RECORD NO. 16-6452

In The

United States Court Of Appeals

For The Fourth Circuit

ADAM DARRICK TOGHILL,

Petitioner – Appellant,

v.

HAROLD W. CLARKE, Director, Dept. of Corrections,

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

BRIEF OF APPELLANT

Gregory Dolin
Associate Professor of Law

Meghan Ellis Brennan, ***Third Year Law Student***
Stuart Goldberg, ***Third Year Law Student***
Jasna McElrath, ***Third Year Law Student***

UNIVERSITY OF BALTIMORE
SCHOOL OF LAW
1420 N. Charles Street
Baltimore, MD 21218
(410) 837-4610

Counsel for Appellant

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I. STATEMENT OF JURISDICTION

This petition for the *writ of habeas corpus* was instituted in the United States District Court for the Western District of Virginia pursuant to the provisions of 28 U.S.C. § 2254. On November 26, 2012, the petitioner, Adam Darrick Toghill, ("Mr. Toghill" or "Petitioner") was tried by a jury in the Circuit Court for the County of Louisa and convicted of computer solicitation of a minor less than fifteen years of age in violation of the former Virginia Code § 18.2–374.3(C)(3). J.A. 369, 397–401. He was sentenced to the minimum allowable term of five years imprisonment. J.A. 370, 397–401.[1] Having exhausted his state appeals, Mr. Toghill filed a *pro se* federal *habeas* petition which presented three issues. J.A. 5–20. As most relevant to the present appeal, the petition argued that the conviction was void *ab initio* in light of this Court's decision in *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013). J.A. 9. The District Court granted the Respondent's

[1] Mr. Toghill is scheduled to be released from confinement on April 24, 2017. Although Mr. Toghill will no longer be incarcerated as of that date, his petition will continue to present a live controversy. This Court will continue to maintain jurisdiction, because the Petitioner will remain subject to a suspended term of confinement of three years, the suspension being conditioned on the completion of post–release supervision. J.A. 400. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) ("[A] parolee's[] challenge to the validity of his conviction always satisfies the case–or–controversy requirement, because … the restriction imposed by the terms of the parole[] constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction."); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (holding that "once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.").

motion to dismiss the petition on February 23, 2016, J.A. 86–100, and denied reconsideration on March 28, 2016. J.A. 118–19. The District Court, however, granted Certificate of Appealability to the Petitioner on his claim that his conviction being predicated on a facially unconstitutional statute cannot be sustained.[2] J.A. 98.

The petitioner mailed a timely notice of appeal on March 21, 2016 and it was docketed on March 23, 2016. J.A. 115–17. *See* Fed. R. App. P. 4(a)(1)(A); *id.* 4(c)(1)(A)(ii). Accordingly, this Court has jurisdiction under 28 U.S.C. § 2253(c)(1)(A).

II. STATEMENT OF THE ISSUE

Whether this Court's prior decision in *MacDonald*, which held Virginia Code § 18.2–361(A) to be facially invalid in light of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) and found Virginia courts' decisions to the contrary to be "a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent," bars Mr. Toghill's conviction that is predicated on the same unconstitutional statute. 710 F.3d at 166 n.17.

[2] The initial habeas petition also presented arguments that there was insufficient evidence to sustain the conviction and that the state trial court improperly denied a motion for mistrial after an expert witness offered improper testimony. The District Court dismissed and denied the Certificate of Appealability with respect to these claims. Having reviewed these two claims, the undersigned Counsel declines to seek a Certificate of Appealability from this Court and therefore, these claims are not part of the present appeal.

III. STATEMENT OF THE CASE

Adam Darrick Toghill, an inmate in the custody of the Virginia Department of Corrections, appeals the final judgment of the United States District Court, Western District of Virginia, which denied his petition for a *writ of habeas corpus*. J.A. 5–20, 86–100; *Toghill v. Clarke*, No. 7:15–CV–00119, 2016 WL 742123 (W.D. Va. 2016) ("*Toghill III*"). Respondent–Appellee, Harold Clarke, sued in his official capacity, is the Director of the Virginia Department of Corrections (collectively "Respondent" or "the Commonwealth").

On November 26, 2012, following a jury trial, the Petitioner was convicted of computer solicitation of a minor less than fifteen years of age in violation of the former Virginia Code § 18.2–374.3(C)(3). J.A. 369, 397–401. The Circuit Court for the County of Louisa entered its final judgment of conviction and ordered Petitioner's incarceration for the statutorily mandated minimum term of five years on January 17, 2013. J.A. 397–401

At the time of his trial, the statute under which Mr. Toghill was convicted read as follows:

> It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child less than 15 years of age to knowingly and intentionally:
>
> ***

> 3. Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2–361.

Va. Code § 18.2–374.3(C)(3) (2012). In turn, in 2012, § 18.2–361, also known as "Crimes Against Nature" or "the anti–sodomy" statute, *see MacDonald*, 710 F.3d at 156, made it a felony for "any person … [to] carnally know[] any male or female person by the anus or by or with the mouth, or [to] voluntarily submit[] to such carnal knowledge…." Va. Code § 18.2–361(A) (2012).

On December 7, 2012, the petitioner filed his Notice of Appeal from his judgment of conviction. J.A. 235. On July 11, 2013, the Virginia Court of Appeals granted Mr. Toghill's Petition for Appeal. J.A. 236–38. While the Petitioner's appeal was pending in the Virginia Court of Appeals, this Court decided *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013) and, relying on *Lawrence v. Texas*, 539 U.S. 558 (2003), held that § 18.2–361(A) was facially invalid. In light of this Court's decision, on November 5, 2013, the Virginia Court of Appeals ordered the parties to brief and argue whether *MacDonald* was binding on Virginia courts and if so, whether that decision voided Mr. Toghill's conviction. J.A. 242.

Following briefing and oral argument, the Virginia Court of Appeals in an unpublished *per curiam* opinion issued on February 11, 2014, rejected all of Petitioner's assignments of error and affirmed his conviction. J.A. 275–86; *Toghill v. Commonwealth*, 2014 WL 545728 (Va. App. Feb. 11, 2014) ("*Toghill I*"). In its

opinion, the Court of Appeals concluded that *MacDonald* did not bind Virginia courts and therefore, was not a bar to the Petitioner's conviction. J.A. 277–78.

Thereafter, on March 11, 2014, Mr. Toghill filed a Petition for Appeal in the Supreme Court of Virginia presenting the same issues as argued to the Virginia Court of Appeals. J.A. 121–46, 287. The Supreme Court of Virginia granted the petition limited to the question of the constitutionality of the statute of conviction in light of *MacDonald*. J.A. 147–48. On February 16, 2016, the Supreme Court of Virginia issued its opinion, again concluding that this Court's decision in *MacDonald* was not binding on the Virginia courts, and re–affirming Mr. Toghill's conviction. J.A. 206–34; *Toghill v. Commonwealth*, 768 S.E.2d 674 (2015) ("*Toghill II*").

Following Virginia courts' failure to quash his conviction, Mr. Toghill filed a timely federal petition for *habeas* relief in the United States District Court for the Western District of Virginia. J.A. 5–20. The federal petition raised the same three grounds for relief which were previously argued to the Virginia courts. *Compare id. with* J.A. 121–40. In its answer to Mr. Toghill's petition, the Commonwealth admitted that it was timely filed and that he had exhausted the state remedies. J.A. 24.[3]

[3]Although Mr. Toghill never pursued post–conviction relief in state courts he nevertheless exhausted his state remedies because as the Respondent points out, *see* J.A. 24, under Virginia law, an "issue raised and decided … on direct appeal from the criminal conviction will not be considered in a habeas corpus proceeding." *Henry v. Warden*, 576 S.E.2d 495, 496 (2003).

