*, 481 U.S. at 135.

In the only §2254 subsection that addresses waiver expressly, Congress heightened the prosecution's protection against waiving an exhaustion defense, requiring an "express[] waive[r]," as opposed to a constructive waiver. 28 U.S.C. §2254(b)(3).[6] The Panel majority implies that (b)(3) means other affirmative defenses cannot be waived (*see* 144 F.4th at 194)—but the Court has already rejected that reading. In *Bennett v. Superintendent*, 886 F.3d 268 (3d Cir. 2018), it noted that while §2254(b)(3) requires an express waiver of an exhaustion defense, the state waived procedural default on appeal by arguing it "in passing" after conceding it below—that is, waived it constructively. *Id.* 280-81 and n.11. "Thus," the Court said, "we do not reach the question" of procedural default. *Id.* All affirmative defenses to a state habeas claim may be waived. And a court may not override an intentional waiver in any context.

Worse, the majority contravenes the principle underlying these flat prohibitions. As noted above, the bar on reaching waived issues

[6] *Granberry*, *supra*, was then the Supreme Court's most recent habeas case. It emphasized the outcome-determinative distinction between waiving and forfeiting an exhaustion defense.

rests on the party-presentation principle, which is "basic to our adversary system." *Wood*, 566 U.S. at 472. Parties and their chosen counsel are trusted to know and advance their own best interest. *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). Accordingly, the adversary process emphasizes judicial restraint and "the judge's impartial evaluation of the parties' arguments." Jeffrey M. Anderson, *The Principle of Party Presentation*, 70 Buffalo L. Rev 1029, 1033–34 (2022).

Moreover, judges who fulfill the role of "passive, neutral decision-maker" promote not only "an evenhanded consideration of each case," but public confidence "that the judicial system is trustworthy." *Id.* 1043–44 (quoting Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St. L. J. 713, 715 (1983)). Respecting waiver reflects the judicial restraint that is foundational to—not a "break-down in" (144 F.4th at 187)—the adversarial process. The "context" of waiver by a public prosecutor, whose duty is to do justice and remain accountable to the community that elected him, only heightens the need for judicial restraint.

Yet here the panel majority created an unprecedented exception to the waiver bar to allow the Attorney General—appearing solely as amicus, at the federal courts' invitation—to effectively supersede a considered waiver by the DA. Both the Attorney General and the panel majority know that Pennsylvania's legislature and highest court block supersession in these circumstances. *E.g., Schab*, 383 A.2d at 822. No matter how "not … normal" the panel majority considers the waiver (144 F.4th at 187), a result-driven departure from judicial restraint impairs the adversary system.

II. The opinion muddles the jurisprudence of "jurisdiction" and "comity."

This unprecedented exception also violates fundamental habeas principles. The majority opinion starts in the right place, recognizing that affirmative defenses are not "jurisdictional" bars to evaluating the merits. 144 F.4th at 185 (citing, *e.g.*, *Wood,* 566 U.S. at 472). But then it turns "jurisdiction" on its head by endorsing the Attorney General's

position that waiving affirmative defenses is "an end run around the limits of a federal court's jurisdiction." *Id.* 187.[7]

Similarly problematic is the panel majority's heavy reliance on "comity." 144 F.4th at 186. In truth "comity" requires only that a court *forbear* deciding an issue a court in a "coordinate system[]" should decide first—not that it *forgo* deciding the issue. *See Ex parte Royall*, 117 U.S. 241, 253 (1886). Procedural default and exhaustion are rooted in the comity interests asserted by the State—which AEDPA recognizes by treating affirmative defenses as waivable and non-jurisdictional.

The laws enacted and refined over the years to regulate habeas litigation "reflect a balancing of objectives (sometimes controversial), which is normally for Congress to make." *Lonchar*, 517 U.S. at 323. With AEDPA, Congress narrowed state prisoners' paths to using §2254 to remedy federal violations. But it left a path open—a path that specifically contemplates waiver—and the Court cannot narrow it further.

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[7] Its citation (*id.*) to *Coleman v. United States*, 501 U.S. 722, 730 (1991), is misleading. *Coleman* explains that procedural default is a jurisdictional bar to direct review, but is ***not*** jurisdictional on habeas review. 501 U.S. at 730.

III. Waiver is particularly appropriate here.

The panel majority implies impropriety when disparaging the effort to access "a more favorable forum" to review Johnson's claims. 144 F.4th at 185. But here, federal courts are only "more favorable" because they enforce federal constitutional law where Pennsylvania courts unreasonably misapply it, as recognized by this Court. Allowing a federal court to correctly evaluate the merits of a federal constitutional claim is a proper (even laudable) prosecutorial goal.

Foremost is Pennsylvania courts' mishandling of *Brady* claims by imposing a due-diligence requirement. *E.g., Commonwealth v. Padillas*, 997 A.2d 356, 367 (Pa. Super. 2010). The "duty to disclose under *Brady* is absolute" and "does not depend on defense counsel's actions," so the diligence requirement is unreasonable. *Dennis v. Sec'y, Pa. Dep't of Corrs.*, 834 F.3d 263, 290 (3d Cir. 2016) (*en banc*); *Johnson*, 144 F.4th at 213–17 (Roth, J., dissenting).

