No. 10-9995

In the Supreme Court of the United States

PATRICK WOOD, PETITIONER

v.

KEVIN MILYARD, WARDEN,
STERLING CORRECTIONAL FACILITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR TEXAS, ALABAMA, ARIZONA, FLORIDA, ILLINOIS, KANSAS, MONTANA, NEBRASKA, NEW JERSEY, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WASHINGTON, WYOMING, AND GUAM AS AMICI CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 2

Argument 3

Waiver and forfeiture principles from the Civil Rules do not prevent appellate courts from raising AEDPA's limitations period *sua sponte*, because those principles are inconsistent with the Habeas Rules 3

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Acosta v. *Artuz*, 221 F.3d 117 (2d Cir. 2000) ... 9

Calderon v. *Thompson*, 523 U.S. 538 (1998) 9

Caspari v. *Bohlen*, 510 U.S. 383 (1994) 7

Town of Concord v. *FERC*, 955 F.2d 67 (D.C. Cir. 1992) 3

Day v. *McDonough*, 547 U.S. 198 (2006) ..... *passim*

Duncan v. *Walker*, 533 U.S. 167 (2001) 1

Freytag v. *Comm'r*, 501 U.S. 868 (1991) 3

Granberry v. *Greer*, 481 U.S. 129 (1987) 7

Hardiman v. *Reynolds*, 971 F.2d 500 (10th Cir. 1992) 8

John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 4

Kiser v. *Johnson*, 163 F.3d 326 (5th Cir. 1999) 9

Long v. *Wilson*, 393 F.3d 390 (3d Cir. 2004) 2

Schiro v. *Farley*, 510 U.S. 222 (1994)..... 7
Smith v. *Murray*, 477 U.S. 527 (1986) 9
Trest v. *Cain*, 522 U.S. 87 (1997)..... 7
United States v. *Burke*,
504 U.S. 229 (1992)..... 10
United States v. *Olano*, 507 U.S. 725 (1993).... 3
Wood v. *Milyard*, 132 S. Ct. 70 (2011)..... 3
Woodford v. *Garceau*, 538 U.S. 202 (2003) 5

Statutes and Rules:

28 U.S.C. 2243..... 9
28 U.S.C. 2244(d) ..... *passim*
Fed. R. Civ. P. 8(c)(1) ..... *passim*
Fed. R. Civ. P. 12(b) 4, 7
Fed. R. Civ. P. 15(a) 4, 10, 11
Fed. R. Civ. P. 81(a)(4)..... 5
Rule 1(a), Rules Governing Section 2254 Cases
in the United States District Courts..... 5
Rule 4, Rules Governing Section 2254 Cases in
the United States District Courts..... *passim*
Rule 5(b), Rules Governing Section 2254 Cases
in the United States District Courts.. *passim*
Rule 11, Rules Governing Section 2254 Cases
in the United States District Courts..... 5

Miscellaneous:

Habeas Rule 4, Advisory Committee Note..... 9
Habeas Rule 11, Advisory Committee Note..... 5
5 Charles Alan Wright & Arthur R. Miller,
Federal Practice and Procedure
(3d ed. 2004)..... 4

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INTEREST OF AMICI CURIAE

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year statute of limitations for state prisoners filing federal habeas applications. 28 U.S.C. 2244(d). This enactment accrues to the benefit of amici States by promoting the finality of the judgments of their state courts. See, *e.g.*, *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001). Petitioner asserts that Section 2244(d)'s limitations period "does not raise the same comity and federalism concerns as exhaustion or procedural default," Pet'r Br. 27, but he is mistaken. See *Day* v. *McDonough*, 547 U.S. 198, 209 (2006) ("AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and

procedural default * * * ." (quoting *Long* v. *Wilson*, 393 F.3d 390, 404 (3d Cir. 2004) (Becker, J.))). Because this case presents an important question concerning the implementation of Section 2244(d) by federal courts of appeals, amici States respectfully submit this brief in support of respondents.