On March 23, 2016, the District Court granted the Respondent's motion to dismiss *in toto*, thereby denying and dismissing all of Toghill's *habeas* claims. J.A. 86–100. The District Court granted the Petitioner a Certificate of Appealability on his *MacDonald* claim, but denied it with respect to all other claims. J.A. 98; *Toghill III*, at *9.[4]

The present appeal followed.

IV. STATEMENT OF FACTS

A. Circumstances Leading to Mr. Toghill's Arrest

The facts of this case are uncomplicated and largely undisputed. As recounted by the Respondent in its brief to the Supreme Court of Virginia,

> As part of his work with the Internet Crimes Against Children Taskforce, Louisa County Deputy Sheriff Patrick Siewert posted in the "miscellaneous romance" section of the website craigslist.com an advertisement with the heading: "suspended, bored and lonely – w4m." The text of the advertisement read: "hey well i just started on CL earlier this week cuz im suspended from skool and was bored but idk what i am really lookin 4 just sumthin 2 do even tho itz rainin outside so hit me up if u want and maybe we can chat or get together or sumthink? Becca." Rebecca Flynn was an assumed identity Siewert used for this sting operation.
>
> Toghill answered the ad, and engaged in an e–mail exchange with Detective Siewert, posing as "Becca Flynn," from 1:13 p.m. until 2:50 p.m. on March 10, 2011.

J.A. 170–71 (original orthography preserved; internal citations omitted).

[4] The District Court denied the Petitioner's Motion for Reconsideration on March 28, 2015. J.A. 118–19.

During his exchange with "Becca Flynn," Mr. Toghill made a number of sexually explicit comments. J.A. 171–74, 379–92. Specifically, in several of his emails, Mr. Toghill suggested that he would like to perform oral sex on "Becca" "if [he] were 16." J.A. 172–74, 386–92.[5] In total, there were fifty–six messages exchanged between "Becca" and Mr. Toghill, of which twenty–nine were sent by "Becca" and twenty–seven by Mr. Toghill. J.A. 379–92.

After Mr. Toghill stopped responding, Detective Siewert twice attempted to re–engage him in conversation to no avail, after which he finally gave up. *See* J.A. 328–29, 342, 392. Detective Siewert then traced the account from which emails to "Becca Flynn" were sent and identified Mr. Toghill as its owner. J.A. 326. Having done so, on April 1, 2011, Det. Siewert arrested and questioned Mr. Toghill regarding the above–described events. J.A. 326–29, 341–43. During the interview, Mr. Toghill admitted to having sent emails to "Becca Flynn." J.A. 328.

[5] The Petitioner has always maintained that his emails only spoke in hypotheticals and only referenced what he would do *if* he were 16, not what he sought to do at the time he sent out those emails. *See* J.A. 342 (testimony of Det. Siewert confirming that Mr. Toghill always maintained that "he never intended to set up a meeting and never intended to meet" "Becca Flynn"), 352 (trial court motion to strike the indictment), 239 (assignment of error in the Virginia Court of Appeals), 128 (assignment of error in the Supreme Court of Virginia), 11 (federal *habeas* petition). Nonetheless, Virginia courts concluded that Mr. Toghill's statements "were not simply 'words alone,'" J.A. 284–85, *Toghill I*, at *6 (quoting *Brooker v. Commonwealth*, 587 S.E.2d 732, 735 (Va. App. 1990), and that "the fact finder could rationally infer that" Mr. Toghill actually proposed oral sex to a person he believed to be under 15 years of age. *Id*.

B. The Criminal Trial

On July 11, 2011, a grand jury sitting in the County of Louisa indicted Mr. Toghill for "use [of] … electronic means for the purpose of soliciting, with lascivious intent, any person he knows or has reason to believe is a child less than 15 years of age to knowingly and intentionally" to perform sexual acts in violation of the then existing § 18.2–374.3 of the Code of Virginia. J.A. 288–89.[6] Mr. Toghill pleaded Not Guilty, and the case proceeded to a jury trial.[7]

At trial, the prosecution called Detective Siewert as its one and only witness. J.A. 296–351 (testimony of Det. Siewert and the Commonwealth resting its case immediately thereafter). The defense declined to call any witnesses. *See* J.A. 165 (Petitioner resting without presenting evidence). On direct examination, Det. Siewert testified about the sting operation and produced a printout of the email messages between Mr. Toghill and "Becca Flynn." J.A. 296–351; 379–94. In particular, Det. Siewert testified that given the emails sent by "Becca Flynn," Mr. Toghill would have been aware that the person he was communicating with was

[6] The grand jury did not specify what subsection of § 18.2–374.3 applied; however, following the trial, the Commonwealth narrowed its argument to cover only conduct prohibited under subsection (C)(3). J.A. 363–64 (stating to the trial judge that the "the case is going to rest on oral sex.").

[7] Mr. Toghill requested a bench trial, but the Commonwealth did not consent to the request and a jury was empaneled. *See* Va. Code § 19.2–257.

under 15 years of age, *see* J.A. 328, and that Mr. Toghill initiated the discussion of sexual activity. J.A. 322.[8]

At the close of Det. Siewert's testimony both sides rested, and at the conclusion of closing arguments[9] the trial judge heard arguments as to the jury instructions. J.A. 361–66. During arguments the Commonwealth conceded that Mr. Toghill's conviction would rise or fall on whether the prosecution proved that the defendant solicited the minor to perform oral sex on her. J.A. 364. The

[8] In general, Det. Siewert's testimony was not contentious or controversial until on re–direct examination he was asked whether he viewed the emails from Mr. Toghill as a mere "desire or a solicitation." The defense promptly objected to this line of inquiry and moved for a mistrial arguing that Det. Siewert should not be permitted to testify on the ultimate legal issue. J.A. 345–48. The trial judge, agreeing that the question was improper and "not appropriate," directed the jury to disregard Det. Siewert's testimony on this issue, but denied defense's motion for a mistrial. J.A. 345, 347. On his direct appeal in Virginia courts and on his federal *habeas* petition in the District Court, Mr. Toghill argued that this failure to declare a mistrial was error. J.A. 239, 128, 7. The Virginia courts and the District Court rejected this argument, J.A. 279–83, *Toghill I*, at *3–5, 147 (denying leave to appeal), 98, *Toghill III*, at *9 (dismissing the *habeas* petition, though without explicitly addressing the mistrial claim). There being no Certificate of Appealability as to this issue, J.A. 98, *id.*, it is not part of the present appeal.

[9] Both at the close of the Respondent's case and the close of all evidence, the Petitioner moved to strike the indictment arguing that the Commonwealth failed to prove that the emails indicated anything more than mere "desire" and did not amount to solicitation. J.A. 352–53, 355–56. The trial judge denied the motion to strike each time it was made. J.A. 353–54, 356–60. The Virginia Court of Appeals affirmed the denial of the motion to strike, J.A. 283–85, *Toghill I*, at *5–6, and the Supreme Court of Virginia denied discretionary review. J.A. 147. The argument was re–presented in the Petitioner's federal *habeas* petition, but was rejected by the District Court. J.A. 97–98, *Toghill III*, at *8. As with the issue identified in the preceding footnote, because a Certificate of Appealability as to this issue was denied, J.A. 98, *id.* at *9, it is not part of the present appeal.

