No. 09-996

In the Supreme Court of the United States

JAMES WALKER, WARDEN, ET AL.,
Petitioners,

v.

CHARLES W. MARTIN,
Respondent.

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

BRIEF FOR CORY R. MAPLES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITY

INTEREST OF *AMICUS CURIAE*

Amicus Cory R. Maples is a death-row inmate incarcerated by the State of Alabama.[1] He has been denied any federal habeas review on the merits of serious constitutional claims challenging the validity of his conviction and sentence on the ground that he procedurally defaulted on those claims by failing to file a timely appeal of the denial of his state petition for post-conviction relief. Maples has a direct interest in the question presented in this case (No. 09-996) because, in upholding the denial of his federal habeas petition, the U.S. Court of Appeals for the Eleventh Circuit divided over whether the alleged default was based on an adequate state law rule. Maples has filed a petition for certiorari (No. 10-63) seeking review of the Eleventh Circuit's divided ruling, and the Court's articulation of the adequacy inquiry in this case may directly impact his case and others like it. Maples's own case also illustrates the different contexts in which adequacy issues arise and underscores that the adequacy doctrine is needed to ensure that inmates are not denied federal habeas review on the basis of state rules interpreted or applied in an arbitrary manner.

The adequacy issue in Maples's case centers on a state procedural rule that by its terms authorizes petitioners to seek relief when "[t]he petitioner failed to appeal within the prescribed time and that failure

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or his counsel made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. The letters of consent have been submitted to the Clerk with this filing.

was without fault on the petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). Maples missed the deadline for the appeal of the denial of his post-conviction petition due to an extraordinary series of events that indisputably were *not* his fault, 10-63 Pet.6-7, and sought to proceed with an out-of-time appeal. At the time he sought that relief, Alabama courts had granted out-of-time appeals in directly analogous circumstances and, indeed, had done so on "indistinguishable facts," 10-63 Pet.App.30a (dissent). Nevertheless, Alabama's courts deemed Maples's claims procedurally forfeited. Maples then filed a petition for federal habeas corpus relief, asserting the constitutional claims that had been found defaulted by the Alabama courts. The U.S. District Court for the Northern District of Alabama concluded that the purported default rule was adequate to preclude federal habeas review of Maples's constitutional claims, and a divided 2-1 panel of the Eleventh Circuit affirmed. 10-63 Pet.App.1a-32a.

The Eleventh Circuit majority's adequacy analysis in *Maples* was deeply flawed in several respects that help to illustrate some of the problems with California's narrow conception of the adequacy requirement in this case. First, the court concluded that the alleged default rule was "firmly established and regularly followed" to *deny* relief, 10-63 Pet.App.12a, even though Alabama courts had *granted* relief in directly analogous cases, 10-63 Pet.13-17. Second, in reaching that counter-intuitive conclusion, the Eleventh Circuit engaged in a *post hoc* analysis to reconcile Alabama's cases in "retrospect," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958), which this Court rejected as improper long ago, *see id.*, and which resulted in the court's creation of an elaborate

tripartite framework based on distinctions that the Alabama courts themselves have never drawn. 10-63 Pet.17-18. Third, in undertaking that revisionist approach, the Eleventh Circuit relied on several Alabama decisions issued *after* the default in Maples's case. 10-63 Pet.16-17, 20-21. Finally, the court placed the burden on Maples to establish that the default rule was *inadequate*, rather than the burden on the state to show that the rule was adequate. 10-63 Pet.19.

As explained below, there are several potentially important distinctions between this case and *Maples*, including the fact that the default rule at issue in this case—unlike the one in *Maples*—arguably is entirely discretionary. *See generally* 10-63 Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner (comparing the two cases). Nevertheless, especially if this Court entertains the broad-brush arguments raised by petitioners and their amicus in this case to eliminate or scale back the adequacy doctrine, the Court's decision in this case may directly impact the adequacy question in *Maples* and many other cases. Moreover, *Maples* underscores the importance of preserving the adequacy doctrine to ensure that inmates are not improperly denied federal habeas review of constitutional claims based on arbitrary or novel state procedural rules. Amicus Maples therefore has a substantial interest in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns whether a case-made, state procedural rule requiring inmates to comply with a discretionary timeliness standard for seeking state post-conviction relief—which calls for inmates to file

habeas claims without "substantial delay" and has been subject to haphazard, inconsistent, and unexplained application by the California courts—is nevertheless adequate to bar federal habeas. Petitioners and their amicus invite this Court to rework its longstanding adequacy doctrine, Pet.Br.9, or do away with it altogether, Brief for Criminal Justice Legal Foundation in Support of Petitioners ("CJLF.Br.") 28. These far-reaching proposals are unnecessary to decide this case, but they are based on a misguided conception of the importance and scope of adequacy doctrine and reflect a cavalier regard for existing precedent. Indeed, petitioners and their amicus invite this Court to depart from or overturn its prior decisions without even attempting to show that the customary *stare decisis* factors for overturning precedent are met.

