No. 09-587

In The
Supreme Court of the United States

KELLY HARRINGTON,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JOHN T. PHILIPSBORN
507 Polk Street, Suite 350
San Francisco, California 94102
(415) 771-3801

CHARLES D. WEISSELBERG
NINA RIVKIND
(*Counsel of Record*)
UNIVERSITY OF CALIFORNIA
SCHOOL OF LAW
Berkeley, California 94720
(510) 643-8159
nrivkind@law.berkeley.edu

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST[1]

The California Attorneys for Criminal Justice (CACJ) and the California Academy of Appellate Lawyers (Academy) respectfully submit this brief as *amici curiae* in support of respondent Joshua Richter.

CACJ is a non-profit corporation founded in 1972. It has over 2,000 members, primarily criminal defense lawyers. CACJ members have extensive experience in habeas corpus litigation in the California and federal courts. One of the principal purposes of CACJ, as set forth in its By-laws, is to defend the rights of individuals guaranteed by the United States and California Constitutions. Federal habeas corpus is essential to safeguard those rights. CACJ members are gravely concerned that if the State's arguments about 28 U.S.C. §2254(d) are accepted, a petitioner who has filed a proper and timely state habeas corpus petition – but who has not received a ruling on the merits of the petition in state court – will nevertheless be accorded only limited federal review under §2254(d). In addition to offering the views set forth here, CACJ agrees with respondent and the National Association of Criminal Defense

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies 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*, their members, or their counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

Lawyers that §2254(d) should not apply to unexplained state-court decisions.

The Academy is a non-profit organization also founded in 1972. Its members are California lawyers with substantial appellate experience, who are elected to membership after rigorous scrutiny of their skills as appellate advocates. Most members are civil law practitioners, although some members practice criminal law. The goals of the Academy include the promotion of sound appellate procedures that are designed to ensure proper and effective representation of litigants and the efficient administration of justice at the appellate level. Academy members are extremely concerned that a deleterious burden would be placed on the already-overworked California Supreme Court if its silent denials in habeas cases are treated as adjudications on the merits under 28 U.S.C. §2254(d).

CACJ and the Academy offer their expertise to explain the history and meaning of a silent habeas corpus denial in the California Supreme Court. Whatever the practice in other jurisdictions, a silent habeas denial in the California Supreme Court is not an adjudication on the merits. Rather, it reflects the justices' considered judgment that a petition cannot be decided "on the merits" or on procedural grounds. We urge this Court to respect their judgment. This Court should not seek to defer to a state court decision that was in fact never made.

SUMMARY OF ARGUMENT

The respondent, Joshua Richter, presented his federal claim to the California Supreme Court in a habeas corpus petition, which was summarily denied without any citations or explanations. This Court granted certiorari and added the question whether "AEDPA deference" applies to a state court's summary disposition of a claim. Under the language of the Antiterrorism and Effective Death Penalty Act, the precise question is whether a summary denial constitutes an adjudication "on the merits" within the meaning of 28 U.S.C. §2254(d). As we explain, whether a state court decision is "on the merits" can only be answered by reference to state law. And under California law, the particular form of habeas corpus denial in Richter's case – a silent denial that was not explained by any state court – is not a decision on the merits.

The California Supreme Court now handles over 10,000 cases each year, including well over 3,000 original petitions for writs of habeas corpus. The petitions are decided at the court's conferences, where the justices consider approximately 250 matters each week. The seven justices of the court sit en banc and do not vote issue-by-issue. To handle its heavy workload, the court denies many habeas cases with summary orders.

Over the last four decades, through an extended dialogue with the federal courts, the California Supreme Court has developed certain summary order

practices. When a majority of the state high court is able to agree on a basis for denying a petition, it says so. The Court expressly denies some habeas petitions on procedural grounds, some "on the merits" and some for both reasons. But when a majority does not agree on a basis for decision, the court simply denies the petition without any citation or explanation at all. The court entered this sort of "silent denial" in Richter's case. As this Court previously recognized in *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." A silent denial says "absolutely nothing about the reasons for the denial" (*id*. at 805), although in many if not most cases a federal court will be able to "look through" a silent denial to the last-reasoned decision of a lower state court.

Under state law and §2254(d), a silent denial is different from a decision "on the merits." This Court should respect the habeas practices of the California Supreme Court, which carefully distinguish among different forms of summary orders. The values of comity and federalism are furthered by respecting these distinctions. This Court should not attempt to fashion a per se, one-size-fits-all federal rule that treats all summary orders identically given that state practices differ, there is no empirical basis for a uniform rule, and the evidence of California's practice indicates that various summary orders carry unique

meanings. Finally, creating a per se rule would inhibit the ability of the California Supreme Court to manage its heavy workload because the conscientious court would be forced to devote significant additional resources to its habeas corpus docket.