Commonwealth agreed that other subsections of § 18.2–374.3 were inapplicable. J.A. 363–64. The jury was instructed to find Mr. Toghill guilty only if it found beyond a reasonable doubt that the defendant "propose[d] to [a] child the performance of an act of oral sex." J.A. 367–68, 376. The jury returned a unanimous verdict finding Mr. Toghill guilty as charged. J.A. 369. The jury also fixed Mr. Toghill's punishment at the statutorily mandated minimum of five years incarceration. J.A. 370.

On January 17, 2013, the trial judge formally sentenced Mr. Toghill to (1) five years of incarceration; (2) a suspended term of confinement of three years, the suspension being conditioned on the completion of post–release supervision; (3) a three year period of post–release supervision; and (4) mandatory registration as a sex offender. J.A. 371–74, 397–401.

C. Appeals to the State Courts

Mr. Toghill timely appealed his conviction to the Virginia Court of Appeals. J.A. 235. The initial petition to appeal did not raise the issue of the constitutionality of §§ 18.2–347.3(C) or 18.2–361(A). J.A. 239–41. However, following this Court's decision in *MacDonald*, the Virginia Court of Appeals, *sua sponte* directed the parties to brief the effect of *MacDonald* on Mr. Toghill's conviction. J.A. 242–43. The Petitioner responded to the Court of Appeals order arguing that following *MacDonald* his conviction could not stand, J.A. 244–57,

271–73, while the Commonwealth took the position that *MacDonald* has no effect on Virginia courts because decisions of the Fourth Circuit are not binding precedent on Virginia courts, especially when they are in conflict with the decisions of the Supreme Court of Virginia. J.A. 258–66. In an unpublished decision, the Virginia Court of Appeals agreed with the Commonwealth's argument and affirmed Mr. Toghill's conviction. J.A. 275–86, *Toghill I*, 2014 WL 545728. Mr. Toghill was then granted leave to appeal the *MacDonald* issue to the Supreme Court of Virginia. J.A. 147.

In response to Mr. Toghill's petition in the Supreme Court of Virginia, the Commonwealth argued that his argument was procedurally defaulted because no objection was raised at trial, and that even if it were not so defaulted, it failed on the merits for the same reasons as were presented to the Virginia Court of Appeals. J.A. 160–205. The Supreme Court of Virginia concluded that there is no procedural bar to the Petitioner's claims,[10] J.A. 208–10, *Toghill II*, 768 S.E.2d at 676–77, and proceeded to reject the argument on the merits.[11] J.A. 210–25, *id.* at 677–82. The Supreme Court of Virginia concluded that 1) this Court's judgments

[10] The Virginia Court of Appeals also concluded that no procedural bar exists, albeit for different reasons than those articulated by the Supreme Court of Virginia. *Compare* J.A. 277, *Toghill I*, at *2, *with* J.A. 208–10, *Toghill II*, 768 S.E.2d at 676–77.

[11] Justice McClanahan would have held Petitioner's claim procedurally barred. J.A. 230–32, *Toghill II*, 768 S.E.2d at 684 (McClanahan, J., concurring).

do not constitute binding authority on Virginia courts, J.A. 211–12, *id.* at 677–78; 2) the Petitioner has no standing to bring a facial challenge to the Virginia anti–sodomy statute, J.A. 212–19 *id.* at 678–80; 3) the *Lawrence* decision was not applicable outside of the context of consenting adult activity, J.A. 215–18, *id.* at 678–79; and 4) though the anti–sodomy statute as written cannot be constitutionally applied to consenting adults, the proper remedy is to merely limit the statute's application rather than invalidate it. J.A. 219–25, *id.* at 680–82. In a concurring opinion, Justice Mims, concluded that this Court's decision in *MacDonald* was "without authority," because in his view, this Court "undertook no AEDPA analysis of [the] opinion deciding the petitioner's direct appeal … [and] did not conclude, as AEDPA required, that [Supreme Court of Virginia's] decision … 'was contrary to, or an unreasonable application of' *Lawrence* … or any other decision of the Supreme Court of the United States." J.A. 230, *id.* at 683 (Mims, J., concurring) (citing *MacDonald*, 710 F.3d at 167 (Diaz, J., dissenting)). Consequently, Justice Mims "reject[ed the] application [of *MacDonald*] in Virginia courts." J.A. 230; *id.* at 684.

D. The Federal Habeas Petition

Having exhausted his remedies in state fora, Mr. Toghill turned to the federal courts. He timely filed his federal *habeas* petition in the U.S. District Court for the Western District of Virginia raising the same issues that were considered in

Toghill I and *Toghill II*. *Compare* J.A. 5–20 *with* J.A. 121–46 and J.A. 239–41. The Respondent moved to dismiss arguing that the question of whether *Lawrence* required facial invalidation of the anti–sodomy statute was one that "was debatable among reasonable jurists." J.A. 21–52. Thus, according to the Commonwealth, a state court decision rejecting the proposition that post–*Lawrence* Virginia's anti–sodomy statute was facially invalid is entitled to deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). J.A. 29–36. The Commonwealth also continued to press the argument that the Virginia courts are not bound by a contrary Fourth Circuit precedent. J.A. 36–40.

The District Court agreed with the Respondent that the Supreme Court of Virginia's conclusion that even post–*Lawrence* the anti–sodomy statute was not facially unconstitutional was not unreasonable. J.A. 89–97, *Toghill III*, at *3–7. The District Court also concluded that Mr. Toghill's conviction did not rest on Virginia's anti–sodomy statute, because in this case, the statute provided "[m]ere reference to the acts" that could not be solicited from a minor via electronic means. J.A. 95, *id.* at *7. Nonetheless, the District Court granted Mr. Toghill a Certificate of Appealability required by 28 U.S.C. § 2253(c), allowing the Petitioner to take his case to this Court. J.A. 98.

V. SUMMARY OF THE ARGUMENT

In *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), this Court held that the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), required facial invalidation of the Virginia's anti–sodomy statute, § 18.2–361(A). The Court concluded that given the way § 18.2–361(A) was written at the time, acts described in the statute were "not, at th[at] moment, a crime in Virginia." *MacDonald*, 710 F.3d at 163 n.13. The Court was categorical in its conclusion that no reasonable jurist could, following *Lawrence*, conclude that the statute written as broadly as the Virginia's anti–sodomy provision could be constitutionally applied to anyone. *See id.* at 166–67. Following *MacDonald*, it is even more unreasonable to conclude, as Virginia courts did, that the anti–sodomy provisions survived *Lawrence*.

The present case is indistinguishable from *MacDonald* in any material respect. Indeed, the Supreme Court of Virginia did not even attempt to differentiate the two cases, instead taking the position that *MacDonald* is not binding on Virginia state courts and declining to apply that precedent. However, basic principles of due process and rule of law require that it be treated no differently than *MacDonald*—a principle embodied in this Court's rule that a panel of the Court is bound by a precedential decision of another panel unless and until overruled by the Court sitting *en banc* or the Supreme Court of the United States.

See United States v. Chong, 285 F.3d 343, 346 (4th Cir. 2002) (Widener, J.). Consequently, Mr. Toghill ought to receive the same remedy that this Court afforded the petitioner in *MacDonald*.