Although petitioners maintain that "there might not be a compelling need in the habeas corpus context for adequacy scrutiny," Pet.Br.24, this Court reaffirmed just last year that federal courts "have an independent *duty* to scrutinize the application of state rules that bar [their] review of federal claims." *Cone v. Bell*, 129 S. Ct. 1769, 1782 (2009) (emphasis added). This "independent duty" follows from, and furthers, the vital purposes served by federal habeas review of state convictions and sentences, by which "Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

In light of this well-settled duty, petitioners' attempt to reduce the scope of adequacy analysis to whether a state gave "fair notice of the rule," Pet.Br.9,

is misguided. Indeed, as petitioners themselves admit, under their conception of the doctrine "'inconsistent' application in the state's enforcement of its procedural rule[s] ... is immaterial to 'adequacy.'" Pet.Br.25 (capitalization omitted). But this Court long ago made held that "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). Instead, this Court has repeatedly insisted that state procedural rules must be "firmly established and regularly followed" in order to be adequate as a matter of federal law. *Beard v. Kindler*, 130 S. Ct. 612, 617 (2009) (citation omitted).

This case should be resolved based on settled adequacy principles. As respondent explains, the state's timeliness rule "operates far outside the mainstream." Resp.Br.57. The state not only has failed to show any coherent, much less consistent, standards guiding the exercise of discretion, it has repeatedly rejected invitations from this Court and other courts to clarify "the uncertain scope" of its standard. *Evans v. Chavis*, 546 U.S. 189, 199 (2006). This Court has held that there is nothing inherently problematic with discretionary rules. But even discretion can be abused. And discretionary or not, incoherent and arbitrarily applied rules like the one at issue in this case fail this Court's settled requirement that a rule must be "firmly established and regularly followed" to provide an adequate basis for precluding federal review, and offer no meaningful notice to individuals seeking post-conviction relief.

Even if this Court were inclined to tolerate greater uncertainty or arbitrariness in the application of overtly discretionary procedural rules, that would

not—as petitioners and their amicus wrongly argue—suggest a broader need to abandon or reformulate the adequacy doctrine. The facially discretionary rule at issue in this case is relatively uncommon, and Maples's case underscores the importance of the longstanding considerations animating adequacy doctrine, as well as the breadth of situations in which adequacy issues arise. Unlike this case, Maples's case involves a state's arbitrary and unduly burdensome application of a state rule that—without discretion—authorizes relief when a failure to appeal was not the petitioner's fault. At the time of the alleged default in Maples's case, the state courts had previously granted out-of-time appeals on "indistinguishable facts." 10-63 Pet.App.28a-30a (dissent). In nevertheless finding that this rule was adequate to *deny* federal habeas review, the Eleventh Circuit majority sought to reconcile the state rule by relying on cases decided *after* Maples's claims were deemed defaulted, and by purporting to glean granular distinctions in state law "in retrospect," *Patterson*, 357 U.S. at 457, resulting in the Eleventh Circuit's creation of an elaborate tripartite framework that has never before been recognized by any Alabama court.

Maples's case both illustrates the ongoing need for a robust adequacy doctrine that protects against the arbitrary application of state law to defeat federal rights, as well as the serious drawbacks of petitioners' proposal to water down the adequacy inquiry or, indeed, "scrap" it altogether in favor of a "cause and prejudice" standard (CJLF.Br. in Support of Certiorari 15), which was designed to address other matters than assuring the adequacy of the state law on which a purported bar to addressing federal rights is based.

ARGUMENT

I. THE ADEQUACY DOCTRINE IS DEEPLY GROUNDED IN THIS COURT'S PRECEDENTS AND SERVES VITALLY IMPORTANT PURPOSES

This Court has time and again held that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Almost 150 years ago, Congress granted federal courts the authority to issue the writ of habeas corpus to state prisoners "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of February 5, 1867, ch. 28, 14 Stat. 385. "There can be no doubt that in enacting [what is today 28 U.S.C.] § 2254, Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)). The adequacy doctrine plays a vital role in ensuring that individuals like amicus are not deprived of federal court review on habeas of serious—and, indeed, meritorious—constitutional claims on the basis of novel or arbitrary state rules.

A. The Adequacy Doctrine Is Entrenched In This Court's Precedents

Because the Great Writ is a "bulwark against convictions that violate 'fundamental fairness,'" *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (citation omitted), this Court has limited access to federal habeas review because of state procedural defaults with caution and care. Both the state and its amicus criticize this

Court's precedents as presenting a "confused jumble of varying rubrics." CJLF.Br.5; *see* Pet.Br.18. There certainly is confusion at the margins and some lower courts have failed properly to heed this Court's teachings in undertaking the adequacy analysis. *See* 10-63 Pet.12-20. But going back at least to Justice Holmes's colorful reference to "springes," this Court has recognized that state law may not be arbitrarily invoked or sprung on inmates to defeat federal rights. *See Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.), discussed *infra* at 14. And for many decades this Court's precedents have established several clear principles governing when a state law rule is adequate.

Perhaps foremost among these principles, the Court has long recognized that only a "'firmly established and regularly followed' state rule[] … will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted); *see also James v. Kentucky*, 466 U.S. 341, 348 (1984); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); Pet.Br.21. As this Court has explained, the "firmly established and regularly followed" standard states two distinct, but complementary requirements, both of which must be satisfied in order for a state procedural rule to bar federal review. *See, e.g.*, *Ford v. Georgia*, 498 U.S. 411, 425 (1991). The "firmly established" requirement tests whether litigants and federal courts are on notice of its contours. And the "regularly followed" requirement tests whether a rule is being applied unpredictably, inconsistently, or surprisingly—all of which implicate the concern that litigants with potentially meritorious federal claims will be arbitrarily barred from federal court and that asserted rules are being used as a pretext to deny federal rights.