ARGUMENT

A SILENT DENIAL IN THE CALIFORNIA SUPREME COURT IS NOT AN ADJUDICATION ON THE MERITS UNDER STATE LAW OR 28 U.S.C. §2254(d)

A. The California Supreme Court Has a Heavy Workload and Denies Most Habeas Corpus Petitions With Summary Orders

The California Supreme Court is the highest court of the largest state in the nation. In 2000, the year before the state court denied Richter's habeas petition, California had 33.8 million people,[2] and 2,018 appellate justices and trial judges presided over their litigation.[3] The California Supreme Court

[2] U.S. Census Bureau, *Census 2000 Data for the State of California*, http://www.census.gov/census2000/states/ca.html.

[3] For fiscal year 2000-2001, there were 7 Supreme Court justices, 105 authorized justices for the courts of appeal, and 1906 "judicial positions" in the trial courts (which included judges, commissioners and referees). *See* Judicial Council of California*, 2002 Annual Report, Court Statistics Report* 18,

(Continued on following page)

oversees this extensive judicial system and has a heavy docket of its own. In 2000-01, the court decided over 9,000 cases. Not surprisingly, given this workload, the court issues summary dispositions in most of its habeas corpus cases.

1. The duties of the California Supreme Court are substantial and varied. The state supreme court, like the courts of appeal and superior courts, has "original jurisdiction in habeas corpus proceedings" as well as "in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Cal. Const. art. VI, §10. Although most habeas corpus petitioners first file in the lower courts, habeas matters in the California Supreme Court are generally original petitions. If a court of appeal denies habeas relief, the typical remedy is to file a new, original petition in the California Supreme Court (*see*, *e.g.*, *In re Catalano*, 29 Cal.3d 1, 7, 623 P.2d 228, 232 (1981)), although a petitioner who is denied relief in the court of appeal may choose to file a "petition for review" in the California Supreme Court instead. *See Carey v. Saffold*, 536 U.S. 214, 223-25 (2002).

In addition to original proceedings, the Supreme Court has jurisdiction to review the decisions of the intermediate courts of appeal. Cal. Const. art. VI, §12 subd. (b). As a court of limited jurisdiction, a substantial part of the work of the state high court

---

39 ("*2002 Court Statistics Report*") available at http://www.courtinfo.ca.gov/reference/documents/csr2002.pdf.

consists of determining which cases it will review. "In exercising its discretion, the Supreme Court reviews cases that will enable it to settle important legal questions of statewide concern and to ensure that the law is applied uniformly throughout the state." *The Supreme Court of California* (2007 ed.), available at http://www.courtinfo.ca.gov/courts/supreme/documents/2007_Supreme_Court_Booklet.pdf, at 19. The court typically grants 5% or fewer of the petitions for review presented each year. *Id*. at 21.

The California Supreme Court also has exclusive appellate jurisdiction over death judgments and must review each one. Cal. Const. art. VI, §11; Cal. Pen. Code §1239(b); *People v. Massie*, 19 Cal.4th 550, 566-71, 967 P.2d 29, 39-43 (1998). Its appellate jurisdiction further extends to decisions of the Public Utilities Commission (Cal. Pub. Util. Code §§1756, 1759) and bar discipline matters. *See* Cal. Bus. & Prof. Code §§6082, 6084.

Consistent with its substantial responsibilities, the California Supreme Court has a large and growing docket. In fiscal year 2000-01, the court determined 9,047 cases with 103 written opinions, and by fiscal year 2007-08, the last year for which data is available, the number rose to 10,440 dispositions with 116 written opinions. Judicial Council of California*, 2009 Court Statistics Report*, available at http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf, at ix, 4 (tbl. 1), 9 (tbl. 6).

A breakdown of the California Supreme Court's dispositions helps place its habeas docket in context. Of the 9,047 dispositions by the state high court in fiscal year 2000-01, there were 5,772 petitions for review, 2,645 original proceedings, 27 habeas petitions related to automatic (capital) appeals, and 592 state bar matters. *See 2002 Court Statistics Report*, at 4 (tbl. 1). The original proceedings included 2,425 non-capital habeas corpus petitions, such as Richter's, which comprised 92% of the dispositions in all original proceedings and 27% of the court's total dispositions. *Id*. at 4 (tbl. 1), 6 (tbl 3).[4] By 2007-08, the number of non-capital habeas dispositions rose to 3,476, which was 91% of the 3,833 dispositions in original proceedings, and 33% of all 10,440 dispositions that year. *2009 Court Statistics Report* at ix, 4 (tbl. 1), 6 (tbl. 3). The court also ruled on 5,989 petitions for review, which included 784 habeas corpus matters. *Id*. at 5 (tbl. 2).

