No. 09-996

In the
Supreme Court of the United States

James Walker, Warden,
Petitioner,
v.
Charles W. Martin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF FEDERAL COURTS SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach and write in the area of constitutional law, federal courts and federal jurisdiction.

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Law school affiliations are included for identification purposes only. The views expressed in this brief are those of the individual *amici* and do not necessarily reflect the views of the institutions at which they teach or with which they are otherwise affiliated.

In this case, the Warden and the Criminal Justice Legal Foundation, appearing as *amicus curiae*

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

in support of the petitioner, have asked this Court to overturn well established adequate and independent state ground jurisprudence in favor of a regime which would either concern itself only with "fair notice" or entirely dispense with the requirement of adequacy. These proposals for sweeping change implicate not only cases which arise in federal district court habeas proceedings but also cases which come before the Court on direct review. Given the central role that the adequate and independent state ground doctrine plays in matters of federal jurisdiction, *amici* have significant familiarity with and expertise in the issues presented in this case.

SUMMARY OF ARGUMENT

Modern case law expounding the adequate and independent state ground doctrine has roots that are nearly as old as the Republic itself. Certainly, for well over a century, this Court has examined the adequacy of state court grounds of decision to determine its own jurisdiction on appeal. And more than thirty years ago, the Court selected the same adequacy inquiry as the standard by which federal habeas courts should decide whether to abstain from exercising their statutory jurisdiction to consider claims brought by state prisoners. Since that time, the law of adequacy has developed and functioned smoothly and interchangeably in both the direct and collateral review contexts. Acceptance of the proposal of the Warden and his *amicus* to abandon (or nearly abandon) the adequacy inquiry would have far-reaching consequences by dictating either corresponding changes to this Court's

jurisdictional determinations in direct appeal cases, or the development of a new line of habeas-specific abstention jurisprudence. Neither consequence is desirable or necessary.

Contrary to the suggestion of the Warden and his *amicus*, the role of the adequacy requirement has never been merely to ensure "fair notice" of state courts' procedural requirements. Instead, its purpose has always been to check the integrity of state court rulings – on notice, clarity, consistency and other grounds – lest the legitimate exercise of federal jurisdiction be thwarted and the uniformity and supremacy of federal law be frustrated. That this has been the historic role of the adequacy requirement is demonstrated repeatedly throughout this Court's relevant decisions, many of which are either misinterpreted or ignored by the Warden and his *amicus*.

Finally, it has also been suggested that the adequacy requirement is an anachronistic relic of the civil rights era whose time has passed. This suggestion overlooks both this Court's application of adequacy doctrine in a wide assortment of non-civil rights cases stretching back more than a century, and Congress' decision not to modify procedural default doctrine – including the adequacy requirement – during its comprehensive 1996 overhaul of the habeas statutory scheme. The more accurate view is that adequacy doctrine has long been, and decidedly remains, an important and useful tool for determining whether federal jurisdiction can or should be exercised. Nothing in the arguments of the Warden or his *amicus* would justify the kind of radical departure from settled law that they have proposed in this case.

ARGUMENT

A panel of the United States Court of Appeals for the Ninth Circuit held that because the California Supreme Court's timeliness bar was not consistently and regularly applied in state habeas corpus cases, it was not an adequate and independent state ground precluding merits review of respondent's claims in federal habeas corpus proceedings. *Martin v. Walker*, 357 Fed. Appx. 793, 794 (2009). *Amici* take no position as to whether the panel correctly applied the adequacy requirement in this particular case. However, In arguments presented for the first time in this Court, the Warden and his *amicus curiae*, the Criminal Justice Legal Foundation (CJLF), propose to jettison the long settled adequate and independent state ground doctrine for the purpose of giving preclusive effect to a state court's determination that some of Mr. Martin's challenges to his convictions for non-capital murder and robbery were not timely filed. The fact that the requests for sweeping change to this Court's jurisprudence were not advanced below is, in and of itself, sufficient reason for this Court to refuse to consider them.[2]