Last term, this Court reached the "uncontroversial" conclusion that "a discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009). The Court explained that a contrary conclusion could discourage states from adopting rules that "grant[] courts discretion to excuse procedural errors." *Id.* But the Court by no means held that *all* discretionary rules were adequate. Nor did it in any way suggest that the "firmly established and regularly followed" requirement was inapplicable to discretionary rules, much less hold that it did not apply with full force to the many state law rules that are *not* discretionary or are non-discretionary in relevant part.[2]

This Court has also recognized that state procedural requirements that are novel or unpredictable are inadequate to preclude federal habeas review. *Patterson*, 357 U.S. at 457-58; *see also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). Even when a state rule is otherwise adequate, this Court has concluded that a state procedural default provides insufficient reason to bar

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[2] The concurrence in *Beard* stressed that the adequacy requirement should not be applied in a way that "would deprive the States of the case law decisional dynamic that the Judiciary of the United States finds necessary and appropriate for the elaboration of its own procedural rules." 130 S. Ct. at 620 (Kennedy, J., joined by Thomas, J., concurring). But as Maples's own case illustrates, there is a fundamental difference between the ordinary "decisional dynamic" that results in the even-handed application of procedural rules on a case-by-case basis over time and the inconsistent, illogical, or arbitrary application of an indeterminate rule from one case to the next. *See infra* at 29-31.

federal review when equities in favor of affording access to federal court exceed the state's interest in enforcing even "a generally sound rule" in a particular case. *Lee*, 534 U.S. at 376; *Flowers*, 377 U.S. at 297 (holding that procedural rule was no bar to Supreme Court review when state court had never applied it with the "pointless severity shown here"). Likewise, procedural defaults will not bar federal review where the enforcement of the default state rule would "force resort to an arid ritual of meaningless form." *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

B. Petitioners Fail To Account For The Statutory And Equitable Policies Underlying The Adequacy Doctrine

Petitioners urge this Court to scuttle or at least marginalize those principles and make the singular focus of the adequacy inquiry a determination whether litigants have received "fair notice of legitimate state procedural rules." Pet.Br.18 (capitalization omitted). Fair notice is of course constitutionally indispensable. And the requirement that a rule be "firmly established and regularly followed" helps ensure that proper notice generally has been given. But petitioners have a different—and significantly watered down—concept of fair notice from what this Court's precedents have required. Instead of ensuring that the state rule has been consistently applied, petitioners seek to shift the focus simply to whether there are legitimate interests for the rule (as expressed by the state). And, tellingly, petitioners argue (at 11) that, "[b]ecause state rules typically serve any one of many legitimate interests, … it will be the rare rule that can be said to serve none."

Under petitioners' proposed inquiry, the adequacy doctrine adds little to the equation in determining

whether federal court review has been arbitrarily short-circuited. But the adequacy doctrine reflects and implements important statutory and equitable policies underlying the federal habeas statutes. "The procedural default doctrine … [is] 'a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (citation omitted). Petitioners' reconception of the adequacy inquiry not only renders it largely superfluous, it does not account for the fact that under this Court's precedents state procedural rules may prove to be an inadequate to bar federal review for a variety of different reasons—not all of which may be distilled into a one-size-fits-all "fair notice" test.

"[T]he independent and adequate state ground doctrine in federal habeas is somewhat different than on direct review by this Court." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). On direct review, the existence of "a state law ground that is independent of the federal question and adequate to support the judgment," whether "substantive or procedural," ordinarily makes this Court powerless to render what would be an advisory opinion on any federal question presented. *Id.* at 729. In contrast, even when there is a state procedural default, a federal habeas court nevertheless remains constitutionally and statutorily empowered to decide whether state prisoners are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The existence of that authority is consistent with the fact that the writ of habeas relief ultimately is governed by "equitable principles."

Munaf v. Geren, 553 U.S. 674, 693 (2008); *see also Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010).

The willingness of federal courts to abstain from passing upon a constitutional claim presented for federal habeas review is premised on prudential "considerations of comity and concerns for the orderly administration of justice." *Francis v. Henderson*, 425 U.S. 536, 538-39 (1976). These concerns are at their apex when a petitioner fails to comply with a "firmly established and regularly followed" state rule. *Beard*, 130 S. Ct. at 617 (citation omitted). Where states can point to a record of consistency and regularity in applying the underlying default rule, federal courts may be confident that state procedural rules are not be being applied improperly to defeat federal rights or foreclose federal habeas review of federal claims.

At the same time, this Court has observed that federal courts have a "duty to scrutinize the application of state rules that bar [their] review of federal claims." *Cone v. Bell*, 129 S. Ct. 1769, 1782 (2009). That duty serves several important interests. To begin with, as explained, the adequacy analysis prevents a state from arbitrarily barring federal habeas review through inconsistent application of procedural rules. *See, e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964). When a state court applies a rule inconsistently or arbitrarily, it raises the serious concern that a state may be discriminating against the exercise of federal rights.

Because the legitimacy of a state's interest in the enforcement of its procedural rules is greatly

diminished where those rules are applied irregularly or arbitrarily, the prudential considerations weigh even less heavily in favor of enforcing the procedural bar in such circumstances. As then-Judge Alito explained:

> If inconsistently applied procedural rules sufficed as "adequate" grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called "rules"—directions of general applicability—rather than by whim or prejudice against a claim or claimant.