2. The California Supreme Court sits en banc in all cases, and disposes of most original habeas petitions by summary orders. The seven members of the court meet in regular Wednesday conferences to decide whether to grant petitions for review or to

[4] Looking back further, non-capital habeas petitions more than tripled in the last decade and a half. In 1991-92, non-capital habeas petitions comprised 1,032 – or 76% – of the high court's 1,358 dispositions in original proceedings and 19% of the 5,466 total dispositions. *2002 Court Statistics Report* at 4 (tbl. 1), 6 (tbl. 3).

issue orders to show cause in habeas corpus cases. *Internal Operating Practices and Procedures of the California Supreme Court*, §§III, XIV.F (rev. 2007), available at http://www.courtinfo.ca.gov/courts/supreme/documents/iopp07.pdf. When a non-capital habeas corpus petition is filed, the court schedules a conference date and assigns the case to the court's criminal central staff to prepare a conference memorandum and recommend a disposition. *Id*., §IV.B.3. "At a typical conference, the justices consider approximately 250 matters. The concurrence of at least four justices is needed for a decision to review a case or take other action." *The Supreme Court of California* at 20.[5]

Given its heavy docket of original habeas petitions and other matters, the California Supreme Court has developed procedures for ruling on a habeas petition without issuing a written decision that states its reasons. Under California law, an order to show cause why a writ should not issue formally creates a "cause" in a habeas case (*People v. Romero*, 8 Cal.4th 728, 740, 883 P.2d 388, 393 (1994)), and makes applicable the state constitutional requirement that decisions of the state supreme court be "in writing with reasons stated." Cal. Const. art. VI, §14.

---

[5] The same procedures were in place in 2001 when Richter's petition was denied. *See* West's California Rules of Court (2001 ed.) at 625, 629 (*Internal Operating Practices and Procedures of the California Supreme Court* §§III, IV.B.2, XIV.F).

However, the court may deny a petition outright "[i]f the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred . . . ." *Romero*, 8 Cal.4th at 737, 883 P.2d at 391. Such dispositions are "commonly referred to as 'summary denials'" (*id.*), and do not require a written opinion because the habeas petition has not resulted in a "cause." *Id.*, 8 Cal.4th at 740, 883 P.2d at 393.[6]

Original habeas corpus petitions filed in the California Supreme Court are overwhelmingly denied through summary orders, without written opinions, under this procedure. While the Judicial Council does not publish statistics for summary denials, "alternative writs or orders to show cause" were issued in only 9 of 2,640 (0.34%) original proceedings disposed of in 2000-01; in 2007-08, such orders were entered in only 11 of 3,816 (0.29%) such cases. *See 2009 Court Statistics Report* at 9 (tbl. 6). And, as we have noted, only 103 and 116 opinions were issued in 2000-01 and 2007-08, respectively.

---

[6] The petition "serves primarily to launch the judicial inquiry into the legality of the restraints on the petitioner's personal liberty." *Romero*, 8 Cal.4th at 738, 883 P.2d at 392. If an order to show cause issues, the custodian's return becomes the principal pleading, and "it is through the return and the petitioner's traverse that the issues are joined . . . ." *Id.*, 8 Cal.4th at 739, 883 P.2d at 392.

B. A Silent Denial – Like Other Summary Habeas Orders – Accommodates the California Supreme Court's Heavy Workload and Facilitates Later Federal Review, But is Not a Decision on the Merits Under State Law

Although the heavy workload of the California Supreme Court necessitates the use of summary dispositions, that court has conscientiously sought to assist the federal courts by indicating – when it is able to do so – which of its summary denials are on procedural or other grounds that may affect later federal review. The California Supreme Court is well aware of federal habeas corpus doctrine; its summary order practices have developed in light of federal habeas law, and its use of particular language to accompany certain denials is quite deliberate. The California Supreme Court also depends upon the federal courts to interpret its language consistently so that the court may continue to communicate accurately through its summary process. Through a series of decisions, the federal courts have made plain that there is a shared federal-state understanding of the meaning of different forms of summary denials, including silent denials.

1. For decades, the California Supreme Court has issued summary denials in habeas corpus cases. The state high court's longstanding practice was to mail summary orders on postcards, and so they were often called "postcard denials." *See Harris v. Superior Court*, 500 F.2d 1124, 1125 (9th Cir. 1974) (en banc),

cert. denied, 420 U.S. 973 (1975). At the outset, postcard denials contained no explanations for the court's decisions. This caused some consternation in the federal courts; the Ninth Circuit criticized the "failure of the California court to reveal the basis of its denial . . . ." *Castro v. Klinger*, 373 F.2d 847, 850 (9th Cir. 1967).[7] In 1969, the California Supreme Court began citing cases or other authorities when a majority of the court was able to agree upon the basis for a postcard denial. *See Harris*, 500 F.2d at 1127-28.[8] That practice still continues. *See infra* at 20-21.

Although the state supreme court endeavors to provide a citation or basis for decision when it can, court procedures do not ensure that a majority of the justices will agree on a reason to deny a petition. As noted, a majority of four justices must concur in the

---

[7] *See also A Study of Postconviction Procedures in California*, *reprinted in* Judicial Council of California, *1971 Annual Report to the Governor and the Legislature* 23, 38-41 (1971) (describing need for state courts to make a record when denying habeas relief for reasons including facilitating later federal review).