Although federal *habeas* review of state convictions "is highly deferential, 'deference does not imply abandonment or abdication of judicial review.'" *Burgess v. Comm'r, Alabama Dep't of Corr.*, 723 F.3d 1308, 1315 (11th Cir. 2013) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003)). When state judges render unreasonable decisions, it is a duty of federal courts to enforce the constitutional rights of prisoners, comity notwithstanding. *See Williams v. Taylor*, 529 U.S. 362, 389 (2000) (Although "the statute directs federal courts to attend to every state–court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state–court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody … violates the Constitution, that independent judgment should prevail."). The unreasonableness of the state court's decision need not be blindingly obvious in order for the federal courts to grant a *habeas* petition. *Id.* (noting that there are cases where "at first blush, a state–court judgment seems entirely reasonable, but thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional

error. In our view, such an erroneous judgment is 'unreasonable' within the meaning of the Act even though that conclusion was not immediately apparent.").

While it is technically true that the Virginia courts are not directly bound by this Court's pronouncements, they are bound, as are all courts by the judgments of the United States Supreme Court. *See James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (*per curiam*). Virginia courts' failure to apply the clear lessons of *Lawrence* is "a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent, and therefore cannot stand." 710 F.3d at 166 n.17.

Having exercised its independent judgment, this Court has already "become convinced" that custody of *any* person pursuant to Virginia's anti–sodomy statute cannot be squared with Constitutional commands. *See id*. This independent judgment should prevail once again.

VI. ARGUMENT

A. Standard of Review

"When, as in this case, a district court's decision on a petition for a writ of habeas corpus is based on a state court record," the Fourth Circuit reviews the matter *de novo*. *Williams v. Ozmint*, 494 F.3d 478, 483 (4th Cir. 2007). The appellate court applies "the same standard that the district court was required to apply." *Longworth v. Ozmint*, 377 F.3d 437, 443 (4th Cir. 2004). *Habeas* review of state court decisions is governed by AEDPA. *See* 28 U.S.C. § 2254. The

"review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011), and relief is available only if the state *habeas* court that adjudicated the claim on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States …." 28 U.S.C. § 2254(d)(1).

B. The Case–at–Bar is Indistinguishable from MacDonald v. Moose

The issue presented by the present case has already been authoritatively decided by this Court. *See MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013). The Supreme Court of Virginia's attempts to evade the clear and unambiguous holding of this Court are erroneous and unreasonable.

In *MacDonald*, the Appellant was convicted of violating Virginia statute that made it a felony for "[a]ny person age eighteen or older …[to] attempt[] to persuade another person under age eighteen to commit a felony …." *See* Va. Code § 18.2–29 (2002). In that case, the prosecution proved that MacDonald, a forty seven year old man, propositioned a seventeen year old woman to perform oral sex on him (a proposition that she declined). Eventually, MacDonald was arrested and charged with attempting to persuade a minor to commit a felony, specifically the act of oral sex. In 2005, when the events leading to MacDonald's conviction

occurred, Virginia Code § 18.2–361[12] made it a felony for "any person [to] … carnally know[] any male or female person … by or with the mouth, or [to] voluntarily submit[] to such carnal knowledge …." Because oral sex was criminally proscribed, *id*., and because MacDonald "attempt[ed] to persuade a [] person under age eighteen to" engage in oral sex, he was, in the judgment of Virginia courts, guilty of violating Virginia Code § 18.2–29. When MacDonald sought to quash his indictment (and later conviction) arguing that the "predicate felony" that he importuned a minor to commit, was not in light of *Lawrence v. Texas*, 539 U.S. 558 (2003) a felony at all, the Virginia courts rejected his argument. The Virginia courts recognized that *Lawrence* made the anti–sodomy provision unenforceable as applied to consenting adults, but that it did not undermine the more limited application of the same statute to children. *See MacDonald v. Commonwealth*, No. 1939–05–2, 2007 WL 43635, *1 (Va. Ct. App. Jan. 9, 2007); *McDonald v. Commonwealth*, 630 S.E.2d 754, 756 (2006)[13]; *see also Martin v. Ziherl*, 607 S.E.2d 367, 370–71 (2005). The Virginia courts reasoned that since MacDonald was convicted of attempting to persuade a *minor* for oral

[12] In *MacDonald*, this Court referred to § 18.2–361 as the "anti–sodomy provision." For the sake of consistency and ease, the Petitioner will adopt the same terminology.

[13] "Though the [MacDonald's] last name in the [two state] appeal[s] is spelled differently, it is clear that both appeals involved the same individual, … William Scott MacDonald." *MacDonald v. Moose*, 710 F.3d at 158.

sex, the statute could be validly applied to him and therefore his facial challenge to the anti–sodomy provision could not be heard. *McDonald*, 630 S.E.2d at 756.

Presented with MacDonald's *habeas* petition, and applying AEDPA deference, this Court concluded that Virginia courts' holdings are "a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent, and therefore cannot stand." 710 F.3d at 166 n.17. Although everyone (including this Court, the Virginia courts, and the Petitioner herein) agrees "that a state could, consistently with the Constitution, criminalize sodomy between an adult and a minor," *id.* at 164; *Toghill II*, 768 S.E.2d at 678–80; *see also McDonald*, 630 S.E.2d at 756, the anti–sodomy provision is not limited to minors, and was enacted for purposes entirely unrelated to criminalization of sexual conduct between adults and children. *MacDonald*, 710 F.3d at 165. "In these circumstances, a judicial reformation of the anti–sodomy provision to criminalize [only sexual conduct between adults and children], and [doing] so in harmony with *Lawrence*, requires a drastic action that runs afoul of the Supreme Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006)." *Id.* at 165–66.

The case at bar is nearly identical to *MacDonald*. In the present case, the Petitioner was convicted under a statute that made it a felony to use electronic devices to "[p]ropose to [a] child [under the age of fifteen] the performance of … any act *constituting an offense* under § 18.2–361." Va. Code § 18.2–374.3(C)(3) (2012) (emphasis added). Like in *MacDonald*, in order for the Commonwealth to obtain a conviction, it had to prove that 1) Mr. Toghill used electronic devices; 2) to solicit, with lascivious intent; 3) a person he had reason to believe is a child less than 15 years of age to; 4) perform an act that is *a crime* under the anti–sodomy provision of the Virginia Code. This is no different than *MacDonald* where in order to maintain the conviction, the Commonwealth needed to show that the defendant in that case 1) attempted to persuade; 2) a child under eighteen years of age; 3) to engage in conduct that is a *felony* under the anti–sodomy provision.

This Court, however, held that *Lawrence* inexorably commands the conclusion that the anti–sodomy provision is a legal nullity. *See MacDonald*, 710 F.3d at 167. The conduct proscribed by the provision that is legally void, by definition, cannot be criminal. It is for that reason that this Court granted MacDonald's *habeas* petition and quashed his conviction. *See id.* ("The anti–sodomy provision itself, however, which served as the basis for MacDonald's criminal solicitation conviction, cannot be squared with *Lawrence*….") MacDonald's *habeas* petition was granted because however repugnant his

solicitation of a minor may have been, given the structure of the Virginia Code what he was soliciting was simply not criminal. *Id.* at 163 n.13 (Noting that MacDonald's conviction was "made possible solely by the Commonwealth's decision to institute prosecution of a man who loathsomely solicited an underage female to commit an act that is not, at the moment, a crime in Virginia. … The legal arm of the Commonwealth cannot simply wave a magic wand and decree by fiat conduct as criminal ….''). The same rule, *mutatis mutandis*, applies with equal force to Mr. Toghill. While his conduct in sending emails to "Becca Flynn" may justly be met with societal opprobrium, what Mr. Toghill actually "proposed" was the performance of an act that was not *an offense* as was statutorily required, because the anti–sodomy provision being facially invalid, does not criminalize (or make an "offense" out of) any conduct.

