No. 09-5327

IN THE

Supreme Court of the United States

ALBERT HOLLAND,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF PETITIONER

JOHN HOLDRIDGE
BRIAN STULL
American Civil Liberties Union Foundation
201 West Main Street, Suite 402
Durham, North Carolina 27701
(919) 682-5659

RANDALL C. MARSHALL
MARIA KAYANAN
American Civil Liberties Union of Florida Foundation, Inc.
4500 Biscayne Blvd., Suite 340
Miami, Florida 33137
(786) 363-2700

LARRY YACKLE
Counsel of Record
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Florida is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving serious questions regarding a federal court's authority to entertain a habeas corpus petition filed by an indigent state prisoner claiming that he is in custody in violation of federal law. Given its longstanding interest in the vindication of federal rights, the questions before the Court are of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

The petitioner, Albert Holland, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. The district court dismissed the petition as untimely in light of the one-year limitation period in 28 U.S.C.

---

[1] Letters of consent to the filing of this *amicus* brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief's preparation or submission.

§ 2244(d)(1). The district court concluded that equitable tolling of the limitation period was unwarranted. On appeal, the United States Court of Appeals for the Eleventh Circuit acknowledged that the limitation period in § 2244(d)(1) is subject to equitable tolling, but affirmed the district court's dismissal of the petition on the ground that the "professional negligence" of the petitioner's counsel in state court did not establish the necessary "extraordinary circumstance" needed for equitable tolling. This Court granted certiorari to review the Eleventh Circuit's judgment.

SUMMARY OF ARGUMENT

The petitioner's brief demonstrates that his application for federal habeas corpus relief was filed late because of assigned counsel's gross negligence and that, in these extraordinary circumstances, the Eleventh Circuit should have held that the limitation period in § 2244(d)(1) was equitably tolled. This brief is exclusively addressed to an issue antecedent to, and thus fairly included within, the question whether equitable tolling was appropriate on this record—namely, whether the limitation period in § 2244(d)(1) is subject to equitable tolling. Specifically, it elaborates upon the showing in petitioner's brief that Congress intended the time limit established by § 2244(d)(1) to be a traditional period of limitation, subject to equitable tolling.

By its explicit terms, § 2244(d)(1) creates a "period of limitation" rather than a jurisdictional requirement, and therefore, as this Court's precedents make clear, it is presumptively subject to equitable tolling. Congress is assumed to act against the backdrop of this Court's precedents and thus must be assumed to have established this period of limitation in the expectation that federal courts would relax the limitation in exceptional circumstances.

Nothing in the text of § 2244(d)(1) or in any other statute rebuts the presumption that equitable tolling is available. The existence of the statutory tolling provision in 28 U.S.C. § 2244(d)(2) does not foreclose equitable tolling by negative implication. This Court has often held that equitable tolling is not eclipsed by the mere presence of a statutory tolling provision, especially when the statutory tolling provision has a reasonable explanation. The provision in § 2244(d)(2) is easily explained as an accommodation of the requirement that state prisoners must exhaust state avenues for litigating federal claims before applying to the federal courts for habeas corpus relief.

None of the individual paragraphs in § 2244(d)(1) suggests that equitable tolling is unavailable. Paragraphs (B) and (D) are not statutory tolling provisions, but function as statutes of repose. Their purpose is to impose caps on the equitable tolling that the limitation period in § 2244(d)(1) would otherwise permit. They address

only cases in which state authorities create an impediment to filing a federal petition and cases in which even diligent petitioners are unable to discover the facts supporting their claims. The provision for these particular scenarios in paragraphs (B) and (D) does not foreclose equitable tolling in other kinds of cases in which Congress has created no statutory caps on the tolling the courts determine to be appropriate *ad hoc*.

Neither 28 U.S.C. § 2263(b)(3) nor 28 U.S.C. § 2254(i) has any bearing on the availability of equitable tolling in cases governed by § 2244(d)(1). Section 2263(b)(3) functions as a statute of repose in capital cases arising from states that have invoked Chapter 154. Section 2254(i) only disclaims counsel malfeasance at the post-conviction stage as a ground for *relief* in habeas corpus proceedings.

Equitable tolling of the limitation period in § 2244(d)(1) raises none of the problems this Court has noted in other contexts, particularly when equitable tolling might be inconsistent with a statutory scheme permitting private suits against a sovereign. A petition for federal habeas corpus relief is a traditional "officer suit," in which state sovereign immunity is not implicated. When this Court has found equitable tolling unavailable in other instances, it has been in light of numerous special circumstances that distinguish those cases from this case.