[8] *Compare*, *e.g.*, Minutes of the California Supreme Court, June 19, 1968 (entering summary orders in 35 original habeas corpus petitions; the court issued 2 orders to show cause, denied 1 petition relating to bail on appeal, and denied 36 petitions with only the following language: "Petition for writ of habeas corpus denied") *with* Minutes of the California Supreme Court, Dec. 7, 1970, reprinted in 35 Cal. Official Reports (1970) (summarily denying 33 original habeas corpus petitions, but citing authority in 19 of the denials).

disposition to decide any matter, including a habeas petition, at the court's conferences. *See Internal Operating Practices and Procedures of the California Supreme Court*, §§III.F, IV.B.3, IV.J (rev. 2007). Thus, even though the California Supreme Court affirmatively indicates the bases for its decisions in a large number of cases, at times the court is simply unable to indicate that a majority of justices has agreed upon a reason for denial. In these circumstances, the justices will issue a summary order without any explanation – a silent denial.

These summary order practices permit the California Supreme Court to manage a large docket of original habeas proceedings (as well as the rest of its substantial workload) and, at the same time, communicate effectively to the federal courts when the majority of the justices is able to agree on the basis for a summary denial. Changing these procedures, such as by requiring the justices to vote "issue by issue" – instead of just voting upon the disposition of a petition – would come at a high cost for a court that regularly decides 250 matters at its weekly conferences, and that rules on at least 3,400 original habeas corpus petitions each year.

There is a direct relationship between the California Supreme Court's habeas practices and its ability to do the rest of its work. Judges of the Ninth Circuit once asked the state high court to consider issuing even more detailed findings in capital habeas

orders which, unlike non-capital habeas orders, do state reasons for denying each claim in the petition.[9] Chief Justice Ronald M. George later told the circuit that the court conducted an internal experiment and found that employing different procedures diverted resources that would otherwise have produced opinions in civil and non-capital criminal matters. The justices "concluded that the costs of issuing such orders would substantially outweigh any benefits and hence preclude our departing from our historical, and current, practice of issuing orders that announce the disposition (invoking, of course, as appropriate both the merits and any procedural bars)."[10]

2. Although the California Supreme Court's summary disposition procedures were born of necessity, they have evolved through an extended dialogue with the federal courts. The federal courts in California and this Court have demonstrated their understanding of summary habeas denials – including silent denials – and this shared understanding allows the state supreme court to use summary orders with confidence.

---

[9] *See*, *e.g.*, *In re Robbins*, 18 Cal.4th 770, 822-24, 959 P.2d 311, 346-47 (1998). From 1998-2008, the California Supreme Court decided an average of 29 capital habeas petitions annually. *See 2009 Court Statistics Report* at 4 (tbl. 1).

[10] *Streamlined Procedures Act of 2005, Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 140 (2005) (reprinting letter from Chief Justice Ronald M. George to Chief Judge Mary M. Schroeder).

An early part of the conversation took place as the federal courts were determining whether a federal habeas petitioner who received a postcard denial had exhausted her state remedies, as a summary denial might be based upon procedural grounds. Prior to the Antiterrorism and Effective Death Penalty Act (AEDPA), amending 28 U.S.C. §§2241, *et seq*., the only issue for the federal courts regarding a silent denial was whether it represented a decision on procedural grounds, and courts split on this question. *Compare Castro*, 373 F.2d at 850 (finding exhaustion) *with Baskerville v. Nelson*, 455 F.2d 430, 432 (9th Cir. 1972) (per curiam) (finding no exhaustion). In *Harris*, the en banc court of appeals held:

> If the denial of the habeas corpus petition includes a citation of an authority which indicates that the petition was procedurally deficient or if the California Supreme Court so states explicitly, then the available state remedies have not been exhausted . . . However, when the California Supreme Court denies a habeas corpus petition without opinion or citation, or when it otherwise decides on the merits of the petition, the exhaustion requirement is satisfied.

Harris, 500 F.2d at 1128-29 (citations omitted). *Harris* thus resolved the exhaustion issue for the federal district courts in the state, and made clear to the California Supreme Court that silent denials would not be interpreted by the federal courts as based on procedural grounds.

More recently, and after AEDPA, the California Supreme Court has participated directly in the conversation with the federal courts about the meaning of its summary denials, and has even modified its practices. Since federal courts will not review a state decision containing a "plain statement" that it relied upon an adequate and independent state ground (*Harris v. Reed*, 489 U.S. 255, 265 (1989)), the California Supreme Court has given the federal courts a clear explanation of its summary order practices. In *In re Robbins*, 18 Cal.4th 770, 814 n. 34, 959 P.2d 311, 340 n. 34 (1998), the court described various aspects of its habeas order practices "in order to provide guidance." It first explained:

> We deny a claim "on the merits" when we conclude, after review, that no prima facie case for relief is stated as to that claim. In so doing, we understand that federal courts will honor independent and adequate state procedural bars even if the state court's procedural disposition is accompanied by an alternative disposition on the merits grounded upon federal law.

Id. (citing *Harris*, 489 U.S. at 264). The court then detailed how it cites to prior cases and applies the four primary grounds for state procedural default: the *Dixon* bar (the claim should have been raised on appeal), the *Waltreus* bar (the claim was already rejected on appeal), and the untimeliness and successor bars. *Id*.