"'Like cases [must] be treated alike,' because '[t]he most fundamental of our legal principles—equal justice under law—demands that this be so.'" *United States v. Irey*, 612 F.3d 1160, 1181 (11th Cir. 2010) (quoting Judge Marvin E. Frankel, Jail Sentence Reform, N.Y. Times, Jan. 15, 1978, at E21); *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."). Equal Protection Clauses of the Fourteenth Amendment demand nothing less.

> "[T]he Equal Protection Clause is a … profound recognition of the essential and radical equality of all human beings. It seeks to ensure that any classifications the law makes are made 'without respect to persons,' that like cases are treated alike, that those who 'appear similarly situated' are not treated differently without, at the very least, 'a rational reason for the difference.'"

SECSYS, LLC v. Vigil, 666 F.3d 678, 684–85 (10th Cir. 2012) (Gorsuch, J.) (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008)).

This principle is not vitiated in *habeas* cases, *cf.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) ("Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution"),[14] nor is it inapplicable simply because the beneficiary may be unpopular. *See Hill v. Texas*, 316 U.S. 400, 406 (1942) (granting a writ of *habeas corpus* to a defendant convicted of rape and holding that "[e]qual protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous.").

[14] Given that Mr. Toghill's case was on *direct* rather than *collateral* review, the Supreme Court's admonition in *Montgomery* applies to him with an even greater force. *See Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) ("[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").

Because there is no difference in either the substantive or procedural issues between Mr. Toghill's case and *MacDonald*, this Court should treat the case at bar in the same manner as it did MacDonald's and issue the writ.

C. Attempts to Distinguish MacDonald are Unpersuasive

When entertaining a federal *habeas* petition from an individual convicted in state courts, this Court's "review under § 2254(d)(1) focuses on what a state court knew and did." *Pinholster*, 563 U.S. at 182. At the same time, this Court has the power to affirm (and therefore deny *habeas* relief) "on any ground supported by the record, even if it has not been raised by the parties." *Allen v. Lee*, 366 F.3d 319, 343 (4th Cir. 2004) (*en banc*) (*per curiam*) (Gregory, J., joined by Wilkins, C.J., and Michael, Motz, and King, JJ., concurring in judgment). For this reason, though the Virginia courts did not attempt to distinguish *MacDonald* (instead simply rejecting its applicability), *Toghill II*, 768 S.E.2d at 677–80, it is appropriate to address the District Court's erroneous finding that unlike MacDonald, Mr. Toghill "was convicted of violating … an entirely different statute dealing expressly with children." J.A. 95, *Toghill III*, at *7. According to the District Court,

> Virginia Code § 18.2–374.3(C)—which makes it unlawful to electronically solicit sex from children—only references the anti–sodomy statute, Virginia Code § 18.2–361, in order to delineate which acts may not be the subject of electronic communications with a child under 15. Mere reference to the acts listed in Virginia Code § 18.2–361 does not unconstitutionally taint Toghill's conviction. In short,

> Toghill was not convicted of violating the anti–sodomy provisions of Virginia Code § 18.2–361; rather, he was convicted of proposing sodomy to a child via electronic means.

Id. (footnote omitted). This analysis simply does not withstand scrutiny.

As an initial matter, and as discussed in Part VI.B, *ante*, MacDonald was also convicted under a statute "dealing expressly with children." After all, the crime of conviction in *MacDonald* was an "attempt[] to persuade another person under age eighteen" (*i.e.*, a "child") to engage in a sexual act. *MacDonald*, 710 F.3d at 155. Second, MacDonald was also not "convicted of violating the anti–sodomy provisions of Virginia Code § 18.2–361; rather, he was convicted of proposing sodomy to a child." *Toghill III*, at *7; *see* 710 F.3d at 155. In both cases, the vitality of the anti–sodomy statute was crucial to securing and maintaining a conviction. Absent § 18.2–361, neither MacDonald, nor Mr. Toghill could be convicted; the former because he would not be importuning a child to commit a felony, and the latter because he would not be propositioning a child to perform an act that constitutes an "offense" under the Virginia criminal code.

Contrary to the District Court's conclusion, § 18.2–374.3(C) does not "only *reference*[] the anti–sodomy statute … in order to delineate which acts may not be the subject of electronic communications with a child." *Toghill III*, at *7. (emphasis added). Instead, § 18.2–374.3(C) makes it unlawful to make two types of electronic communications with a child: a) propositioning "sexual intercourse;"

or b) propositioning an act that is an "*offense*" under the anti–sodomy statute. The Commonwealth did not attempt to prove that Mr. Toghill propositioned "sexual intercourse" to "Becca Flynn." *See* J.A. 364 (admitting that the "the case is going to rest on oral sex."). Thus, the only possible basis for the conviction is proof that Mr. Toghill propositioned a child to perform an *illegal sexual act*. However, *Lawrence* and *MacDonald* make clear that oral sex *qua* oral sex, cannot, consistent with the Due Process Clause, be proscribed. The District Court's reading of § 18.2–374.3(C) is therefore erroneous.

Furthermore, the District Court's reading is simply inconsistent with the authoritative construction that the Supreme Court of Virginia gave that statute. The Supreme Court of Virginia is a final arbiter of the meaning of Virginia laws. *See Gill v. Rollins Protective Servs. Co.*, 836 F.2d 194, 199 (4th Cir. 1987). When adjudicating Mr. Toghill's appeal, the Supreme Court of Virginia did not hold that the inclusion of § 18.2–361 into the elements of a crime under § 18.2–374.3(C) was merely a short–hand definitional device. Rather, the Supreme Court of Virginia held, contrary to this Court's decision in *MacDonald*, that § 18.2–361, in and of itself, remains valid *as applied* to Mr. Toghill. *Toghill II*, 768 S.E.2d at 679 ("[W]e hold that Code § 18.2–361(A) was constitutional as applied to Toghill."). At no point did the Virginia courts even hint at the construction adopted by the District Court. *See id.* at 678–82. The District Court is simply not free to imbue

Virginia statutes with meaning that was rejected by Virginia's own courts. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither th[e Supreme] Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); *Redmon v. Peyton*, 420 F.2d 822, 826 (4th Cir. 1969) (*per curiam*) ("[C]ases decided by the Virginia Supreme Court of Appeals, … are binding on [federal courts] in determining the meaning of Virginia law…."). The highest court of Virginia construed § 18.2–374.3(C) to prohibit solicitation of activities that are *criminal* under § 18.2–361(A). *Toghill II*, 768 S.E.2d at 682. It is improper for the District Court to construe the same section to prohibit solicitation of activities that are *listed* in § 18.2–361(A), *whether or not* they are criminal. *Toghill III*, at *7 ("Virginia Code § 18.2–374.3(C) … only references the anti–sodomy statute, Virginia Code § 18.2–361, in order to delineate which acts may not be the subject of electronic communications with a child under 15.").