Bronshtein v. Horn, 404 F.3d 700, 708 (3d Cir. 2005) (Alito, J.), *cert. denied*, 546 U.S. 2109 (2006); *see id.* (acknowledging that the "pertinent statutory provision … appears on its face to impose a one-year deadline" but finding such rule inadequate because "strict enforcement of [it] did not begin immediately").

The adequacy analysis also ensures that both habeas petitioners and federal courts have notice of a state procedural rule's requirements and established application. When states have engaged in the process of "elaborating, defining, and then shaping [their] decisional law," *Beard*, 130 S. Ct. at 620, states place litigants "on notice" of their obligations if they want to preserve habeas rights, and place federal courts on notice of the principles that they commit to follow consistently. Where a litigant nonetheless runs afoul of state rules through his own fault, a federal court appropriately declines to consider federal claims that should have first been presented to state courts. The opposite is true, however, where—as here—a state's

courts have studiously and repeatedly eschewed invitations and specific requests from the federal courts to help federal courts perform their important "duty" by clarifying and providing content to a rule that has been applied in an inconsistent or utterly indeterminate fashion. *See infra* at 19-21.

Significantly, the adequacy analysis also ensures that state rules do not unduly burden federal rights. As this Court has recognized, "the mine run of procedural rules, generally serve[] a legitimate state interest." *Lee*, 534 U.S. at 387. But this Court has recognized the importance of ensuring that such state procedural rules—even those serving genuine interests—are not applied to cut off access to federal courts in a manner that would be unjust. *See, e.g.*, *Staub*, 355 U.S. at 320 (a state procedural ground may not preclude federal review when the state rule, even when consistently enforced, "force[s] resort to an arid ritual of meaningless form"); *Lee*, 534 U.S. at 376 (in certain cases, the unyielding application of a generally sound state law would disserve any state interest). It has thus been an almost century-old and bedrock principle of this Court's jurisprudence that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis*, 263 U.S. at 24 (1923) (Holmes, J.).

C. The Court Should Reject Petitioners' Request To Shift The Ordinary Burden Of Proof On An Affirmative Defense

To overturn the judgment below, petitioners also ask this Court to undercut the adequacy requirement in a more subtle, but nevertheless significant, manner

by asking this Court to shift the burden from the state to prove the adequacy of its rules to habeas petitioners to prove the *inadequacy* of rules. This Court however, already has held that "procedural default is normally a 'defense' that the State is 'obligated to raise.'" *Trest v. Cain*, 522 U.S. 87, 89 (1997) (citations omitted); *see also Gray v. Netherland*, 518 U.S. 152, 165-66 (1996) (Rehnquist, C.J.) (noting in habeas case that "procedural default is an affirmative defense for the [State]"). And it is hornbook law that the proponent of the affirmative defense of procedural default bears the burden of proving the defense (and all of its elements). *See, e.g.*, 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.2a, at 1265 n.5 (5th ed. 2005) (in habeas cases, the state bears the burden "not only of asserting that a default occurred, but also of persuading the court that the factual and legal prerequisites of a default … are present").

The courts of appeals broadly agree and have held that the state bears the burden of proving adequacy. *See Jones v. Sussex I State Prison*, 591 F.3d 707, 716 (4th Cir. 2010); *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir.), *cert. denied*, 130 S. Ct. 1014 (2009); *Pike v. Guarino*, 492 F.3d 61, 73 (1st Cir.), *cert. denied*, 522 U.S. 1066 (2007); *Smith v. Mullin*, 379 F.3d 919, 927 (10th Cir. 2004); *Combs v. Coyle*, 205 F.3d 269, 276-77 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000). *But see Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995) (presuming that a "state court's reliance on a procedural bar functions as an independent and adequate ground in support of the judgment" unless the petitioner can show otherwise); 10-63 Pet.19-20.

Petitioners' argument that state prisoners should bear the burden of establishing the inadequacy of the

state rule makes little practical sense. First, as repeat, institutional litigants, states are far better positioned to demonstrate that a rule is "firmly established and regularly followed" than a state prisoner is able to prove the opposite. Indeed, states can draw on their own experience enforcing the same procedural rules to demonstrate the rule's adequacy in a typical case. In contrast, the inequity of making a state prisoner—often operating pro se or with little means—to prove a negative from analysis of the state's case law is self-evident. Second, the fact that federal courts respect the adequacy of state procedural bars in the large majority of cases, notwithstanding that most circuits place the burden on the state to show the adequacy of their procedural rules, shows that the status quo does not create some insurmountable burden for the state.

Last, petitioner provides no persuasive reason why—in contrast to well-established practice—a habeas petitioner should bear the burden of *disproving* his opponent's affirmative defense. Petitioners' appeal to comity and federalism falls flat. Federal courts already show respect for federalism when abstaining from cases in which a state has *demonstrated* that claims were forfeited pursuant to a firmly established and regularly followed state procedural rule. But where a state cannot show that its rules are firmly established or regularly followed (precisely because of a State's courts refusal to identify how and under what circumstances the bar is to be invoked), this Court has long recognized that federalism considerations do *not* counsel against the federal review of claims.

Habeas petitioners, many of whom have no alternative but to proceed pro se, typically face daunting burdens in challenging their convictions and

sentences and generally bear the ultimate burden of showing that they are entitled to relief. *See, e.g.*, 10-63 Brief of *Amici* Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner 15-16 (discussing the procedural minefield that typically indigent defendants must navigate to seek post-conviction relief in Alabama). But especially considering the gravity of cutting off federal review of potentially meritorious constitutional claims before any hearing on the merits, there is no basis to pile on by saddling habeas petitioners with the burden to *disprove* the affirmative defense of procedural default, including the adequacy of the alleged default rule.