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[2]In the lower court proceedings, the Warden did not argue, and the lower courts did not have the opportunity to address, whether the adequate and independent state ground doctrine should be modified. Nor did the Question Presented in the Warden's Petition for Writ of Certiorari seek the radical departure from the adequacy inquiry that the Warden and his *amicus* now propose. Under this Court's well-established jurisprudence, these failures preclude consideration of the suggestions to jettison the adequacy requirement now before the Court. *See, e.g., Illinois v.*

More importantly, the effects of these proposals, if adopted, would be felt far beyond Mr. Martin's case, other California cases, or even habeas corpus cases generally. For well over a century, the adequate and independent state ground doctrine has governed this Court's direct appellate jurisdiction, ensuring that this Court appropriately reviews federal questions. Since its importation more than thirty years ago as the mechanism for implementation of a non-jurisdictional abstention policy in habeas corpus cases arising under 28 U.S.C. §§ 2241 and 2254, the doctrine – including its rules for assessing adequacy – has been developed and applied seamlessly across both the direct appeal and habeas contexts.

To make the changes now proposed by the Warden and his *amicus*, this Court would be required either to distort a long line of adequacy jurisprudence affecting both habeas abstention and direct appeal jurisdiction, or to separate the adequacy inquiry in habeas from the heretofore identical inquiry on direct appeal. Neither course would be wise. The former would affect this Court's appellate jurisdiction in ways that cannot fully be anticipated, and the latter would invite years, perhaps decades, of litigation over the meaning of the new standard. The circumstances presented by this case do not justify the introduction of so much uncertainty into a settled, fully functional area of federal law. In short, the adequate and independent state ground doctrine is not broken, and it does not need to be fixed.

Gates, 462 U.S. 213, 220-21 (1983).

I. The Court's jurisprudence defining the adequacy inquiry for state rulings is well established, clearly defined, and applicable to civil and criminal cases that come before the court in a wide range of procedural postures.

A. The adequate and independent state ground doctrine has been developed and applied seamlessly between habeas corpus and other categories of cases.

The adequate and independent state ground doctrine has its roots in decisions construing jurisdictional statutes enacted in the earliest days of the Republic. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 354-60 (1816). For example, in *Tyler v. Magwire*, 84 U.S. 253 (1872), the state court rejected the mandate of this Court's resolution of a property dispute involving federal titles because of state law purporting to prohibit such suits in the court of equity in which it was raised. *Id.* at 284. In this context, the Court ruled that

> Presented as the proposition was as a reason for not executing the mandate of this court, the question as to its sufficiency is one which must necessarily be determined by this court, else the jurisdiction of the court will always be dependent upon the decision of the State court, which cannot be admitted in any

case.

Id. at 284; *see also Murdock v. Memphis*, 87 U.S. 590, 636 (1874) (noting the issue is "whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question"). The effectiveness of this simple doctrine – to inquire into the "sufficiency" of state rulings that would preclude the Court's jurisdiction – is apparent in its long, virtually unchanged application from the time of *Tyler* and *Murdock*.[3]

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[3]*See, e.g., Memphis Natural Gas v. Beeler*, 315 U.S. 649, 654 (1942) (reviewing the effect of a state contract to determine whether it "rests upon a fair and substantial basis"); *Broad River Power v. South Carolina ex rel. Daniel*, 281 U.S. 537, 543 (1930) (holding that state court ruling on the operation of electric street railway did not so depart "from established principles as to be without substantial basis"); *Ward v. Bd. of Cty. Comm'rs*, 253 U.S. 17, 22 (1920) (explaining that "it is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support"); *Enterprise Irrigation Dist. v. Farmers Mut. Canal*, 243 U.S. 157, 164 (1917) (finding state ruling on estoppel was not "arbitrary, or a mere device to prevent a review of the decision upon the Federal question"); *Creswill v. Grand Lodge*, 225 U.S. 246, 261 (1912) (finding "no evidence" to support state resolution of incorporation and infringement suit against fraternal order that rejected valid laches defense); *Leathe v. Thomas*, 207 U.S. 93, 99 (1907) (determining whether state ruling contract on dispute was "palpably unfounded"); *Pierce v. Somerset Ry*., 171 U.S. 641, 648 (1898) (determining in a suit between railroad and its stockholders whether a defense of estoppel is