SUMMARY OF ARGUMENT

By arguing that Section 2244(d)'s limitations period is subject to ordinary principles of waiver and forfeiture, petitioner takes for granted the applicability of the Federal Rules of Civil Procedure (Civil Rules). Petitioner's assumption is unsound. Civil Rule 8(c)(1) does not govern federal habeas proceedings with respect to waiver or forfeiture of statute-of-limitations defenses, because it is inconsistent in that regard with the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules). Habeas Rule 5(b), which establishes a distinct procedural mechanism for pressing Section 2244(d)'s limitations period and other bars to habeas relief, does not incorporate waiver or forfeiture principles. And Habeas Rule 4 departs from the purely adversarial litigation model that petitioner attributes to the Civil Rules, in favor of a more inquisitorial model that gives district courts an independent duty to weed out losing habeas applications. The Court did not have to address this issue of inconsistency in *Day* v. *McDonough*, 547 U.S. 198 (2006). The issue is squarely presented here, however, and the Court should now hold that waiver and forfeiture principles derived from Civil Rule 8(c)(1) do not deprive the courts of appeals of authority to raise Section 2244(d)'s limitations period *sua sponte*.

ARGUMENT

WAIVER AND FORFEITURE PRINCIPLES FROM THE CIVIL RULES DO NOT PREVENT APPELLATE COURTS FROM RAISING AEDPA'S LIMITATIONS PERIOD *SUA SPONTE*, BECAUSE THOSE PRINCIPLES ARE INCONSISTENT WITH THE HABEAS RULES

A. As framed by the Court, the first question presented asks, "Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense?" *Wood* v. *Milyard*, 132 S. Ct. 70 (2011). Petitioner takes this question to implicate principles of waiver and forfeiture, arguing that "[t]he one-year federal limitations period in 28 U.S.C. § 2244(d) for filing habeas petitions is an affirmative defense, subject to waiver or forfeiture." Pet'r Br. 17. Evaluating the soundness of his claim requires an understanding of the legal basis for waiver and forfeiture principles.

Waiver and forfeiture "are not really the same," though the concepts are related insofar as waiver is "one means by which a forfeiture may occur." *Freytag* v. *Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks omitted). Waiver, then, is a subset of forfeiture—it is forfeiture effected by an act (intentional abandonment) rather than just an omission (failure to assert). See *Town of Concord* v. *FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992) (Randolph, J.) ("To use Justice Scalia's terminology,

waiver means that a right has been 'forfeited' by intentional abandonment.").

In ordinary civil litigation, a statute of limitations provides an affirmative defense that can be waived or forfeited. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008). Civil Rule 8(c)(1) makes it so. See Fed. R. Civ. P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including * * * statute of limitations * * * ."); see also Fed. R. Civ. P. 12(b). Civil Rule 8(c)(1) directs parties to "affirmatively state" a statute-of-limitations defense, and defiance of this command has been held to result in waiver or forfeiture. See *Day* v. *McDonough*, 547 U.S. 198, 207-208 (2006) ("Under the Civil Procedure Rules, a defendant forfeits a statute of limitations defense, see Fed. Rule Civ. Proc. 8(c), not asserted in its answer, see Rule 12(b), or an amendment thereto, see Rule 15(a)."); *id.* at 212 (Scalia, J., dissenting) ("[T]he Civil Rules adopt the traditional forfeiture rule for unpleaded limitations defenses.").[1]

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[1] As the leading treatise explains:

> It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by [Civil] Rule 8(c) results in the waiver [read: forfeiture] of that defense and its exclusion from the case * * * . This proposition has been announced by numerous federal courts in cases involving a variety of affirmative defenses, including * * * the bar of the applicable statute of limitations * * * .

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 644-660 (3d ed. 2004).