Finally, the District Court's construction of § 18.2–374.3(C) is undermined by the subsequent legislative history of that statute. In 2014, the Virginia Legislature amended § 18.2–374.3(C)(3) to prohibit "[p]ropos[ing] to [a] child [under 15] the performance of an act of sexual intercourse, *anal intercourse, cunnilingus, fellatio, or anilingus* or any act constituting an offense under § 18.2–361." Va. Acts 2014, c. 794, § 1 (eff. April 23, 2014) (language added by the

amendment italicized). The same bill also amended § 18.2–361(A) to prohibit "carnally know[ing] in any manner any brute animal~~, or carnally know[ing] any male or female person by the anus or by or with the mouth, or voluntarily submit[ting] to such carnal knowledge~~." *Id.* (language removed by the amendment struck through). The sponsors of the bill explained that the purpose behind the amendment is to "clarif[y] that engaging in consensual sodomy is not a crime if all persons participating are adults, are not in a public place, and are not committing, attempting to commit, conspiring to commit, aiding, or abetting any act in furtherance of prostitution." Va. S.B. 14 (2014) (summary as introduced). Thus, the 2014 amendments to § 18.2–374.3(C)(3) specifically criminalized using electronic means to solicit a child to perform oral sex, whether or not oral sex as such, is an offense, changing the previous prohibition on solicitation of criminal sexual activity only.

It is well settled that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Loving v. United States*, 517 U.S. 748, 770 (1996) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, n.13 (1980)). Yet, in the District Court's view, the 2014 amendments rather than making clear that pre–2014 version of the statute prohibited electronic communications soliciting children for acts that are *criminal* under § 18.2–361(A), actually supported the conclusion that § 18.2–374.3(C)

always prohibited electronic communications soliciting children for acts merely listed in § 18.2–361(A). *Toghill III*, *7 n.10. In other words, in the District Court's view the 2014 amendments to § 18.2–374.3(C) were of no substance or consequence whatsoever. This conclusion is belied by the legislative history behind the 2014 amendments.

It is true that not every amendment to the statutory text signifies a change in substantive law and that some amendments are made merely for purposes of clarification of existing law. *See Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004). In order to determine whether a subsequent legislative "amendment clarifies or changes an existing law, a court, of course, looks to statements of intent made by the legislature that enacted the amendment." *Id.* Though the Commonwealth of Virginia does not keep records of floor or committee debates, the intent of the 2014 amendments can be ascertained from section 2 of the Act. *See* Va. Acts 2014, c. 794, § 2.

Under the Virginia Constitution, laws passed by the General Assembly during its regular session "take effect on the first day of July following the adjournment of the session of the General Assembly at which it has been enacted." Va. Const. art. IV, § 13. The General Assembly may, however, direct an earlier effective date, but only "in the case of an emergency" and upon concurrence "of four–fifths of the members voting in each house." *Id.* Section 2

of Va. Acts 2014, c. 794 does declare "[t]hat an emergency exists and this act is in force from its passage." That provision was adopted unanimously. *See* H.D. 10, Gen. Assembly Reg. Sess. (Va. 2014). The District Court's conclusion that there is "no constitutional distinction between Virginia Code § 18.2–374.3(C) as it has been amended" and the version of § 18.2–374.3(C) as it existed when Mr. Toghill was convicted, is hard to square with the Virginia Legislature's unanimous belief that the then–existing state of affairs was so dire that it required an emergency fix. Nearly a century ago, the Supreme Court of Virginia stated that "[t]he reason for postponing the operation of statutes, as is done by section 53 of the Constitution, was that the people might be informed of their contents before they became effective. The reason for making exceptions to the rule was *manifest necessity*."[15] *City of Roanoke v. Elliott*, 96 S.E. 819, 822 (Va. 1918) (emphasis added). If the 2014 Amendments worked no substantive change in the law, it is hard to see what sort of "manifest necessity" existed that would lead the Virginia General Assembly to deprive the Commonwealth's citizenry of the ability "to be informed" of the content of the new laws. And while courts are not permitted to second–guess Legislature's judgment regarding existence of an

[15] The Court was referring to the 1902 Constitution of Virginia. The present Constitution was adopted in 1971 (and then amended on several occasions, but as relevant to the present discussion, the "effective date" provisions, though renumbered and somewhat modified, remain part of the current Constitution of Virginia. *Compare* Va. Const. art. IV, § 53 (1902), *with* Va. Const. art. IV, § 13 (2017).

emergency, *Elliott*, 96 S.E. at 822 ("Legislature is the sole judge of the existence of an emergency, and its action is not reviewable"), "it is permissible to examine the conditions under which the[] [emergency laws] were passed to ascertain legislative intent." *Falls Church v. Bd. of Sup'rs.*, 144 S.E. 870, 872 (1928). A fair minded examination of the conditions under which the General Assembly passed the 2014 amendments to § 18.2–374(C) on an emergency basis would unavoidably lead to the conclusion that prior to the amendments, the then–existing statutory language required the state to prove that the defendant solicited a child to perform a sexual act that was in and of itself criminal.

This Court issued its decision in *MacDonald* on March 12, 2013. *MacDonald*, 710 F.3d at 154. At that time, the Virginia Legislature was not in session (as the 2013 session concluded on February 23, 2013). *See* Va. Gen. Assembly 2013 Session Calendar, *available at* http://dls.virginia.gov/pubs/calendar/cal2013_2.pdf (last visited April 13, 2017) ("2013 Session Calendar"). The Commonwealth's petition for rehearing and rehearing *en banc* was not disposed of until April 8, 2013, *MacDonald v. Moose*, No. 11–7427, D.E. 58 (4th Cir., April 8, 2013) (order denying rehearing and rehearing *en banc*), and the Court's mandate didn't issue until a week after that. *Id.* at D.E. 59. Once again, the Virginia Legislature was out of session as its special sitting lasted only one day and was held on April 3, 2013. *See* 2013

Session Calendar. The Supreme Court denied the Commonwealth's petition for *certiorari* on October 7, 2013. *See Moose v. MacDonald*, 134 S. Ct. 200 (2013) (Mem.), but the Virginia Legislature would not reconvene until January 8, 2014. *See* Va. Gen. Assembly 2014 Session Calendar, *available at* http://dls.virginia.gov/pubs/calendar/cal2014_2.pdf (last visited April 13, 2017).[16]

When the Virginia General Assembly reconvened for the 2014 legislative session, it understood that, given the decisions in *Lawrence* and *MacDonald*, the criminalization of oral or anal sex as such, was no longer tenable. It further understood that given the then–existing structure of the Virginia Code, solicitation of acts of oral or anal sex, even from minors, was not actually criminalized since the predicate statute, § 18.2–361(A), was held to be facially invalid. *See MacDonald*, 710 F.3d at 156. It is this legal vacuum that constituted the emergency which spurred the Virginia General Assembly to amend § 18.2–361(A) and § 18.2–374(C) and make the amendment effective immediately. If Virginia were to continue to protect minors from sexual crimes, there "was manifest necessity," *Elliott*, 96 S.E. at 822, to fill this legal void and to do so quickly.

[16] Under the rules, bills for the 2014 Virginia legislative session could be pre–filed beginning November 18, 2013. *See* Va. Gen. Assembly 2014 Session Pre–Filing Calendar, *available at* http://dls.virginia.gov/pubs/calendar/cal2014_1.pdf (last visited April 13, 2017). The 2014 amendments to the Virginia anti–sodomy statute and § 18.2–374.3(C) were pre–filed on December 4, 2013.