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court observed that in federal habeas corpus review the adequate and independent state ground doctrine had functioned to bar federal review when an adequate foundation of state *substantive* law was dispositive, but that treatment of state procedural default had not consistently been guided by the same principle. *Id.* at 81. Reflecting on a recent decision in which it identified the "same clear interests" in the context of its habeas corpus review and direct review of criminal cases, *Francis v. Henderson*, 425 U.S. 536, 543 (1976), the Court eliminated this discrepancy and incorporated the adequacy doctrine to guide federal courts in determining when to abstain from exercising their habeas corpus jurisdiction in cases involving state procedural defaults. *Wainwright v. Sykes*, 433 U.S. at 87. With *Sykes*, the Court thus unified its treatment of substantive and procedural state bars across civil, criminal, and habeas corpus proceedings. The application of a single, simple rule of adequacy has continued to function effectively and operate seamlessly across all such cases. *See, e.g., Howlett v. Rose*, 496 U.S. 356, 366 (1990) (holding state ruling inadequate to bar review of civil rights violations based on search of a student's car on school premises); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (holding state court ruling in a habeas proceeding was inadequate to bar review of claims that sentence was based on an invalid prior conviction); *James v. Kentucky*, 466 U.S. 341, 348 (1984) (holding state ruling on criminal appeal

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"sufficient upon which to base and sustain the judgment of the state court").

was inadequate to bar review of claim that defendant's right to remain silent was violated by failure to instruct jury that adverse inference could not be drawn from his decision not to testify).

B. Accepting a proposal to eliminate an inquiry into adequacy would either distort over a hundred years of jurisprudence or unnecessarily divorce the habeas and direct review inquiries.

Were the Court to accept the invitation of the Warden and his *amicus* to abandon an inquiry into the adequacy of state rulings, one of two scenarios could be expected. If the Court forgoes its existing inquiry into the adequacy of state rulings in all categories of cases that come within its jurisdiction – either entirely or in favor of the limited attention to "fair notice" that the Warden suggests – the impact of such a dramatic departure from well-established jurisprudence that has simply and effectively governed federal review would be substantial. Such a change would affect this Court's appellate jurisdiction in ways that cannot fully be anticipated. The settled state of the law, and uncertainty following changes that are not necessitated by "bad law," counsel against revision. *Rogers v. Tennessee*, 532 U.S. 451, 472, 477 (2001) (Scalia, J., dissenting) (internal quotation omitted) (changes in law that represent exceptions to *stare decisis* must serve to correct "'manifestly absurd or unjust'" law and not the perception that need for a law has diminished over

time). One thing *is* predictable, however: eliminating the adequacy inquiry, or replacing it with "fair notice," would undermine the Court's constitutional and statutory obligations in its review of federal questions. *See* Section II, *infra.*

If the Court instead divorces the rule of adequacy in habeas corpus from that on direct review, additional concerns would arise. Such a development would invite extended litigation over the meaning of the new standard. This change also would stand in sharp contrast to the Court's prior approach to its jurisdiction in the two contexts. Although the adequacy "doctrine originated in cases on direct review, where the existence of an independent and adequate state ground deprives this Court of jurisdiction … [it] applies with equal force, albeit for somewhat different reasons, when federal courts review the claims of state prisoners in habeas corpus proceedings." *Lee v. Kemna*, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting). This is true because the statutory scheme set forth in 28 U.S.C. § 2254 does not alter the *purpose* of federal review or its constitutional underpinnings. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 375 (2000) ("Over the years, the federal habeas corpus statute has been repeatedly amended, but the scope of that jurisdictional grant remains the same."). The same purpose in both direct and habeas corpus review warrants the same requirements for adequacy in both contexts, for "[f]aced with a common problem," the Court adopts "common solution[s]" to guide direct and habeas review. *Coleman v. Thompson*, 501 U.S. 722, 734 (1991) (aligning treatment of ambiguous state decisions in direct and habeas review).