The Ninth Circuit in turn has demonstrated its understanding of these signals, including the state court's shorthand references for these state procedural bars. *See*, *e.g. Thorson v. Palmer*, 479 F.3d 643, 645 (9th Cir. 2007) (reading a summary order's citation to "the very page of *Robbins* that sets forth 'the basic analytical framework' governing California's timeliness determinations in habeas corpus proceedings" as "a clear ruling that Thorson's petition was untimely"); *Jackson v. Roe*, 425 F.3d 654, 657, n. 2 (9th Cir. 2005) (reading a summary order citing only to *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953) as based on procedural bar precluding habeas claims that could have been, but were not, raised on direct appeal); *Washington v. Cambra*, 208 F.3d 832, 833-34 (9th Cir.) (reading a summary denial citing *In re Swain*, 34 Cal.2d 300, 304, 209 P.2d 793 (1949) and *Dixon* as resting on procedural bars of untimeliness and failure to raise the claim on appeal), *cert. denied*, 531 U.S. 919 (2000).

This Court too has participated in the dialogue between the federal and California courts, stepping in on two occasions where the Ninth Circuit has misread summary orders and silent denials. In *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), this Court correctly stated that "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." The silent habeas denial by the California Supreme Court in *Ylst* "said absolutely

nothing about the reasons for the denial." *Id*. at 805.[11] The Court then "looked through" the California Supreme Court's silent denial to the last-reasoned state court decision, and found that the habeas petitioner's claim was procedurally defaulted. *Id.* at 805-06. *Ylst* communicated two messages to the California Supreme Court: first, it reassured the state high court that unexplained denials would continue to be treated as not setting forth any basis for decision; and, second, it made clear that unless the court chose to couple a habeas denial with an explanation, federal courts could "look through" to the last-reasoned state court ruling.

This Court weighed in again post-AEDPA, issuing a decision that reinforced this settled understanding about summary orders and silent denials. In

---

[11] In their briefing in that case, the State and its *amicus* both argued that a silent denial is not a decision on the merits, and thus that the federal courts should look to the last-reasoned state decision. *See* Closing Brief for Petitioner, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (No. 90-68), 1991 U.S. S.Ct. Briefs LEXIS 719, *36 ("the state supreme court is composed of seven justices, each of whom may have a different reason for denying relief. For example, two may reject the claim on the merits, two may determine that the claim was not stated with sufficient particularity and three may decide that the petitioner should have raised the issue on appeal."); Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (No. 90-68), 1990 U.S. S.Ct. Briefs LEXIS 627, *39-*40 (arguing that a summary denial "stands for nothing more than the fact that the California Supreme Court did not believe that the case warranted supreme court review.")

Evans v. Chavis, 546 U.S. 189, 198 (2006), this Court could not tell from a silent denial whether the California Supreme Court ruled on the merits or denied the petition as untimely. Arguing for this holding, the California Attorney General quoted *Ylst* to point out that "[t]he essence of unexplained orders is that they say nothing." Petitioner's Brief on the Merits, *Evans v. Chavis*, 546 U.S. 189 (2006) (No. 04-721), at 25 (quoting *Ylst*, 501 U.S. at 804).

A shared state-federal understanding of the California Supreme Court's habeas practices thus has been made explicit by the courts: silent denials communicate nothing, but if the California Supreme Court is able to specify the basis for a summary order, that specification will be given effect. Two decades after *Harris v. Superior Court*, the Ninth Circuit observed that the state high court, which had issued an unexplained denial, "had good reason to know the effect it would be given in federal court." *Hunter v. Aispuro*, 982 F.2d 344, 347 (9th Cir. 1992), *cert. denied*, 510 U.S. 887 (1993). Likewise, after *Ylst v. Nunnemaker* and *Evans v. Chavis*, the California Supreme Court also has had good reason to know how silent denials would be treated by the federal courts, and the state high court has continued to issue them with confidence as to how they would be received.

3. The California Supreme Court's summary adjudication procedures were firmly established when Richter's habeas corpus petition was denied, and they remain so today. The court denies habeas petitions with four distinct types of orders. These four

categories were in use in 2000-01, and they continue to be employed today.

a. First, some orders indicate that the petition is unmeritorious (*In re Robbins*, 18 Cal.4th 770, 814 n. 34, 959 P.2d 311, 340 n. 34 (1998)) and these orders explicitly state: "Petition for writ of habeas corpus is DENIED on the merits." *In re Gerkin*, No. S092534, 2001 Cal. LEXIS 3638 (2001); *see also In re Luna*, No. S181847, 2010 Cal. LEXIS 5894 (2010) (same).

b. Second, some orders deny the petition on a procedural ground without considering its merits (*Robbins*, 18 Cal.4th at 778 n. 1), and these orders cite the case or cases setting forth the applicable procedural rule. An example is: "Petition for writ of habeas corpus is DENIED. (*See In re Clark* (1993) 5 Cal.4th 750, 866 P.2d 729; *In re Waltreus* (1965) 62 Cal.2d 218, 225, 42 Cal.Rptr. 9, 397 P.2d 1001.)" *In re Le*, No. S094971, 2001 Cal. LEXIS 3694 (2001); *see also In re Leon*, No. S178772, 2010 Cal. LEXIS 5283 (2010) (citing other procedural bars).