II. THERE IS NO BASIS IN THIS CASE FOR THE COURT TO REWORK, MUCH LESS DISCARD, THE ADEQUACY DOCTRINE

A. This Case Should Be Resolved On The Basis Of Settled Adequacy Principles

California and its amicus urge this Court to depart from the settled requirements for establishing the adequacy of state default rules—including the time-honored requirement that the rule be "firmly established and regularly followed"—and decide this case on the basis of their novel conception of the adequacy doctrine. But the Court should adhere to established precedent and affirm the Ninth Circuit's conclusion that the state simply has failed to meet its burden of showing that the rule at issue is adequate.

This Court has held that "a discretionary state procedural rule *can* serve as an adequate ground to bar federal habeas." *Beard*, 130 S. Ct. at 618 (emphasis added). And, when state courts engage in "the case process" by "elaborating, defining, and then shaping" the principles by which they will exercise the

discretion permitted by a given rule, *id.* at 620 (Kennedy, J., joined by Thomas, J., concurring), nothing makes the exercise of discretion inherently inadequate to bar federal review, *id.* at 618 (majority opinion). But the Court has never suggested that a State may apply a discretionary rule like the one at issue here arbitrarily, or *without* "elaborating, defining, and then shaping" the principles by which discretion may be exercised. As this Court has admonished, "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005); *see id.* ("We have it on good authority that 'a motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'") (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (Va. Cir. Ct. 1807) (Marshall, C.J.)) (alteration in original).

To take an extreme example, no matter how much discretion a state rule might confer, it would be the height of arbitrariness for a state to apply the rule to deny federal rights on the basis of the outcome of a coin toss or a turn of a Magic-8 Ball. The same conclusion follows where a state adopts a discretionary rule but fails to provide any "sound legal principles," *Burr*, 25 F. Cas. at 35, for the exercise of discretion, or applies it in an arbitrary fashion. Thus, if a state rule considered defaulted all post-conviction petitions that were written "sloppily," and the state failed to provide any explanation for why some petitions met that standard and others did not, such a rule would be inadequate to bar federal habeas review. A contrary result not only would license arbitrary state action, but also would

provide a perverse incentive for state courts to *eschew* the case process of elaborating the purposes and principles animating their rules, so as to retain maximum flexibility in future cases.

To avoid the arbitrariness in application made apparent in the record below, California attempts to derive some articulable principles guiding the exercise of discretion under the rule at issue on a case-by-case basis. In doing so, California points to pronouncements by the California Supreme Court in *capital* cases. But less than five years ago, California explained to this Court that its timeliness rules in the capital context pertain to a different process—and serve different policies—than its timeliness rules in noncapital cases like this one. *Evans v. Chavis*, 546 U.S. 189 (2006); *Townsend v. Knowles*, 562 F.3d 1200, 1207-08 (9th Cir. 2009) (discussing application of California's timeliness rule in capital versus noncapital contexts).

Among other things, the State's objective for encouraging timely petitions is quite different in capital as compared to noncapital cases, given the different incentives that apply in each context. As Justice Stevens observed in his concurring opinion in *Evans*, there are reasons to think that California's different timeliness standards in capital versus noncapital cases reflects the state's intent to specially incentivize capital prisoners to file their petitions for relief more speedily. 546 U.S. at 203 & n.1. In particular, as Justice Stevens explained, "while prisoners on death row often have an incentive to adopt delaying tactics, those serving a sentence of imprisonment presumably want to obtain relief as promptly as possible." *Id.*

California's unwillingness (and presumably inability) to defend its case with reference to

noncapital precedents must also be interpreted in tandem with its steadfast refusal to respond to federal courts'—including this Court's—repeated invitations to clarify the principles governing the state's timeliness rules. *See id.* at 199 (suggesting that the Ninth Circuit "might seek guidance [regarding the rule] by certifying a question to the California Supreme Court in an appropriate case"); *Chaffer v. Lockyer*, 546 F.3d 662 (9th Cir. 2008) (Ninth Circuit order seeking such certification). These unanswered federal court pleas for some articulation of the timeliness standards is a telling indication of the lack of any intelligible standards guiding the exercise of discretion. *See Chaffer v. Prosper*, No. S166400, 2009 Cal. LEXIS 2693, at *1 (Cal. Mar. 11, 2009). If a state is free to assert a procedural bar on the basis of indecipherable procedural rules even following notice from federal courts (and even this Court, *see Evans*, 546 U.S. at 199) that their rules are unclear, then little will be left of the adequacy doctrine in the context of discretionary rules and states will have no incentives to provide inmates with even the most basic standards governing the exercising of discretion under the case model.

Contrary to petitioners' argument before this Court that its "untimely delay" standard establishes a "clear edict," Pet.Br.37, California's Supreme Court acknowledged—in the capital context—that "no clear guidelines [had] emerged" from California's "untimely delay" standard itself, necessitating the court to provide more specific guidance to capital petitioners. *In re Clark*, 5 Cal. 4th 750, 763 (1993). But whatever guidance California has provided to capital petitioners, California has eschewed every opportunity to provide greater clarity to *noncapital* petitioners through the

case process. As respondent has explained, the California courts have been all over the map in applying the timeliness standards. Resp.Br.35-36. That inconsistency is exacerbated by California's "post-card denial" practice of summarily denying petitions for post-conviction relief without providing any meaningful explanation. Resp.Br.8-9. California has failed to provide any sound basis for concluding that it has adopted legal standards for exercising the discretion it touts in a manner that "promote[s] the basic principle of justice that like cases should be decided alike." *Martin*, 546 U.S. at 139.