The notion that Section 2244(d)'s limitations period is subject to waiver or forfeiture assumes that federal habeas proceedings are governed in this respect by Civil Rule 8(c)(1). See *Day*, 547 U.S. at 219 (Scalia, J., dissenting) ("I would hold that the ordinary forfeiture rule, *as codified in the Civil Rules*, applies to the limitations period of §2244(d)." (emphasis added)). Indeed, petitioner explicitly invokes Civil Rule 8(c) in arguing that respondents waived or forfeited any Section 2244(d) defense through their acts or omissions in the district court. Pet'r Br. 22, 25-26.

Petitioner's argument demands harmony between the Civil Rules and the Habeas Rules on the subject of waiver and forfeiture. Any inconsistency would defeat the assumption upon which his argument is based, because the Civil Rules "may be applied" to federal habeas proceedings only "to the extent that they are not inconsistent with" the Habeas Rules themselves. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts, reprinted in 28 U.S.C. 2254 (2006); see also Rule 1(a), Rules Governing Section 2254 Cases in the United States District Courts, reprinted in 28 U.S.C. 2254 (2006) (defining the scope of the Habeas Rules); Fed. R. Civ. P. 81(a)(4) (limiting the scope of the Civil Rules in habeas proceedings); *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003) ("The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules."); Habeas Rule 11, Advisory Committee Note, 28 U.S.C. 2254 (2006) ("The court does not have to rigidly apply [Civil Rules] which would be inconsistent or inequitable in the overall

framework of habeas corpus."). If the waiver and forfeiture principles derived from Civil Rule 8(c)(1) are inconsistent with the Habeas Rules, then the Civil Rules cannot forbid appellate courts to raise Section 2244(d)'s limitations period *sua sponte*.

B. The Civil Rules and the Habeas Rules are inconsistent with respect to waiver or forfeiture of statute-of-limitations defenses. Petitioner's attempt to subject Section 2244(d)'s limitations period to Civil Rule 8(c)(1) fails as a result of this inconsistency.

1. The fatal inconsistency is best illustrated by Habeas Rule 5(b), which prescribes the contents of the government's answer in a habeas proceeding. If the district court calls for a response to a federal habeas application under Habeas Rule 4, then Habeas Rule 5(b) goes on to provide:

> The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

Significantly, for purposes of this case, "the statute of limitations is explicitly aligned with" defenses based on exhaustion, procedural default, and non-retroactivity. *Day*, 547 U.S. at 208; see also *id.* at 209 (noting that Habeas Rule 5(b) "plac[es] 'a statute of limitations' defense on a par with 'failure to exhaust state remedies, a procedural bar, [and] non-retroactivity' " (second alteration in original)).

Habeas Rule 5(b) sets up a distinct procedural mechanism for urging these impediments to federal habeas relief, quite apart from the general regime of

the Civil Rules. Given that Habeas Rule 5(b) compels the government to "state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations," there is no need to apply Civil Rule 8(c)(1)'s requirement that a party "affirmatively state" things like statute-of-limitations defenses. And given that Habeas Rules 5(b) and 4 provide for responsive filings in the form of an "answer" or a "motion," there is little work left for Civil Rule 12(b) to do. Because Habeas Rule 5(b) establishes an independent procedural mechanism tailored to the peculiarities of habeas practice, application of Civil Rule 8(c)(1) in that context will be redundant at best and inconsistent at worst.

Examination of Habeas Rule 5(b)'s mechanism reveals that it does not entail ordinary principles of waiver or forfeiture—notwithstanding its command that the government "must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." In *Granberry* v. *Greer*, 481 U.S. 129, 131-134 (1987), the Court held that a court of appeals may consider an exhaustion argument that was not urged in district court. The circuits, meanwhile, "have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default." *Day*, 547 U.S. at 206-207 (collecting cases and noting that the issue was left open in *Trest* v. *Cain*, 522 U.S. 87, 90 (1997)). Similarly, *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994), and *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994), recognize that federal courts have discretion to consider non-

retroactivity *sua sponte*. And in *Day*, 547 U.S. at 209, the Court held "that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition," while "noting that it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners" enumerated in Habeas Rule 5(b).