c. Third, some orders deny the petition both on a procedural ground and "on the merits" (*Robbins*, 18 Cal.4th at 814 n. 34), stating, for example, "Petition for writ of habeas corpus is DENIED on the merits and as successive." *In re Pierce*, No. S091769, 2001 Cal. LEXIS 701 (2001); *see also In re Slade*, No. S146027, 2007 Cal. LEXIS 3736 (2007) (denying petition on the merits and for lack of diligence).

d. Fourth, some orders, as in Richter's case, are wholly silent; they deny the petition without

identifying any grounds whatsoever. For example: "Petition for writ of habeas corpus is DENIED." *In re Zetino*, No. S091126, 2001 Cal. LEXIS 574 (2001); *see also In re Pedraza*, No. S179142, 2010 Cal. LEXIS 5791 (2010) (same).

4. Finally, although the silent denial is the only summary disposition that reveals nothing about its reasons, on federal habeas review, many, if not most, of the silent denials issued by the California Supreme Court are "look through" orders under *Ylst*.

Under California's unique habeas procedure, the superior courts, the courts of appeal, and the supreme court all have original jurisdiction over a petition for writ of habeas corpus. Cal. Const. art. VI, §10. Although a habeas petitioner may file his initial petition in the California Supreme Court without initially seeking relief in the lower courts (*see*, *e.g.*, *In re Harris*, 5 Cal.4th 813, 824, 855 P.2d 391, 395 (1993)), he must plead whether he previously filed the same claim in another court, provide detailed information about any prior petition, and explain the circumstances justifying his application in an appellate court rather than in the lower court. Cal. R. Ct., rules 8.380(a)(1), 8.384(a)(1) & 8.384(b)(1)-(2); Judicial Council form MC-275, p. 6, # 12-14, 18. Moreover, when a habeas petition is filed in the superior court, any order denying the petition must be in writing and "contain a brief statement of the reasons for the denial. An order only declaring the petition to be 'denied' is insufficient." Cal. R. Ct., rule 4.551(g). With these facts before it, an appellate court

has discretion, but is not required, to deny an original petition that was not filed first in a lower court. *In re Steele*, 32 Cal.4th 682, 692, 85 P.3d 444, 449 (2004). This Court already has recognized that "California's habeas rules lead a prisoner ordinarily to file a petition in a lower court first." *Carey v. Saffold*, 536 U.S. at 221 (citations omitted).[12] Given this state procedure, it is reasonable to expect that for a majority of California silent denials, the federal courts will be able to "look through" to a reasoned decision based on a procedural bar and/or on the merits; silent denials with no lower court order to consider under *Ylst*, like Richter's, are the exception.

As this discussion shows, the California Supreme Court's summary disposition practices developed in light of decisions from the federal courts, including this Court's opinion in *Ylst*. Summary denials are a

[12] Statistics published by the California Judicial Council tend to confirm this Court's understanding that habeas petitioners usually file first in the lower courts in California. For example, in fiscal year 2000-01, when the California Supreme Court decided 2,425 original non-capital habeas petitions, including Richter's, the California superior courts decided 5,121 habeas petitions. *2002 Court Statistics Report* at 57 (tbl. 13). During the last decade, the number of habeas petitions determined by the superior courts has increased steadily to 7,301 in fiscal year 2007-08. *See 2009 Court Statistics Report* at 57 (tbl. 11). Similar data on the number habeas dispositions in the courts of appeal are not available. *See 2002 Court Statistics Report* at 25 (tbl. 5) (reporting a total of 9,096 dispositions in original proceedings without separately identifying criminal habeas petitions).

necessity for the state high court given its workload. The habeas procedures and the four categories of denial orders have been refined through an iterative process in which the state court has sent signals through the careful use of language accompanying its summary denials, and the federal courts have reassured the California Supreme Court that its signals are understood. The California Supreme Court's choice of a particular type of order denying a habeas corpus petition is calculation, not coincidence. It reflects a reasoned decision, and each type of order has a distinct meaning, as the federal courts have consistently recognized. Under this considered system, a silent denial is not a denial on the merits.

C. A Silent Denial is Not an Adjudication "On the Merits" Within the Meaning of §2254(d)

With this clear and well-settled summary order practice, a silent denial from the California Supreme Court cannot be an adjudication "on the merits" within the meaning of 28 U.S.C. §2254(d). There are at least three reasons why. First, considering a silent denial to be a decision "on the merits" would obliterate the state-law distinctions between different forms of summary denials, and fail to respect the state court's decisional process. Second, this Court should not apply a single, inflexible federal standard to assess the state courts' judgments. Third, construing a silent denial to be a decision "on the merits" within the meaning of §2254(d) would impede the

work of the California Supreme Court because that busy court would have to expend additional time and resources on petitions that it already has decided to deny.