Similarly problematic is Pennsylvania's cumulative-materiality standard, which bars state courts from considering evidence not presented in a timely-pled *Brady* claim. *Commonwealth v. Natividad*,

200 A.3d 11, 39 (Pa. 2019). That too is contrary to clearly established federal law. *E.g., Glossip v. Oklahoma*, 145 S. Ct. 612, 629 (2025) (requiring "cumulative evaluation" of all evidence, whether or not included in a claim for relief).

No one questions that "in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman*, 501 U.S. at 731. But where state courts unreasonably undermine federal rights, justice requires letting state prisoners address their federal claims to a federal court as Congress provides.

A prosecutor's need to do justice is particularly acute where entrenched practices by the sovereign he represents denied it. *See Young v. United States*, 315 U.S. 257, 258 (1942). Data compiled before DA Krasner's election show that Philadelphia County has the second-highest rate of death-row exonerations in the *nation*, all due to "official misconduct." DPIC Special Report: The Innocence Epidemic (2021) (live link), at 8–9. And Philadelphia County "is by far the leading producer of prosecutorial misconduct claims" in Pennsylvania, with 70.6 misconduct allegations per million residents—more than quadruple the

number in similarly-populated Allegheny County. Hidden Hazards: Prosecutorial Misconduct Claims in Pennsylvania, 2000-2016, Quattrone Center for the Fair Administration of Justice (Dec. 16, 2021) (live link), at 13.

No conscientious prosecutor would fail to note that Johnson's federal habeas petitions allege misconduct that fits the patterns plaguing Philadelphia County: withholding material exculpatory information, coercing eyewitnesses to identify the defendant, surreptitiously excusing from trial an eyewitness who could not identify him and then lying about the witness's availability. Br. of Amici Curiae of Philadelphia Def. Counsel, *Commonwealth v. Brown*, No. 32 EM 2023, at 6–28 (Pa. Oct. 7, 2024) (documenting history with supporting citations). Additional prosecutorial misconduct had prompted the trial court to consider a mistrial. JA1375-1393, JA1415-1424.

The District Attorney's Office did not rubberstamp Johnson's allegations or concede relief. It did its own thorough and professional investigation, ultimately concluding that justice required giving Johnson a chance to try to prove his allegations to a federal court which would faithfully apply federal constitutional law. This approach was

not out of the ordinary. It was fully aligned with AEDPA and with ethical standards requiring prosecutors to redress wrongful convictions.[8] It was squarely within the discretion the Pennsylvania legislature, constitution, and Supreme Court confer on him. And it was accountable to the voters who elected him.[9] *See Schab*, 383 A.2d at 822.

The panel majority may believe this choice to be ill-advised. But that judgment is not for the Court to make. Much less may this Court condition §2254(a) jurisdiction on a District Attorney's alignment with a given judge's—or another law-enforcement officer's—view of the issue.

CONCLUSION

This Court should grant rehearing or rehearing en banc.

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[8] *See* Brief for Fair and Just Prosecution as Amicus Curiae Supporting Appellant and Rehearing, DoC. 115-2, at 3-4, 8.

[9] The number of waivers by the DA does not measure their wisdom—much less their propriety. "Conviction Integrity Units" are a recent phenomenon nationally (from one in 2007 to 96 in 2024). Improving upon the narrow remit and limited resources of his predecessor's Conviction Review Unit is a campaign promise Krasner kept and his supporters applaud.

Respectfully submitted,

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Dated: September 18, 2025

REQUIRED CERTIFICATIONS

A. Type-Volume. Pursuant to Rule 29(a)(4) and 29(b)(4) of the Federal Rules of Appellate Procedure, and Third Circuit L.A.R. 29.1(b), I certify that, according to the word-counting function of my word processing system, this Brief contains 2,599 words, including footnotes, and employs 14-Point Century Schoolbook font.

B. Bar Membership. Pursuant to Rules 28.3(d) & 46.1(e) of the Local Appellate Rules, I certify that all counsel who have signed this Brief are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

C. Electronic Filing. Pursuant to Rule 31.1(c) of the Local Appellate Rules, I certify that the text of the electronically filed Brief is identical to the text in the paper copies of this Brief as filed with the Clerk. The electronic (PDF) version of this Brief has been checked for viruses using Trend Micro Security Agent, an antivirus program, with all current updates, and no virus was detected.

CERTIFICATE OF SERVICE

I, hereby certify that I have electronically filed and served a copy of the Brief of *Amici Curiae* in support of Appellant's Petition for Rehearing or Rehearing En Banc upon all counsel of record through the Third Circuit Court of Appeals' Electronic Case Filing (NextGen CM/ECF) system.

/s/ *Lisa A. Mathewson*
Lisa A. Mathewson

Dated: September 18, 2025