Given that the state simply declined to accept the Ninth Circuit's request for clarification of its rule, the Ninth Circuit was left with the California Supreme Court's own recognition that its timeliness standard failed to provide "clear guidelines" in the absence of judicial elaboration, and a long litany of summary orders and post-card denials from California's courts failing to provide such elaboration. As such, the Ninth Circuit hardly broke ground—or improperly intruded on state prerogatives—by concluding that California's timeliness rule provided no "clear standards" to habeas petitioners outside the capital context in which this case arises. *Martin v. Walker*, 357 F. App'x 793, 794 (9th Cir. 2009) (quoting *Townsend*, 562 F.3d at 1208).

Discretionary rules appropriately reserve *discretion* for their application in individual cases. And thus, as California observes, state courts need not "articulate in advance *all* of the parameters of their procedural rule or all possible justifications or every factual scenario that will qualify for an exception in order to obtain a finding of adequacy." Pet.Br.39 (emphasis added). But at the same time, to be

adequate, even discretionary rules must operate as *rules—i.e.*, they must be guided be some articulable principles that help ensure that like cases are decided alike. *See, e.g.*, Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982) ("The jurisprudential rule of like treatment demands consistency not only between cases that are precisely alike but among those where the differences are not significant."). That is especially true when it comes to applying state rules to deprive inmates of federal rights and effectively bar access to the federal courts for habeas relief. In the typical case, this ought not be a particularly difficult threshold for a state rule to pass. But, as respondent has explained, California has simply failed to establish that the indecipherable rule at issue in this case meets that minimum threshold.[3]

Finally, it bears noting that, while California alleges that the "delay" in this case should be calculated as "nearly five years," Pet.Br.5, the state has not argued that the adequacy of California's timeliness bar turns on the particular length of delay in this case. Rather, the state has contended that this case should be resolved based on whether the state's rule is adequate as a general matter and the state defended the rule in

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[3] Even assuming, *arguendo*, that a state could adopt a discretionary rule that is intended to be entirely standardless—leaving judges to determine whether a petition was defaulted merely on whim—California has never suggested that the rule at issue is such a rule. At minimum, the state's failure to provide "fair notice" to petitioners (or federal courts) that its rule was intended to apply in such a manner weighs heavily against such an interpretation. As such, California may not escape the charge that its rule has been applied in a standardless and arbitrary manner simply by invoking the shibboleth of "discretion."

all its application. *See* Pet.Br.33-44. As a result, there is no basis for deciding this case on the ground that—whatever may be true for a shorter period of delay—the rule was adequate as applied in this particular case.

B. This Case Is Hardly Representative Of The Typical Case In Which The Adequacy Issue Arises On Federal Habeas

According to the state, the timeliness rule at issue here involves a discretionary standard that nevertheless establishes a "clear edict," Pet.Br.37, providing "fair notice to petitioners" about what they must do to preserve federal claims, Pet.Br.34. Respondent persuasively debunks that contention. But to the extent that this case is properly viewed as testing the adequacy limits of such a discretionary standard, it presents far different considerations than a case, for instance, in which the state is alleged to be applying a *non-discretionary* procedural bar in an arbitrary or inconsistent manner. *See, e.g.*, *Edwards v. Carpenter*, 529 U.S. 446, 450 (2000); *Ford v. Georgia*, 498 U.S. 411, 425 (1991); *Maples v. Allen*, No. 10-63.

As this Court's own precedents illustrate (and countless other lower court cases underscore), the fact pattern presented here represents only one of many different kinds of adequacy issues that are typically presented to the courts. *Compare, e.g.*, *Patterson*, 357 U.S. at 457-58 (determining whether a novel state procedural rule may be adequate, notwithstanding that "in retrospect," it appeared to "form part of a consistent pattern of procedures") *with Ford*, 498 U.S. at 425 (analyzing adequacy given state's "inconsistent application of [its] rule," and other deficiencies); *Lee*, 534 U.S. at 376 (finding that "generally sound rule" that was applicable to petitioner's case was

nevertheless inadequate to stop consideration of federal question); *Davis*, 263 U.S. at 24-25 (noting that "local practice shall not be allowed to put unreasonable obstacles in the way" of federal review) (Holmes, J.).

Even petitioners recognize that the adequacy issue arises in "different contexts." Pet.Br.9. Because the adequacy issue presented by this case is relatively unusual, this case presents an ill-suited vehicle to provide any broad pronouncements concerning the adequacy doctrine, much less to retool the doctrine altogether. *Cf. Beard*, 130 S. Ct. 619 ("The procedural default at issue here—escape from prison—is hardly a typical procedural default, making this case an unsuitable vehicle for providing broad guidance on the adequate state ground doctrine."). And whatever this Court concludes regarding the kind of standardless, "discretionary" rule here, the adequacy doctrine is necessary to protect against the arbitrary or unduly burdensome application of non-discretionary rules—like the rule at issue in *Maples*, *see infra* at 29-31[4]—to foreclose federal court review of constitutional claims.