The intent of Virginia's General Assembly was not "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases," *Brown*, 374 F.3d at 259 (quoting *United States v. Sepulveda*, 115 F.3d 882, 885 n.5 (11th Cir. 1997)), or "purely to make what was intended all along even more unmistakably clear," *id.* (quoting *United States v. Montgomery County*, 761 F.2d 998, 1003 (4th Cir. 1985)), but to substantively change existing (but unconstitutional) law.

The District Court's conclusion that there is "no constitutional distinction between" the pre– and post–amendment versions of § 18.2–374(C) is inconsistent with the Virginia Legislature's understanding of its own enactments and therefore cannot stand.

In summary, the District Court's judgment that Virginia Code § 18.2–374(C) survives *Lawrence* because it "only references the anti–sodomy statute, … in order to delineate which acts may not be the subject of electronic communications with a child under 15," is legally erroneous for it misreads the plain language of § 18.2–374(C), construes the statute inconsistent with the authoritative construction given it by Virginia's highest court, and ignores Virginia Legislature's intent in crafting amendments to the statute in question.

D. The Supreme Court of Virginia's Recalcitrance Should Not be Countenanced by this Court

In adjudicating a *habeas* claim under AEDPA, federal courts must defer to state courts' adjudication on the merits unless the state–level decision was

"contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States …." 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established Federal law when a "state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law[, or when] the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that reached by the Court. *Williams v. Taylor*, 529 U.S. at 406 (endorsing the test set out in *Green v. French*, 143 F.3d 865, 869–70 (4th Cir. 1998)). A state court's decision involves "unreasonable application of" Federal law when the "state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407 (again endorsing *Green*, 143 F.3d at 869–70). The Supreme Court of Virginia's adjudication of Mr. Toghill's appeal fails both of these prongs.

1. The Decision of the Supreme Court of Virginia is "Contrary to" Clearly Established Federal Law

The Supreme Court of Virginia refused to follow this Court's decision in *MacDonald* on the ground that Fourth Circuit's "decisions are not binding precedent for decisions" of Virginia state courts. *Toghill II*, 768 S.E.2d at 677. While that observation is true as far as it goes, *see, e.g.*, *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); *Owsley v. Peyton*, 352 F.2d 804,

805 (4th Cir. 1965), it offers no refuge against the binding force of United States Supreme Court's precedents. *See Nitro–Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*) ("'It is th[e Supreme] Court's responsibility to say what a [federal law] means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'") (quoting *Rivers v. Roadway Express*, 511 U.S. 298, 312 (1994)). "The [Virginia] Supreme Court, like any other state or federal court, is bound by th[e U.S. Supreme] Court's interpretation of federal law." *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (*per curiam*). Virginia courts recognize this axiom. *See Thacker v. Peyton*, 146 S.E.2d 176, 178 (1966).

The binding case on Virginia courts was therefore not *MacDonald*, but *Lawrence*. The only issue then is what did *Lawrence* actually hold. The Supreme Court of Virginia concluded that *Lawrence* invalidated the Texas anti–sodomy statute only as applied to consenting adults. *See Toghill II*, 768 S.E.2d at 678–79. As this Court, however, explained in *MacDonald*, "[t]he *Lawrence* Court [] recognized that the facial due process challenge in *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)] was wrongly decided," 710 F.3d at 163, meaning that neither the Georgia anti–sodomy provision considered in *Bowers*, nor the Texas anti–sodomy provision considered in *Lawrence* survive *either* the as applied *or* facial challenge. *Id.* It necessarily follows that the Virginia "anti–sodomy provision—an enactment

in no way dissimilar to the Texas and Georgia statutes deemed unconstitutional by the Supreme Court—," *id.* at 164, also fails a facial challenge. The Supreme Court of Virginia conclusion that § 18.2–361(A) is *not* facially unconstitutional is "a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent," *id.* at 166, n.17, because the "state court arrive[d] at a conclusion opposite to that reached by th[e Supreme] Court on a question of law…." *Williams v. Taylor*, 529 U.S. at 406.

Likewise, the Supreme Court of Virginia's decision on the standing issue (refusing to entertain Petitioner's facial challenge because the anti–sodomy statute could purportedly be applied to him), *see Toghill II*, 768 S.E.2d at 680, is "contrary to" the clearly established Federal law. A statute is not saved from a facial challenge just because it may be validly applied in some limited circumstances. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) (holding that avoiding facial invalidation merely because the statute could be constitutionally applied in some circumstances "would inflict enormous costs on both courts and litigants, who would be required to [constantly seek judicial clarification] whenever a single application of a law might be valid."); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 731–32 (1995) (Scalia, J., dissenting) (rejecting the approach where "the only regulation susceptible to facial attack is one that *not only* is invalid in all its applications, but

also does not sweep up *any* person who *could have been* held liable under a proper application of the statute. That is not the law. … [Such an approach] confuses lawful application of the challenged regulation with lawful application of a *different* regulation, *i.e.*, one requiring the various elements of liability that this regulation omits.") (emphasis in original).

The Supreme Court of Virginia's attempts to limit the reach of the anti–sodomy statute so as to avoid hearing Mr. Toghill's facial challenge run head first into several controlling U.S. Supreme Court decisions. As the Supreme Court explained nearly 150 years ago, "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v. Reese*, 92 U.S. 214, 221 (1875) (quoted in *Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997)). For this reason, when "considering a facial challenge, [courts] may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. ACLU*, 521 U.S. at 884. The Virginia anti–sodomy provision, however, is not susceptible to such a construction because the courts would be engaged in little more than

guesswork in trying to determine how and to whom Virginia Legislature would apply the anti–sodomy provisions of § 18.2–361(A) in a constitutional manner.[17]

Because the Virginia anti–sodomy statute prohibits sodomy *simpliciter*, it does not survive *Lawrence* and therefore, cannot be constitutionally applied to *anyone*. That Mr. Toghill could have been convicted under a *different* statute that included *additional* elements of liability (*e.g.*, requiring the sexual partner to be a minor as an element of the offense) is irrelevant to the question of whether the anti–sodomy statute *as written* could be applied to him (or for that matter anyone else). The *Lawrence* Court answered that question with an emphatic "No," *see MacDonald*, 710 F.3d at 163–64, and therefore, the Supreme Court of Virginia's

[17] For example, Virginia Legislature might reasonably conclude that oral sex should have lower age of consent or perhaps lower penalties than sexual intercourse with a minor, as is the case in Maryland. *See* Md. Crim. L. Code. § 3–306(a)(3) (defining "sexual acts" with a child under 14 years of age if the person performing the act is more than 4 years older than the child as a "*sexual offense* in the second degree which is punished by anything from a probation to imprisonment for a maximum of 20 years); 3–304(a)(3) (defining "sexual intercourse" with a child under 14 years of age if the person performing the act is more than 4 years older than the child as a "*rape* in the second degree" which carries a mandatory minimum sentence of 15 years of incarceration); 3–301 (defining "sexual act" to include, *inter alia*, oral and anal sex, but not "vaginal intercourse."). Of course, the Commonwealth of Virginia is free not to follow Maryland and to treat sexual intercourse and other sex acts with minors in like manner. The point though is that courts have no insight as to what kind of statute Virginia Legislature would prefer, and therefore should not engage in "quintessentially legislative work," *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006), instead leaving such work in the capable hands of Virginia legislators who have proven themselves up to the task. *See* Va. Acts 2014, c. 794 (amending §§ 18.2–374.3(C) and 18.2–361(A)).

refusal to entertain Mr. Toghill's facial challenge is also "flatly contrary to controlling Supreme Court precedent." *Id.* at 166, n.17.