ARGUMENT

I. CONGRESS ENACTED 28 U.S.C. § 2244(d)(1) AS A NON-JURISDICTIONAL LIMITATION PERIOD SUBJECT TO EQUITABLE TOLLING, ALLOWING COURTS THE FLEXIBILITY NEEDED TO DO JUSTICE IN EXCEPTIONAL CIRCUMSTANCES

This Court's precedents draw a crucial distinction between a limitation period, which governs the way claims are processed, and a jurisdictional requirement, which specifies the limits of judicial power. *E.g.*, *Bowles v. Russell*, 551 U.S. 205 (2007). Concomitantly, the precedents explain the quite different implications that follow from Congress' decision to create one kind of time limit rather than the other. A jurisdictional requirement does *not* customarily allow for equitable tolling.[2] A period of limitation *does*. [3]

---

[2] *Bowles*, supra, at 214. The Court explained in *Bowles* that reading the text of 28 U.S.C. § 2107 to establish a jurisdictional bar was consistent with a long tradition of treating time limits for "taking an appeal" to be "mandatory and jurisdictional." *Id.*, at 209, quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (*per curiam*). The period of limitation established by § 2244(d)(1) is not a time limit for "taking an appeal," but is, instead, a statute of limitations for initiating an independent original action in a federal district court. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (distinguishing habeas corpus proceedings from appellate review).

As petitioner's brief explains, this Court has already recognized that 28 U.S.C. § 2244(d)(1) by its very terms is a "period of limitation," not a jurisdictional requirement. *Day v. McDonough*, 547 U.S. 198, 205 (2006). Accordingly, as eleven circuits have held,[4] its limitation period, or the similar period in 28 U.S.C. § 2255(f), allows for equitable tolling.[5]

---

[3] Legions of cases hold that if a time limit is understood to be a statute of limitations, it is also understood to permit equitable tolling. *E.g.,Young v.United States*, 535 U.S. 43, 49 (2002); *Bowen v. City of New York*, 476 U.S. 467, 479-80 (1986); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982); *Amer. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-58 (1974); *Honda v. Clark*, 386 U.S. 484, 501 (1967). Of course, there may be a fair debate about the box into which a particular statute fits. But once a statute is put in one box or the other, there is no debate about the implications that customarily follow.

[4] *Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Miller v. New Jersey Dep't of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 329-40 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *McClendon v. Sherman*, 329 F.3d 490, 492 (6th Cir. 2003); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999); *Calderon v U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997), overruled on other grd's, 163 F.3d 530 (9th Cir. 1998)(en banc); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Sandvik v. United States*, 177 F.3d 1269, 1270 (11th Cir. 1999). The question is open in the D.C. Circuit. *United States v. Pollard*, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005).

[5] See also H.R. Conf. Rep. No. 104-518, at 111 (1996), 1996 U.S.

(continued…)

In light of this Court's precedents, Congress is presumptively aware that if it chooses to create a jurisdictional mandate, it cannot rely on the courts to make adjustments when justice requires. Instead, Congress must anticipate scenarios that warrant dispensation and provide for them in the statute. This is dangerous ground, of course. It is difficult, if not impossible, to think of every deserving case that may arise, and Congress must necessarily steel itself for injustice in some number of unanticipated instances. Put differently, Congress must conclude that competing values (e.g., stability and finality) are so important in the context at hand that they demand a rigid jurisdictional bar, subject only to the exceptions that Congress itself identifies, notwithstanding the injustice in worthy cases Congress does not foresee.[6]

(…continued)
Code & Admin. News 924 (stating that the Antiterrorism and Effective Death Penalty Act of 1996 "sets a one year statute of limitation on an application for a habeas writ"); *Calderon*, *supra*, at 1288 (collecting statements by the floor leaders explaining that the bill would establish a "statute of limitations").

[6] The Court explained in *Bowles* that Congress need not fashion statutory exceptions on its own but "may authorize courts to promulgate rules that excuse compliance with statutory time limits" that would otherwise bar federal jurisdiction. *Bowles*, *supra*, at 214-15. Yet any such rules would presumably be case-specific. If Congress were to authorize the judiciary to adopt a (continued...)

If, by contrast, Congress chooses to create a limitation period, quite different implications customarily attach. Among these implications is equitable tolling. This is far safer ground. Congress need not anticipate all the scenarios in which tolling may be justified, but can rely on courts to exercise case-by-case judgment. The point of creating a period of limitation is to permit flexibility in exceptional cases.

Given this Court's precedents, Congress must be assumed to understand all this and, accordingly, to enact a limitation period fully appreciating that courts will make *ad hoc* adjustments in the interests of equity. If this Court is to respect Congress' authority, the Court cannot deny the very equitable tolling for which Congress has provided in § 2244(d)(1). The warden's argument that equitable tolling is unavailable in this case invites this Court to play bait-and-switch with the Legislative Branch.