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[4] As noted, the state rule at issue in Maples's case authorizes relief when a petitioner failed to appeal within the proscribed time and that failure was without fault on petitioner's part. When the petitioner is without fault, the rule by its own force *entitles* a petitioner to bring an untimely appeal. *See* 10-63 Pet.13-14; 10-63 Reply 6-7. In *Maples*, the State has not disputed that the no-fault element is met. *Maples* thus presents a more conventional application of the adequacy doctrine in the context of a non-discretionary rule that has been inconsistently and arbitrarily applied by the state court to defeat federal rights.

C. The Court Should Reject CJLF's Shrinking Suggestion To Scrap The Adequacy Doctrine In Favor Of A Cause-and-Prejudice Standard

As discussed, petitioners argue that the adequacy doctrine should be substantially scaled back, even though they never argue that any particular precedent should be overruled. Petitioners' amicus, CJLF, however, goes even further. It has argued that "[t]here is no need for a separate adequacy inquiry on habeas corpus" at all. CJLF.Br.6. Instead, CJLF argues that the "cause and prejudice" and "actual innocence" exceptions fully serve the federal policies promoted by adequacy review. *Id.* CJLF made this far-reaching argument an emphasis of its briefing recommending certiorari, but in its amicus brief in support of the State at the merits stage it essentially relegates the argument to a paragraph. CJLF.Br.28.

For several reasons, CJLF's suggestion that the Court should "scrap" the adequacy doctrine should be rejected. To begin with, the State did not raise this argument below or on its petition for certiorari. And as respondent explains, that alone suggests that this Court should not review this additional question. Resp.Br.60-63. This Court generally does not consider additional questions presented only by amici. *See, e.g.*, *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). And while CJLF blithely suggests that this Court should dispense with a doctrine embedded in nearly a century's worth of case law, it does not even mention the *stare decisis* factors governing this Court's decision whether to dismantle settled precedent. *Cf.*

Randall v. Sorrell, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment).[5]

In any event, the CJLF argument is as misguided as it is unsupported (tellingly, CJLF fails to cite a single decision that would support its peculiar suggestion to replace the adequacy doctrine with the cause-and-prejudice standard, *see* CJLF.Br.28). This Court's inquiries into the adequacy of a rule, and whether a petitioner may demonstrate "cause and prejudice" from the rule, serve distinct purposes. The focus of cause-and-prejudice analysis is generally on whether an *external* event prevented a petitioner from proceeding in accordance with state law. Thus, notwithstanding a petitioner's failure to comply with even a crystal clear, firmly established, and regularly followed state rule, a petitioner may show "cause" for failure to comply with such a rule because, for instance, "something *external* to the petitioner, something that cannot fairly be attributed to him" prevented compliance. *Coleman*, 501 U.S. at 753.

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[5] CJLF's revisionist account that this Court's concern with "less-than-strict[ly]" applied rules was driven primarily by the unique historical concerns present during the Civil Rights era, and so is immaterial today, *see* CLJF.Br.19-21, cannot be squared with the historical record. This Court's adequacy doctrine was well-established before the Civil Rights era began. *See, e.g.*, *Davis*, 263 U.S. at 24; *Ward v. Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920) (listing cases dating back to late 1800s). And notwithstanding CLJF's speculation that the concerns driving the adequacy analysis are somehow a "faint shadow of what it was in 1964," CJLF.Br.21, this Court has deemed state procedural rules inadequate to bar federal review many times in the nearly five decades since. *See, e.g.*, *Lee*, 534 U.S. at 376 (2002); *Ford*, 498 U.S. at 425 (1991); *James*, 466 U.S. at 348.

For example, if a firmly established and regularly followed state timeliness rule required litigants to file within six months, the rule would be adequate. But a state prisoner could demonstrate "cause" for failure to comply if it were shown that the state prison deliberately discarded all requests for post-conviction relief. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (cause would be demonstrated if "some interference by officials made compliance impracticable") (internal quotation marks and citations omitted).

In contrast, the focus of adequacy doctrine is properly on the *rule itself*—namely, whether it serves legitimate state interests, whether it is "firmly established and regularly followed," whether it provides fair notice to defendants, and whether it unduly burdens the presentation of federal rights. An inadequate rule is no bar to federal rule regardless of whether a litigant can show cause for failure to comply.

Maples graphically illustrates how the adequacy and cause-and-prejudice inquiries may diverge in individual cases. Maples has argued that the state's procedural rule governing out-of-time appeals is an inadequate basis on which to bar federal review of his constitutional claims because the state rules authorize relief when a failure to appeal was without fault on petitioner's part, and other courts had granted relief on directly analogous facts. At a minimum, the rule that the state invoked in his case was not "firmly established and regularly followed." *See infra* at 29-31. But even assuming that the rule were adequate, a different series of events would establish cause (and prejudice) to excuse any procedural default.