1. To begin, there appears to be no dispute among the parties in this case that state law controls whether a state court decision is an adjudication "on the merits." The State asserts that the silent denial here was a decision on the merits, but urges that conclusion as a matter of California law. *See* Petitioner's Brief on the Merits at 22. Respondent agrees that state law controls. *See* Respondent's Brief on the Merits at 17.

This is wholly consistent with the way this Court has addressed the intersection of state procedural rules and habeas corpus provisions. Thus, in *Evans v. Chavis*, 546 U.S. at 199-200, the Court looked to the California courts and legislature for guidance to determine whether a state habeas petition was timely filed, because AEDPA's statute of limitations is tolled while such a petition is pending. And state law also informs whether the federal claim has been exhausted and may be reviewed in federal court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (under the exhaustion doctrine, a petitioner must present his claims in a petition for discretionary review to the state supreme court, when such opportunity is provided by state law, before filing his petition for federal habeas relief); *Cone v. Bell*, 129 S.Ct. 1769, 1780 (2009) (under the procedural default doctrine, state court's refusal to adjudicate a claim

because a petitioner failed to raise his federal claims in compliance with a relevant, adequate and independent state procedural rule ordinarily bars federal habeas review).

Although the State would look to state law to determine whether an order represents an adjudication on the merits, it overlooks the different forms of summary denials in the California Supreme Court. Of course, a habeas denial with a citation to a procedural bar indicates that at least four justices voted to deny the petition on state procedural grounds. But the fact that four justices did not vote to deny the petition on state procedural grounds does not mean that four justices denied the petition "on the merits." There are procedural denials; there are denials "on the merits" – when a majority of the California Supreme Court expressly uses that language; there are denials both "on the merits" and for procedural reasons; and then there are silent denials for which there is no discernible basis for the state high court's decision. As we have shown, the summary order practices of the California Supreme Court have not changed since this Court decided *Ylst v. Nunnemaker* and *Evans v. Chavis*. A silent denial still means that there was no basis for decision that commanded four votes.

If this Court accepts the State's argument in this case, it will conflate denials "on the merits" with silent denials, effectively erasing the careful distinction made by the California Supreme Court. But state law should control whether a silent denial is an

adjudication on the merits. Disrespecting the state court's measured judgment would not serve "AEDPA's goal of promoting 'comity . . . and federalism . . . .'" *Carey v. Saffold*, 536 U.S. at 220 (quoting *(Michael) Williams v. Taylor*, 529 U.S. 420, 436 (2000)); *see also Panetti v. Quarterman*, 551 U.S. 930, 945 (2007). As noted in *Williams*,

> Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to . . . safeguard the States' interest in the integrity of their criminal and collateral proceedings.

Id., 529 U.S. at 436.

Over the last forty years, the California Supreme Court has developed summary order procedures for habeas corpus cases. The state high court has decided to issue four types of summary orders, not three, and each category has a well-established meaning and purpose. If this Court holds that silent denials are the same as denials expressly "on the merits," it will attribute a meaning to silent denials that was in no way intended by the California Supreme Court, and ignore state law. This Court instead should safeguard the state court's interest in the integrity of its collateral proceedings, and respect the considered judgment of the California Supreme Court.

2. Nor should this Court attempt to create a one-size-fits-all federal standard. There is insufficient evidence about summary dispositions in the states to permit this Court to fashion a rule that will accurately reflect and respect the variations in state practices.

Texas and several other states have argued that summary rulings should be treated as adjudications on the merits. Although their *amici* brief indicates that a number of states issue summary orders in habeas corpus cases, their brief does not supply evidence as to which of those summary orders are in fact on the merits and which are not. *See generally* Brief of Texas et al. as Amici Curiae in Support of Petitioner. There is no empirical evidence to support the per se rule sought by *amici*. Indeed, the only clear evidence we have about summary denials and merits adjudications counsels *against* the creation of a per se rule. We already have demonstrated that silent denials in California cannot be considered "on the merits." And in its brief, Texas provides a specific explanation of its own practices, noting that "Texas courts use terms of art to indicate the nature of their decisions," with a "denial" signifying a merits disposition and a "dismissal" indicating a ruling unrelated to the merits. *Id*. at 14 n. 1. Even Texas employs at least two different forms of summary orders and only one is arguably related to the merits.

Thus, even if this Court were to seek to craft a federal presumption or rule treating summary orders as adjudications "on the merits," this Court can have

no confidence that such a rule would accurately capture the variety of summary order practices in the fifty states. As this Court held in *Coleman v. Thompson*, 501 U.S. 722 (1991), "[*p*]*er se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter . . . ." *Id.* at 737. While "[w]e accept errors in [a] small number of cases . . . in exchange for a significant reduction in the costs of inquiry . . . , [t]he tradeoff is very different when the factual predicate does not exist." *Id.* A presumption or per se rule certainly would not accurately capture the practices of California, the nation's most populous state, and we do not know how it would fare with respect to other states.

Amici argue that denying "AEDPA deference" to summary dispositions would fail to promote comity, finality and federalism (*see* Brief of Texas et al. as Amici Curiae in Support of Petitioner at 13-19), but in truth the reverse is true. Constructing a blunt federal rule, one that fails to account for variations among the states, would offend and not further the values of comity and federalism.