Any argument that Congress must explicitly authorize courts to make *ad hoc* adjustments in the interests of equity is misplaced. Under existing precedents, that is what Congress *does* when it designates a time limit as a period of limitation rather than a jurisdictional requirement. At the

---

(…continued)
rule calling for equitable tolling *ad hoc*, Congress would effectively transform the time limit in question into a period of limitation.

very least, placing the burden on Congress to authorize equitable tolling explicitly would reverse the longstanding presumption that a period of limitation is subject to equitable tolling unless Congress enacts an explicit *disclaimer*.

II. NOTHING IN § 2244(d)(1) OR IN ANY OTHER STATUTE OVERCOMES THE PRESUMPTION IN FAVOR OF EQUITABLE TOLLING

Congress has power to uproot the settled legal landscape by describing a time limit as a period of limitation and nonetheless forbidding equitable tolling. But nothing suggests that Congress has done any such thing here. The familiar "period of limitation" description in § 2244(d)(1) is, instead, a clarion statement that Congress is doing business as usual, operating within the clear boundaries set by this Court's precedents.

A. Statutory Tolling. The limitation period in § 2244(d)(1) is subject to tolling according to § 2244(d)(2).[7] Yet providing for *statutory* tolling in no way affects the availability of the *equitable* tolling that a limitation period customarily contemplates.

[7] Section 2244(d)(2) provides as follows: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

This Court's precedents caution against construing a statute that clearly establishes a period of limitation to bear unconventional meaning. To justify such an extraordinary reading, the Court has required that equitable tolling be "inconsistent with the *text* of the relevant statute." *Young*, *supr*a, at 49, quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (emphasis supplied); *Amer. Pipe*, *supra*, at 558 (explaining that the question is whether tolling in a "given context" is "consonant with the legislative scheme"). *See also Greyhound Corp. v. Mt. Hood Stages*, 437 U.S. 322, 338 (1978) (Burger, C.J., concurring) (observing that equitable tolling may be available where a statutory tolling provision fails to provide the time that justice requires).

Nothing in the text of any habeas statute conflicts with the usual equitable tolling that attends a period of limitation. The only positive text here is the basic language in § 2244(d)(1) itself and that text, as noted, establishes a "period of limitation" and not a jurisdictional restriction qualified only by statutory exceptions.[8]

---

[8] This Court has demanded that Congress use not only text, but "unambiguous" text, to effect a withdrawal of habeas corpus jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). This Court has also made clear that a withdrawal of habeas jurisdiction would raise serious constitutional questions under the Suspension Clause. *Cf. Boumediene v. Bush*, ___ U.S. ___, ___, 128 S.Ct. 2229, 2270 (2008) (explaining that "the Suspension Clause remains applicable and the writ relevant . . . even where the prisoner is detained after a criminal trial (continued…)

In this instance, moreover, there is a self-evident reason why § 2244(d)(2) always tolls the period of limitation for the "time during which a properly filed application for State post-conviction . . . review . . . is pending." The exhaustion doctrine often requires habeas petitioners to pursue relief via state post-conviction proceedings before they seek federal habeas relief. The statutory tolling arrangement in § 2244(d)(2) reconciles the policy behind the limitation period (encouraging petitioners to file early) with the policy embedded in the exhaustion requirement (encouraging petitioners to file late—that is, at a time when federal court action will not interfere with proceedings in state court). *Duncan v. Walker*, 533 U.S. 167, 179 (2001).

Statutory tolling to accommodate the exhaustion doctrine only makes sense. One can scarcely imagine any knowledgeable drafter proposing any other mechanism. It would have been bizarre to ignore the exhaustion requirement and rely on equitable tolling to sort out the tension between the time limit and exhaustion on a case-by-case basis. Certainly, Congress' use of statutory tolling to square the period of limitation created by § 2244(d)(1) with a longstanding feature of habeas

---

(…continued)
conducted in full accordance with the protections of the Bill of Rights"). Here, as in *St. Cyr*, the avoidance of Suspension Clause questions is in itself a sufficient reason for construing a statute not to restrict habeas jurisdiction. *See St. Cyr*, supra, at 301 n.13.

jurisprudence is no basis for inferring, by negative implication, that Congress has departed in this instance from the customary expectations regarding a period of limitation.

B. Starting Points. The starting points for the period of limitation in § 2244(d)(1) are also perfectly consistent with conventional practice and, accordingly, with equitable tolling.[9] Paragraph (A) identifies the basic trigger for most cases and thus supplies a necessary feature of any time limit—namely, the date on which the judgment under attack "became final by the conclusion of direct

---

[9] Section 2244(d)(1) provides as follows: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

review or the expiration of the time for seeking such review."