As explained in Maples's petition, Maples failed to receive timely notice of the denial of his post-conviction

petition because his pro bono attorneys of record left their firm without notifying the state court, the letters mailed to counsel were returned to the state clerk unopened and stamped "Return to Sender—Left Firm," and when the state court clerk received the returned letters the clerk did nothing but stick them in a file. 10-63 Pet.6-7. The state court clerk's failure to do anything upon receiving the returned and unopened letters addressed to counsel violates due process under *Jones v. Flowers*, 547 U.S. 220 (2006), and thus provides cause to excuse any procedural default, even assuming the alleged default rule was adequate to begin with. *See* 10-63 Pet.6-7; 10-63 Reply Add.7a-8a.[6]

CJLF loses sight of the fact that the adequate state ground rule does not simply create administrative liabilities, but rather often leads to the vindication of meritorious claims. Even in capital cases, where the incentives to follow state procedural rules are at their apex, many prisoners run afoul of state procedural rules. Such a forfeit may be a matter of life and death, given that this Court has long recognized that "a substantial proportion of [state] prisoners succeed in having their death sentences vacated in habeas corpus proceedings." *Murray v. Giarratano*, 492 U.S. 1, 14

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[6] Petitioners suggest in passing that this Court's development of the "cause and prejudice jurisprudence" "obviates any need to treat individual cases of injustice as instances of alleged 'inadequacy' of the state rule itself." Pet.Br.12 (citing *Lee*, 534 U.S. at 376). The case they cite (*Lee*), however, itself substantially post-dates the development of this Court's "cause and prejudice" exception. *See, e.g.*, *Murray*, 477 U.S. at 489. Again, the Court's development of its "cause and prejudice" test in no way diminishes the continuing vitality of its precedents for determining the adequacy of a state rule itself.

(1989) (Kennedy, J., concurring in the judgment). The policies promoted by this Court's adequacy doctrine remain strong today, and the availability of the adequacy doctrine to protect against the arbitrary elimination of federal rights—and access to federal court review on habeas corpus to protect those rights—remains vitally important.

III. MAPLES'S CASE UNDERSCORES THE NEED FOR THE ADEQUACY DOCTRINE TO PROTECT AGAINST THE ARBITRARY DENIAL OF FEDERAL COURT REVIEW

Maples's case vividly illustrates the continued importance of adequacy review to ensure that federal courts are not arbitrarily closed to litigants with serious constitutional claims. 10-63 Pet.12-24. Unlike the discretionary, judge-made timeliness rule at issue in this case, *Maples* involves the state's inconsistent application of a non-discretionary, written procedural rule. *Cf. Bostick v. Stevenson*, 589 F.3d 160, 165 n.6 (4th Cir. 2009) ("We also note that the state courts' inconsistent application of [South Carolina] Rule 59(e) here is clearly distinguishable from the Supreme Court's recent decision in *Beard v. Kindler* …. In *Kindler*, the Court held only that facially discretionary state rules can be adequate to preclude federal habeas review. We do not read *Kindler* to apply to facially mandatory rules that state courts nonetheless apply arbitrarily.") (internal citations omitted).

As noted, the rule in *Maples* on its face provides for relief when the default "was without fault on petitioner's part," Ala. R. Crim. P. 32.1(f) (1990), and the state does not dispute that the missed deadline in *Maples* occurred through no fault of Maples himself. Well prior to the missed deadline in Maples's case, the

Alabama courts had answered in the affirmative "whether Rule 32 … permits an out-of-time appeal from the denial of a petition for post-trial relief," *Fountain v. State*, 842 So. 2d 719, 720 (Ala. Crim. App. 2000), *aff'd in relevant part*, *Ex parte Fountain*, 842 So. 2d 726 (Ala. 2001), including on directly analogous facts. *Marshall v. State*, 884 So. 2d 898, 899 (Ala. Crim. App. 2002), *rev'd on other grounds*, 884 So. 2d 900 (Ala. 2003); *Thompson v. State*, 860 So. 2d 907, 909-10 (Ala. Crim. App. 2002). The Eleventh Circuit majority nevertheless held that the alleged default rule was adequate to *foreclose* federal habeas review of Maples's ineffective-assistance-of-counsel claims.

The Eleventh Circuit's divided decision flouts this Court's decisions holding that a state default rule is not adequate to bar federal habeas review unless it is "firmly established and regularly followed." Indeed, if there has been a consistent rule in circumstances like Maples's, it has been to *allow* untimely appeals. 10-63 Pet.15. The manner in which the Eleventh Circuit arrived at its conclusion that the alleged default rule was adequate was equally flawed and out of step with this Court's precedents. The court improperly engaged in a *post hoc* reformation of Alabama law, ultimately coming up with a tripartite framework based on distinctions never drawn by the Alabama courts. *See Patterson*, 357 U.S. at 457. The court improperly relied on Alabama case law decided *after* the alleged default, which by definition could not have given Maples any notice of the asserted default rule. 10-63 Pet.20. And, rather than requiring the state to show that the alleged default rule was adequate, the Eleventh Circuit shifted the burden to Maples to demonstrate the inadequacy of the alleged rule. 10-63 Pet.19-20.

As illustrated by Maples's case, adequacy review remains an essential check to ensure that federal court review of constitutional claims is not arbitrarily thwarted by the novel or inconsistent application of state law. Indeed, the state's attempt to preclude federal habeas review of Maples's constitutional claims reflects the kind of "gotcha" mentality that this Court long ago repudiated. *See Davis*, 263 U.S. at 24. No matter how the Court ultimately resolves the adequacy question in this case, it should ensure that the adequacy doctrine remains available to protect against the deprivation of federal habeas review in circumstances like those presented in *Maples*.

CONCLUSION

For the foregoing reasons, the Court should reject the invitation of petitioners and their amicus to revamp or discard the adequacy doctrine, and decide this case in favor of respondent in accordance with settled principles governing the adequacy of state rules.

Respectfully submitted,

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