2. The Decision of the Supreme Court of Virginia is an "Unreasonable Application of" Clearly Established Federal Law

"AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)). Instead, state courts' denial of *habeas* relief must be set aside and the writ granted, whenever a "state court ... unreasonably refuses to extend [a legal principle from the Supreme Court's precedent] to a new context where it should apply." *Williams v. Taylor*, 529 U.S. at 407.

It is true that the present case is not the exact replica of *MacDonald*, as the Petitioner here was convicted of violating a different statute than the petitioner in that case. Nonetheless, in both cases, the convictions were and had to be predicated on the conduct criminalized by Virginia's anti–sodomy statute. Refusal to extend the principle of *Lawrence* to this "new context" is textbook "unreasonable application" of clearly established Federal law. "A legal principle, by definition, applies to diverse factual scenarios. And those factual scenarios can differ in innumerable ways, so long as they are analogous on the point to which the legal principle applies." *Robinson v. Polk*, 444 F.3d 225, 232 (4th Cir. 2006) (King, J., dissenting from the denial of rehearing *en banc*). That the present case's facts differ

from *MacDonald* or *Lawrence* does not *ipso facto* mean that the refusal to apply the legal principles announced by the Supreme Court to this set of facts is "reasonable."

The District Court rejected Mr. Toghill's petition concluding that "[t]he Supreme Court of Virginia's determination that Petitioner's claim under *Lawrence* was unpersuasive precludes federal habeas relief because 'fairminded jurists could disagree on the correctness of the state court's decision.'" *Toghill III*, at *6 (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). This conclusion is erroneous and the Supreme Court of Virginia's decision, being unreasonable, is entitled to no deference.

It is important to note that the Supreme Court of Virginia did much more than find "that *Petitioner's* claim under *Lawrence* was unpersuasive." *Id.* (emphasis added). Instead, the Supreme Court of Virginia held that the anti–sodomy statute survives constitutional challenge with respect to *all* individuals other than consenting adults. *See Toghill II*, 768 S.E.2d at 682 ("[W]e hold that it is proper to apply the 'normal rule' by prohibiting those applications of Code § 18.2–361(A) that are unconstitutional and leaving the constitutional applications of Code § 18.2–361(A) to be enforced."). In other words, even if a case *identical* to *MacDonald* were to come before the Supreme Court of Virginia, that Court would *still* deny relief. This broad (but unreasonable) holding is an implicit recognition by that Court (*pace* the District Court's opinion in *Toghill III*) that though the

statute of conviction in the present case differs from the one in *MacDonald*, the difference is immaterial to its resolution of the present case. And therein lies the problem. If the Supreme Court of Virginia was unreasonable in failing to extend the rule of *Lawrence* to the petitioner in *MacDonald*, it necessarily follows that it was unreasonable in failing to extend this same rule to the case at bar. *Cf. Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002) ("'To the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue.' Reference to such cases may be especially helpful when the governing Supreme Court precedent articulates a broad principle that applies to a wide variety of factual patterns.") (quoting *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998)).

AEDPA requires that federal courts defer to erroneous but reasonable legal conclusions reached by state courts. *See Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state–court decision applied [the law] incorrectly.") (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24–25, (2002) (per curiam)) (alterations in original). "But AEDPA deference is not unlimited." *Bennett v. Stirling*, 842 F.3d 319, 323 (4th Cir. 2016). "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial

review. Deference does not by definition preclude relief." *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003). This Court has rejected the view that its "job is solely to rubber–stamp the state [*habeas*] court—never mind that court's flouting of clear Supreme Court precedent ….," holding instead that there is "a meaningful role for the federal courts in safeguarding the constitutional rights of state prisoners …." *Elmore v. Ozmint*, 661 F.3d 783, 872 (4th Cir. 2011). That meaningful role cannot be exercised were federal courts "to defer to the opinion of every reasonable state–court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody … violates the Constitution, that independent judgment should prevail." *Williams v. Taylor*, 529 U.S. at 389. Though the justices of the Supreme Court of Virginia are reasonable and conscientious jurists, that alone is not sufficient to insulate that Court's judgment from review. The District Court's deference to the Supreme Court of Virginia "—never mind that court's flouting of clear Supreme Court precedent—," *Elmore*, 661 F.3d at 872, was unwarranted.

Finally, upholding the judgment of the Supreme Court of Virginia would of necessity abrogate *MacDonald*. Again, the Supreme Court of Virginia did not limit its holding to convictions brought under § 18.3–347.3(C), but rather declared that the anti–sodomy provision itself remains good law provided it is applied outside the context of consensual adult behavior. *See Toghill II*, 768 S.E.2d at 682.

For this Court to defer to such a holding would be to conclude that its own conclusion that "the anti–sodomy provision is unconstitutional when applied to *any* person," 710 F.3d at 162, was wrong. However, "[i]t is well settled that 'a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting *en banc* can do that.'" *United States v. Chong*, 285 F.3d 343, 346 (4th Cir. 2002) (Widener, J.) (quoting *Mentavlos v. Anderson*, 249 F.3d 301, 312 n.4 (4th Cir. 2001)).

The *MacDonald* decision, which held that applying Virginia's anti–sodomy statute to *anyone* is contrary to, and the unreasonable application of, the legal principle announced in *Lawrence* stands as the binding precedent of this Court. *See id.* This Court cannot allow the Supreme Court of Virginia to essentially overrule one of this Court's prior precedents by refusing to follow it. Doing so would change the well–settled rule that only the U.S. Supreme Court or this Court sitting *en banc* can overrule a precedential panel decision, *id.*, to a novel and rather astonishing rule where any state court adjudicating a criminal matter could do so. Nothing in AEDPA requires such a perverse result. *See Williams v. Taylor*, 529 U.S. at 378–79 (Stevens, J., dissenting in part) ("When federal judges exercise their federal–question jurisdiction under the "judicial Power" of Article III of the Constitution, it is 'emphatically the province and duty' of those judges to 'say what the law is.' … A construction of AEDPA that would require the federal courts to

cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

VII. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the judgment of the United States District Court for the Western District of Virginia be reversed, that the *writ of habeas corpus* issue against the Respondent, and that the Petitioner's conviction be quashed.

VIII. REQUEST FOR ORAL ARGUMENT

Petitioner–Appellant respectfully requests that this matter be calendared for oral argument.

/s/ Gregory Dolin
Gregory Dolin
Associate Professor of Law

Meghan Ellis Brennan, *Third Year Law Student*
Stuart Goldberg, *Third Year Law Student*
Jasna McElrath, *Third Year Law Student*

UNIVERSITY OF BALTIMORE
SCHOOL OF LAW
1420 N. Charles Street
Baltimore, MD 21218
(410) 837-4610

Counsel for Appellant

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Counsel for Appellant

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I hereby certify that on April 19, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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/s/ Shelly N. Gannon
Shelly N. Gannon
*Gibson*Moore Appellate Services, LLC
206 East Cary Street
P.O. Box 1460 (23218)
Richmond, VA 23219
(804) 249-7770 – Telephone
(804) 249-7771 – Facsimile
shelly@gibsonmoore.net