Paragraph (C) accommodates cases in which prisoners claim that they are in custody in violation of a "newly recognized" constitutional right that is "made retroactively applicable to cases on collateral review." The period of limitation plainly must be tailored to account for changes in this Court's understandings of constitutional rights. Paragraph (C) is not an adjustment of the limitation period in anticipation of exceptional circumstances. The point is not that petitioners whose cases fall under this heading should be excused for failing to file petitions earlier. Instead, the idea is that some claims are not generally available to be raised until this Court accepts jurisdiction in a particular case (usually a case on direct review) and adopts a novel interpretation of federal law.[10]

C. Statutes of Repose. Paragraphs (B) and (D) can fairly be read as attempts by Congress to anticipate circumstances in which there are reasons for starting a fresh clock. Those cases are obvious

---

[10] *See* *Dodd v. United States*, 545 U.S. 353 (2005) (holding that paragraph (C) starts the clock when this Court first recognizes a "new right"); *Teague v. Lane*, 489 U.S. 288 (1989) (holding that a claim based on a "new rule" of law is rarely cognizable in federal collateral proceedings). We think this is the best understanding of paragraph (C). If, instead, paragraph (C) is understood to start a fresh clock out of fairness to petitioners, then paragraph (C) is a statute of repose, having the effect next described in the text with respect to paragraphs (B) and (D).

and easy to foresee. Paragraph (B) anticipates cases in which state authorities create an "impediment to filing an application." Paragraph (D) anticipates cases in which even petitioners who exercise "due diligence" are unable to discover the "factual predicate" of a claim. Congress might have left cases of this kind to be handled by courts via equitable tolling. But it would have been strange to provide for their disposition *ad hoc*.

The question now is whether by anticipating cases so easily foreseeable Congress somehow meant paragraphs (B) and (D) to foreclose, by negative implication, the equitable tolling that a limitation period brings into play. No such negative inference is justified.

Paragraphs (B) and (D) are not tolling provisions attending the general statute of limitations established by § 2244(d)(1). They are better understood as *statutes of repose*. A statute of limitations conventionally starts the filing period when an action accrues. In the context of habeas challenges to state court judgments, the analogous event is the finality of the judgment under attack. This is why paragraph (A) starts the clock for most cases at the conclusion of direct review. By contrast, a statute of repose typically starts a filing period on some other occasion. Its function is not to toll a limitation period, but rather to place a cap on any tolling a limitation period would otherwise contemplate.

This Court's precedents explain that a statute of repose is not itself presumptively subject to equitable tolling—for the obvious reason that its purpose is to curtail tolling that a court might otherwise think is warranted. *E.g.*, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451-52 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991); *see* 4 Wright & Miller, Fed. Prac. & Proc. § 1056, at 240 (3d ed. 2002).

No one proposes that the time limits specified in paragraphs (B) and (D) are subject to equitable tolling. If, for example, the facts underlying a prisoner's claim could not have been discovered for some time following the conclusion of direct review, the time limit allowed is one year from the date when circumstances changed and the facts became discoverable—not a year plus some further period that a court thinks is equitably justified. By starting the one-year period only when the facts could have been unearthed, Congress has already accounted for the difficulties caused by the petitioner's inability to learn the truth earlier. And Congress has itself determined what additional time these circumstances warrant.

If the statute of repose in paragraph (D) did not exist, the customary equitable tolling that attends the basic statute of limitations (running from the conclusion of direct review) would come into play. A court might give the prisoner the additional time the court thinks is warranted on equitable grounds.

But paragraph (D) *does* exist and puts a one-year outer limit on the time allowable for a case in which the facts were undiscoverable earlier. This is why the cases dealing with the problems caused by undiscoverable facts are not handled via equitable tolling, but as an occasion for interpreting paragraph (D). *Cf. Johnson v. United States*, 544 U.S. 295 (2005) (involving what is now paragraph (4) of § 2255(f)).

Paragraphs (B) and (D) displace equitable tolling by courts in the kinds of cases they capture. But they do not foreclose equitable tolling in other circumstances—like, for example, the tolling that Albert Holland seeks in light of counsel's misbehavior. By contrast, paragraphs (B) and (D) *presuppose* equitable tolling as the conventional baseline and then *restrict* extensions of time in two, easily foreseeable fact patterns. To read paragraphs (B) and (D) to exclude equitable tolling in all other circumstances would be to mistake their place in this statutory framework and, in addition, to attack the premise on which Congress operates—that is, the premise that a limitation period is subject to equitable tolling.