Habeas Rule 5(b), as it has been interpreted by the Court, does not impose the same waiver and forfeiture principles that have been judicially attributed to Civil Rule 8(c)(1). Accordingly, petitioner's reliance on Civil Rule 8(c)(1), Pet'r Br. 22, 25-26, is an invitation to inconsistency.

2. Habeas Rule 4 deepens the inconsistency by establishing that federal habeas practice does not follow the party-driven model of litigation that petitioner attributes to the Civil Rules. District courts are duty-bound "to play a more active role in § 2254 cases than they generally play in many other kinds of cases." *Hardiman* v. *Reynolds*, 971 F.2d 500, 504 (10th Cir. 1992). This is due to Habeas Rule 4, which provides in pertinent part:

> The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or

> other response within a fixed time, or to take other action the judge may order.

See also 28 U.S.C. 2243 (relieving district court of obligation to take further action on an application for federal habeas relief if "it appears from the application that the applicant or person detained is not entitled thereto").

Under the Habeas Rules, therefore, "it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Habeas Rule 4, Advisory Committee Note, 28 U.S.C. 2254 (2006). Assignment of this gatekeeping role to the federal courts reflects "the profound societal costs that attend the exercise of habeas jurisdiction." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)). Habeas Rule 4 confirms that "values beyond the concerns of the parties" are often in play in habeas litigation, *Day*, 547 U.S. at 205 (quoting *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)), by taking the decision to waive out of the government's hands altogether—after all, a party cannot express intentional abandonment of a defense if the district court ends the case without even entertaining that party's views.

By directing district courts "to weed out meritless habeas petitions" without so much as a response from the government, Habeas Rule 4 "differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999). Petitioner acknowledges that his attempt to import waiver and forfeiture principles from Civil Rule

8(c)(1) is calculated to "advance[] the adversary and party presentation principles underlying the American judicial system, by requiring issues to be presented by the parties to the court." Pet'r Br. 27. But the purely adversarial model that petitioner advocates is fundamentally inconsistent with practice under Habeas Rule 4, which has been made partially inquisitorial by design. Cf. *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered * * * distinguishes our adversarial system of justice from the inquisitorial one.").

C. In *Day*, the Court resolved an issue closely related to the first question presented in this case, holding that district courts have authority to raise Section 2244(d)'s limitations period *sua sponte*. *Day*, 547 U.S. at 209. In reaching this sound result, however, the *Day* Court did not squarely address the matter of inconsistency between the Habeas Rules and the Civil Rules regarding waiver or forfeiture of statute-of-limitations defenses. See *id.* at 212 (Scalia, J., dissenting) (asserting that "[t]he Court does not identify any 'inconsisten[cy]' between this forfeiture rule and the statute, Rules, or historical practice of habeas proceedings" (second alteration in original)).

Day did not address this inconsistency because Civil Rule 15(a) offered a procedural crutch that supported its holding: Instead of raising a Section 2244(d) problem *sua sponte*, a district court could direct the government to amend its answer, pursuant to Civil Rule 15(a), and include a Section 2244(d) argument. See *Day*, 547 U.S. at 209 (majority opinion). Having thus found a way to reconcile the

Civil Rules with the aversion to waiver and forfeiture reflected in federal habeas practice, the *Day* Court did not have to decide whether any inconsistency foreclosed application of Civil Rule 8(c)(1).

As petitioner points out, see Pet'r Br. 33, the procedural crutch of Civil Rule 15(a) probably cannot support a holding in favor of *sua sponte* consideration by a court of appeals. But there is no need to give the government the benefit of phantom amendments under Civil Rule 15(a) if the waiver and forfeiture principles derived from Civil Rule 8(c)(1) do not apply in the first place. The first question presented in this case calls for a decision as to whether Civil Rule 8(c)(1) and the Habeas Rules are inconsistent with respect to waiver and forfeiture of statute-of-limitations defenses. Because such an inconsistency exists, the Court should hold that waiver and forfeiture principles derived from Civil Rule 8(c)(1) do not justify reversal of the judgment below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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