3. Finally, adopting the rule urged by the State here would interfere with the ability of the California Supreme Court to manage its heavy caseload. As already noted, the California Supreme Court is an extraordinarily busy tribunal. It has appellate jurisdiction in capital and other appeals. And in 2007-08, the last reported year, it entered orders in 3,476 noncapital habeas corpus cases. *See 2009 Court Statistics Report* at 6 (tbl. 3).

If this Court rejects the settled meaning of a silent denial, a conscientious state high court will be forced to devote substantial additional resources to its habeas docket. To avoid having the federal courts erroneously treat a silent denial as a merits adjudication, a majority of the justices of the California Supreme Court will have to agree on a basis for decision in each case or specifically explain that a majority could not reach agreement on any single issue (unless there is a reasoned lower court decision to which the federal courts can look, as permitted by *Ylst*). To facilitate this discussion and voting, the court's criminal central staff will need to recommend a disposition on each separate claim, and the justices will have to vote issue-by-issue. Even though the majority of California's silent denials likely are *Ylst* look-through orders, the additional work required to reach agreement or state a reason for the truly silent denials would be significant, especially given the state supreme court's disposition of over 3,400 non-capital habeas cases each year (*see ante* at 8) and the conclusion of its Chief Justice that issuing more detailed orders in capital habeas cases, which represent but a small fraction of its non-capital habeas caseload, would be unworkable. *See ante* at 14.

The California Supreme Court's docket rivals that of this Court, and perhaps it would not be inappropriate to consider the impact upon this Court if

others read meaning into the denial of petitions for writs of certiorari.[13] Of course, it is well-settled that the denial of such a petition "imports no expression of opinion upon the merits of the case . . . ." *United States v. Carver*, 260 U.S. 482, 490 (1923); *see also Barber v. Tennessee*, 513 U.S. 1184 (1995) (Statement of Stevens, J., respecting the denial of certiorari). That is a matter of necessity. Certiorari jurisdiction "was designed to permit this Court to keep within manageable proportions . . . the business that is allowed to come before us." *Brown v. Allen*, 344 U.S. 443, 491 (1952) (Opn. of Frankfurter, J.). A denial of certiorari "is occasioned by a variety of reasons which precludes the implication" of a merits ruling. *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting). As with habeas denials in the California Supreme Court, "[d]ivergent and contradictory reasons often operate as to the same petition and lead to a common vote of denial. The want of explanations

---

[13] In fiscal year 2000-01, when Richter's silent denial was issued, the California Supreme Court received 8,891 new filings and decided 9,047 cases with 103 opinions (*2009 Court Statistics Report* at 4 (tbl. 1), 9 (tbl. 6)), while this Court had 7,852 new filings and decided 7,713 cases with 87 opinions. Journal of the Supreme Court of the United States, October Term 2000, at II, available at http://www.supremecourt.gov/orders/journal/jnl00.pdf. In fiscal year 2007-08, the California Supreme Court received 10,521 new filings and decided 10,440 cases with 116 opinions (*2009 Case Statistics Report* at 4 (tbl. 1), 9 (tbl. 6)), while this Court had 8,241 new filings and decided 8,374 cases with 74 opinions. Journal of the Supreme Court of the United States, October Term 2007, at II, available at http://www.supremecourt.gov/orders/journal/jnl07.pdf.

for denials of certiorari is in part due to the fact that a collective reason frequently could not be given." *Id*.

In *Ylst*, the State's *amicus* compared this Court's certiorari practices with the California Supreme Court's summary order procedures. It noted that habeas corpus petitions in the California Supreme Court frequently raise a multitude of claims. "[A]s there could be different reasons for dismissing each claim," *amicus* explained, "a summary dismissal of a habeas petition is likely to involve many different issues. Uniting the views of the justices on these disparate issues would at least equal the task of getting this Court to agree on its reasons for denying certiorari." Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (No. 90-68), 1990 U.S. S.Ct. Briefs LEXIS 627, *37. CACJ and the Academy agree.

Imposing a presumption that a silent denial is an adjudication on the merits would place an undue burden on the California Supreme Court. This Court said in *Coleman*, 501 U.S. at 739:

> It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment. We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions

> . . . [W]e will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim . . . in order that federal courts might not be bothered with reviewing state law and the record in the case.

These principles apply here as well.

CONCLUSION

For the foregoing reasons, the Court should hold that a silent denial of a petition for writ of habeas corpus in the California Supreme Court is not an adjudication "on the merits" within the meaning of 28 U.S.C. §2254(d).

Respectfully submitted,

JOHN T. PHILIPSBORN
507 Polk Street, Suite 350
San Francisco, California 94102
(415) 771-3801

CHARLES D. WEISSELBERG
NINA RIVKIND
(*Counsel of Record*)
UNIVERSITY OF CALIFORNIA
SCHOOL OF LAW
Berkeley, California 94720
(510) 643-8159

Counsel for Amici Curiae

July 16, 2010