Even if paragraphs (B) and (D) *were* statutory tolling provisions rather than statutes of repose, their presence would not support the inference that they occupy the field to the exclusion of equitable tolling in other kinds of cases, as explained above. *See* pp. x-y, *supra*. This Court's precedents recognize that Congress may enact statutory tolling provisions

that supplement rather than displace equitable tolling. *Young*, *supr*a, at 53. In *Young*, the Court dealt with the three-year "lookback period," which governs the bankruptcy priority of IRS claims for taxes. The Court initially held that the "lookback period" is a "limitations period subject to traditional principles of equitable tolling." *Id*. at 47. The Court rejected the taxpayers' argument that the existence of statutory tolling provisions in the Tax Code "displays an intent to preclude equitable tolling of the lookback period." Id. at 52. The Court drew "no negative inference from the presence of an express tolling provision" in one section of a statute and "the absence of one" in another. Id. Indeed, the Court drew no negative inference from the presence of a statutory tolling provision in the very subsection creating the "lookback" limitation period. Id. at 53.

It was reasonable in *Young* for Congress to specify statutory tolling for particular cases. In one instance, Congress may have wanted to instruct non-bankruptcy courts to relax a statute of limitations on equitable grounds while Congress assumed that bankruptcy courts would exercise their "inherent equitable powers" without explicit statutory authorization. Id. at 52. In another instance, Congress may have wanted to clarify that equitable tolling was appropriate while a claimant's "offer in compromise" was pending. Id. at 52-53.

Equally in this case, when Congress fashioned time limits for habeas corpus petitions, it was reasonable for Congress to deal with the foreseeable

cases identified by paragraphs (B) and (D) in the statute while leaving the courts to handle *ad hoc* other, less easily anticipated and described cases.

D. 28 U.S.C. § 2263(b)(3). In some lower court cases, wardens have contended that 28 U.S.C. § 2263(b)(3) indicates that Congress did not mean to permit equitable tolling of the period of limitation in § 2244(d)(1).[11] *See, e.g., Calderon*, *supra*, at 1289

---

[11] Section 2263 provides in its entirety as follows:

> "(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> (b) The time requirements established by subsection (a) shall be tolled—
>
> (1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
>
> (2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and
>
> (3) during an additional period not to exceed 30 days, if—
>
> (A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus
>
> (continued…)

(rejecting this claim). Section 2263(b)(3) is located in Chapter 154 and is applicable only to capital cases from qualifying states. This Court has never had occasion to construe it. On its face, it appears to authorize a 30-day extension of the time limit established by § 2263(a), provided the prisoner files a proper motion in the district court and shows "cause" for failing to file within the ordinary period. It is implausible to think that § 2263(b)(3) bears any significance for the meaning of § 2244(d)(1).

First, by its very terms, § 2263(b)(3) has only to do with the time limit for death penalty cases subject to Chapter 154—not to the general limitation period in § 2244(d)(1), applicable to capital and noncapital cases alike. Obviously, Congress could have allowed for extensions of an extremely brief filing period for Chapter 154 cases (only 180 days), without implying anything about the ordinary statute of limitations in § 2244(d)(1). To draw any negative inference from § 2263(b)(3) outside its own context would be purely conjectural and thus unwarranted. *Cf. Lawrence v. Florida*, 549 U.S. 327, 334 (2007) (declining to draw a negative inference from § 2263(b)(2) for purposes of interpreting § 2244(d)(2)).

(…continued)

> application under section 2254; and
>
> (B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section."

Second, § 2263(b)(3) provides for *statutory* tolling and thus has no more bearing on the availability of *equitable* tolling than does § 2244(d)(2). It is not the case, and it has never been the case, that Congress departs from the conventional understanding that a limitation period is subject to equitable tolling whenever Congress enacts a supplemental statutory tolling provision. Statutory tolling displaces equitable tolling only when equitable tolling is inconsistent with the text of the enacted statute. There is no such inconsistency if there is a rational explanation for restricting statutory tolling to certain kinds of cases. There certainly is a rational explanation for § 2263(b)(3)—namely, to orchestrate the short 180-day time limit for death penalty cases subject to Chapter 154.

Third, within its proper sphere, § 2263(b)(3) functions as a *statute of repose*. While it does affirmatively authorize an extension of the time for filing, its primary function is to fix an outer limit. As Judge Kozinski has explained, the "30-day tolling limit was . . . probably designed to cap what would have otherwise been an unlimited tolling period." *Calderon*, *supra*, at 1289. If any inference is to be drawn from § 2263(b)(3) regarding the availability of equitable tolling under § 2244(d)(1), it rests on the fact that § 2244(d)(1) contains no similar cap, and thus it is reasonable to infer that Congress did not

intend to upset the normal default rule allowing longer tolling periods." Id.[12]

E. 28 U.S.C. § 2254(i). The warden erroneously proposes that 28 U.S.C. § 2254(i) somehow bears on whether the limitation period in § 2244(d)(1) is subject to equitable tolling.[13] By its explicit terms, § 2254(i) only denies the federal

---

[12] The rationale for Chapter 154 is to encourage states to supply competent counsel in state court in exchange for more favorable terms for federal habeas litigation later. It would be consistent, then, for Congress to cap the statutory tolling provision in § 2263(b)(3), but not to place a similar restraint on traditional equitable tolling in run-of-the-mine cases governed by § 2244(d)(1). In *Lindh v. Murphy*, 521 U.S. 320 (1997), the Court held that the 1996 amendments to Chapter 153 were applicable only to cases filed after the date of enactment. In part, the Court relied on the express provision in the Act making Chapter 154 applicable to cases already pending. In *Lindh*, it was reasonable to conclude from the *combination* of the provision regarding Chapter 154 and the absence of any similar provision regarding Chapter 153 that Congress meant to restrict the latter to after-filed petitions. It would not be reasonable to infer that by enacting a particular *operative* provision for death penalty cases in Chapter 154 (here, § 2263(b)(3) on time limits) without a corresponding amendment to Chapter 153, Congress meant to deny any equitable tolling in Chapter 153 cases. One might as well propose that, by negative implication, Chapter 154 effects a wholesale, *sub silentio* repeal of everything in Chapter 153.

[13] Section 2254(i) provides as follows: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

courts a "ground" for awarding federal habeas "relief." That is why § 2254(i) appears where it does, among other limits on habeas relief, *e.g.,* 28 U.S.C. § 2254(d), rather than in § 2244(d)(1)—where it would be located if it had anything to do with the limitation period.[14]

III. NO OTHER HABEAS CORPUS DOCTRINE SUGGESTS THAT EQUITABLE TOLLING IS UNAVAILABLE

Nothing in this Court's general body of habeas jurisprudence bars equitable tolling of the limitation period in § 2244(d)(1). There are occasions, to be sure, when habeas-specific rules and doctrines produce arrangements that depart from ordinary practice. In *Day*, for example, the Court concluded that justice is best served if district courts are

---

[14] If § 2254(i) had the significance the warden insists it has, § 2254(i) would signal that equitable tolling is never appropriate on the basis of attorney malfeasance. Accordingly, § 2254(i) would go only to the threshold question to which this *amicus* brief is addressed, that is, whether the limitation period in § 2244(d)(1) is subject to equitable tolling—not to the further question whether, given the availability of equitable tolling in some case, tolling is warranted on the facts in this record. A blanket prohibition on tolling because of counsel misbehavior would be the antithesis of equitable tolling, which is by nature *ad hoc*. Since § 2254(i) does not foreclose equitable tolling wholesale, and it cannot logically affect equitable tolling retail, § 2254(i) is entirely irrelevant to any matter now before the Court.

allowed *sue sponte* to notice a warden's computation error regarding the § 2244(d)(1) limitation period—notwithstanding that an affirmative "limitation" defense ordinarily must be raised or forfeited. *Day*, *supra*, at 202, 209. Yet the point of *Day* and similar cases is not that habeas corpus should be governed by rigid rules inapplicable elsewhere, but that habeas cases should be processed flexibly in a way that attends properly to all the interests at stake.

In *Day* itself, it was clear that the district court might have informed the warden of the computation error and entertained an amendment to the answer. In those circumstances, the majority concluded that it would have been unduly formalistic to distinguish between what the court did and what it might have done. Flexibility in habeas corpus is a two-way street. Just as the Court eschews rigid habeas corpus rules that "trap the unwary *pro se* prisoner," the Court sometimes permits a district court to notice an error that, if uncorrected, would deprive a warden of a valid defense. *Day*, *supra*, at 209, quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[15] At the end of *Day*, equitable discretion was preserved.

The Court also approved discretion with respect to § 2244(d)(1) in *Rhines v. Weber*, 544 U.S. 269 (2005). There, the Court recognized that the enforcement of the "total exhaustion" rule announced

[15] Of course, the Court did not suggest that a limitation defense under § 2244(d)(1) can be raised at any time, as though it were a jurisdictional objection.

in *Rose v. Lundy*, 455 U.S. 509 (1982), might work an injustice if a prisoner whose "mixed" application was dismissed could not satisfy the exhaustion doctrine and return to federal court before the limitation period ran out. To avoid unfairness, the Court allowed the district court to hold the prisoner's federal petition in abeyance, thus ensuring that the prisoner had a chance to press all his claims in a single petition as *Lundy* envisions. The lesson was again the same: the limitation period in § 2244(d)(1) can be managed *ad hoc* to avoid perverse results.

The warden contends that one aspect of the Court's procedural default doctrine cuts against the availability of equitable tolling in § 2244(d)(1) cases. Since counsel malfeasance does not ordinarily establish "cause" excusing default, so this argument goes, consistency demands that counsel malfeasance should not be the basis for equitable tolling. But this is to mix cabbages and kings. According to this Court's precedents, the principal reason that counsel error does not excuse procedural default is that counsel's failure to raise a claim in state court may have been deliberate—an attempt to "sandbag" the state courts and save the claim for federal habeas. *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977). That rationale does not travel to counsel's failure to file a federal petition within the limitation period in § 2244(d)(1). In this context, there can be no tactical explanation for counsel's conduct.

IV. EQUITABLE TOLLING OF THE LIMITATION PERIOD IN § 2244(d)(1) IMPLICATES NONE OF THE ISSUES RAISED WITH RESPECT TO THE TIMING OF LAWSUITS AGAINST A SOVEREIGN

In recent years, this Court has acknowledged that the familiar distinction between jurisdictional requirements and claim-processing rules can be elusive in some contexts. The task is to implement congressional policy. Yet it is not always easy to ascertain what that policy is, because the statutes Congress enacts can be ambiguous and because some time limits operate in circumstances where it is clear that Congress meant to be absolutist about a filing period, even though Congress did not specify a jurisdictional bar.

This case, however, raises none of the difficulties the Court has faced elsewhere. Congress' decision to adopt a period of limitation rather than a jurisdictional requirement is perfectly clear, and the customary understanding that the limitation period is subject to equitable tolling is not rebutted by anything in habeas law. Nor does deciding this case within the conventional framework risk broaching issues of wider jurisprudential significance.

In particular, this case raises none of the concerns the Court has noted when Congress adopts time limits for suits against the United States, which may be conditions on the judicial power that the Government's waiver of immunity admits. The

limitation period in § 2244(d)(1) is not a condition on a state's consent to be sued and thus cannot be understood to circumscribe the judicial power a federal court has to exercise. A habeas corpus application is a quintessential "officer suit" in which the state's immunity is not implicated. *Ex parte Young*, 209 U.S. 123, 168 (1908) (explaining that a habeas corpus petition naming a custodian as respondent is not a "suit against the state"). Since sovereign immunity has no bearing here, nothing in the statutes governing habeas litigation, far less the limitation period in § 2244(d)(1), can be regarded as jurisdictional in the sense that it defines the boundaries of a state's consent to be sued.

In an abundance of caution, we want to distinguish two cases decided against the backdrop of the Federal Government's waiver of sovereign immunity, *United States v. Beggerly*, 524 U.S. 38 (1998), and *United States v. Brockamp*, 519 U.S. 347 (1997)—*Beggerly* because it is cited by the warden in this case, *Brockamp* because it is often cited in the case law on equitable tolling generally. In both instances, the Court concluded that equitable tolling was unwarranted, despite Congress' failure to state clearly that a time limit was to be a jurisdictional bar. Yet the circumstances in both cases were quite different from the circumstances here.

The plaintiffs in *Beggerly* sued the United States for an order setting aside a settlement in a previous suit, under which the Government had obtained title to certain land. They based

jurisdiction in the district court on two grounds, one of which was the Quiet Title Act, 28 U.S.C. § 2609a. The Court held that the action was barred by the "express 12-year statute of limitations" for QTA actions, established by the QTA itself in § 2409a(g). The circuit court below had allowed the plaintiffs more than twelve years to file their complaint on the theory that the statute of limitations was subject to equitable tolling and that tolling was appropriate in this instance in view of the plaintiffs' diligence in pursuing their rights. This Court held, however, that equitable tolling was "not permissible," because it would be "incompatible with the Act." Id. at 48-49.

Beggerly is distinguishable on three grounds.

First, while the Court described the time limit in § 2409a(g) as a "statute of limitations," 524 U.S. at 48, the time limit was written as a jurisdictional requirement. Congress did not articulate the 12-year time limit as a conventional "limitation period," but, instead, employed the absolutist language of a jurisdictional prohibition: "Any civil action . . . shall be barred unless it is commenced within" the time specified. Likewise, the Court may have treated the time limit in § 2409a(g) as jurisdictional on the theory that it was a condition on the Government's consent to be sued.[16] No such concern is implicated

[16] In *Block v. North Dakota*, 461 U.S. 273 (1983), this Court had held that the time limit specified for quiet title actions under the QTA was a condition on the waiver of sovereign immunity the Act was adopted to achieve. To be sure, in *Irwin v. Dep't of* (continued…)

in this case, involving a habeas corpus petition seeking release from the custody of state executive officers.

Second, while the Court in *Beggerly* said that the time limit in § 2409a(g) "*effectively* allowed for *equitable* tolling," 524 U.S. at 48 (emphasis added), § 2409a(g) was actually, of course, a *statutory* provision. It had an equitable flavor only inasmuch as it started the clock when a claimant "knew or should have known of the claim of the United States" and, into the bargain, provided a generous filing period of twelve years. That filling period, in turn, functioned as a *period of repose*—not itself customarily subject to equitable tolling. The Court did not use the "statute of repose" nomenclature in *Beggerly*, but did make the functional point—namely, that Congress had anticipated this kind of case and decided, in the statute itself, that twelve years was

---

(…continued)
Veterans Affairs, 498 U.S. 89 (1990), the Court had held that, in future, a time limit that would presumptively admit equitable tolling in a suit against a private defendant would also presumptively warrant equitable tolling in a suit against the United States. Yet *Irwin* dealt with suits under Title VII and did not necessarily control actions under other statutes. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133, 137-38 (2008). Particularly in a case involving the Government's proprietary interest in land, the Court in *Beggerly* may have hesitated to assume that sovereign immunity was irrelevant. Cf. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (holding that state executive officers could set up the state's sovereign immunity to defeat the functional equivalent of a quiet title action).

sufficient. Any extension of the 12-year period by judges would have been inconsistent with the cap that § 2409a(g) imposed. In this case, Mr. Holland does not contend that the statutes of repose in § 2244(d) are subject to judicial tailoring in the name of equity. He rests on the equitable tolling that the general limitation period contemplates for other circumstances.

Third, the Court in *Beggerly* listed two context-specific considerations that fortified its conclusion. The 12-year time limit was itself "unusually generous," and it affected the interests of landowners, who need to "know with certainty what their rights are, and the period during which those rights may be subject to challenge." 524 U.S. at 48-49. Neither of those considerations figures in this case. The limitation period in § 2244(d)(1) is not unusually generous. Prior to its enactment, habeas corpus petitions were not subject to any fixed filing period at all. *See Lonchar v. Thomas*, 517 U.S. 314 (1996) (concluding that a petition could not be dismissed even though it might have been filed six years earlier). The institution of *any* stated time period for filing a habeas petition, certainly a time period of a single year, is a stark departure from tradition.

It may be said that equitable tolling in habeas cases diminishes the force of the limitation period as an incentive to seek relief as soon as possible and thus, at the margin, compromises state interests in expediting federal habeas litigation. Yet state

interests in speeding prisoners into the federal forum must be balanced against the federal and individual interests in federal adjudication of what may be meritorious claims. As Judge Kozinski has pointed out, the general limitation period in § 2244(d)(1), which operates in most instances, "will doubtless speed up the habeas process considerably," and equitable tolling in extraordinary circumstances will rarely slow things down—and then only in an individual case and for a limited time. *Calderon*, *supra*, at 1288-89.

The plaintiffs in *Brockamp* were federal taxpayers who had failed to seek refunds within the time limit prescribed by statute. They contended that if they had sought restitution from private defendants in analogous common law suits (for money had and received) the filing period would have been subject to equitable tolling. Relying on *Irwin*, *supra*, they argued that the statutory time limit applicable to their claims against the IRS could equally be equitably tolled. This Court described the time limit as a "statutory time period" and assumed *arguendo* that the analogy to a suit for restitution was sound. But the Court nonetheless rejected the taxpayers' argument, because, in the special context of tax refund claims against the United States, there were "strong reasons" for concluding that Congress "did *not* want the equitable tolling doctrine to apply." *Brockamp*, supra, at 350.

Examining the statutory scheme with care, the Court found numerous indications that the time

limits it prescribed could not be read to contain "implicit exceptions." By contrast to "ordinary limitations statutes [which] use fairly simple language," the numerous time limits in this statute were stated in "unusually emphatic form." *Id.* The statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicat[ed] that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute it wrote." *Id.* at 352. Moreover, the Court recognized that the "nature of the underlying subject matter" (tax collection) strengthened the conclusion that equitable tolling was unavailable. If the time limit for tax refund claims could be equitably tolled, the IRS might be swamped with millions of late-filers all seeking equitable tolling. *Id.*

All these special factors persuaded the Court in *Brockamp* that, in the tax context, Congress meant to "pay the price of occasional unfairness in individual cases . . . in order to maintain a more workable tax enforcement system." Id. at 353. By the same token, the absence of similar reasons for thinking that Congress departed from convention in this case fortifies the conclusion that Congress did not mean to pay such a price in habeas corpus cases. *Brockamp* is thus readily distinguishable.

CONCLUSION

For the reasons stated above, this Court should conclude that the limitation period in § 2244(d)(1) is subject to equitable tolling and reverse the judgment below.

Respectfully submitted,

JOHN HOLDRIDGE
BRIAN STULL
American Civil Liberties Union Foundation
201 West Main Street, Suite 402
Durham, NC 27701
(919) 682-5659

RANDALL C. MARSHALL
MARIA KAYANAN
American Civil Liberties Union of Florida Foundation, Inc.
4500 Biscayne Blvd., Suite 340
Miami, Florida 33137
(786) 363-2700

LARRY YACKLE
Counsel of Record
765 Commonwealth Avenue
Boston, MA 02215
(617) 353-2826

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

December 29, 2009