II. The contention by the Warden and his *amicus* that adequacy is primarily concerned with "fair notice" is historically and descriptively inaccurate.

The Warden states that "[i]n most cases where this Court has found state rules inadequate, a lack of fair notice was explicitly or implicitly the basis for the decision." (Petr.'s Br. at 9.)[4] This position not only represents a serious misreading of the Court's precedent, but also reflects a fundamental misunderstanding of the role of the adequate and independent state ground doctrine in the Court's constitutional and statutory duty to ensure the supremacy of federal law. Throughout the history of the doctrine, the Court consistently has insisted that state procedural rules must be regularly applied among the

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[4]The Warden cites Justice Kennedy's dissent in *Lee v. Kemna*, *supra*, to conclude that "there are 'two essential components of the adequate state ground inquiry: First, the defendant must have notice of the rule; and second, the State must have a legitimate interest in its enforcement.'" (Petr.'s Br. at 18 (quoting *Lee v. Kemna*, 534 U.S. 362, 389 (2002) (Kennedy, J., dissenting).) Justice Kennedy also notes, however, that "[t]he Court will disregard state procedures not firmly established and regularly followed. In *James v. Kentucky*, 466 U.S. 341, 346 (1984), for example, the rule was 'not always clear or closely hewn to.'" 534 U.S. at 389; *see also Bronshtein v. Horn*, 404 F.3d 700, 708 (3rd Cir. 2005) (recognizing that "fair notice" is one part of a test for adequacy that also includes a "requirement of regular application"). As described in detail in section II.B, *infra*, whether a rule is firmly established and regularly followed is not limited to a question of notice.

same types of cases before barring federal review.[5] It is an inquiry that is critical to the Court's role in balancing state and federal interests in the exercise of its jurisdiction.

A. Inquiry into the adequacy of state rules is based in the Court's constitutional and statutory obligations.

This Court's constitutional authority to review "all cases," whether from state or federal tribunals, *Martin v. Hunter's Lessee*, 14 U.S. 304, 338 (1816), is guided by Congress in both the review of state judgments, 28 U.S.C. § 1257, and, in conjunction with the lower federal courts, in determinations of the lawfulness of an individual's custody pursuant to a state judgment, 28 U.S.C. §§ 2241 and 2254; *Coleman v. Thompson*, 501 U.S. at 730. This jurisdiction exists to

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[5]Although the Warden and his *amicus* make no effort to distinguish between substantive and procedural state rules when they claim that notice is the touchstone of the Court's jurisprudence in adequacy, there can be no serious argument that notice serves as the basis for the Court's treatment of substantive state rulings. The wealth of jurisprudence regarding the adequacy of substantive state rules plainly attends to the supremacy of federal law, a question unaffected by notice of the state's rules. *See, e.g., Howlett*, 496 U.S. at 366 (holding state ruling violated supremacy of federal law and thus was without "fair or substantial support"); *Radio Station WOW v. Johnson*, 326 U.S. 120, 131 (1945) (finding that state remedy in case of fraud between radio stations improperly impinged on federal licensing authority). We therefore will confine our discussion of the history of the doctrine to its application to procedural rules.

ensure the supremacy of the United States Constitution and federal laws. *See, e.g., Daniels v. Allen*, 344 U.S. 443, 510 (1953) (jurisdiction established through 28 U.S.C. § 2254 is "one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law" and "merely expresses the choice of Congress how the superior authority of federal law should be asserted"); H.R. Rep. No. 100-660, *8 (1988), *reprinted in* 1988 U.S.C.C.A.N 766, 773 (in the course of amending 28 U.S.C. § 1257 to eliminate mandatory review, Congress recognized that the purpose of the statute is to "ensure the supremacy of Federal laws").

Therefore, at its core the doctrine of adequacy and independence functions to maintain federal authority over the protection of constitutional rights and supremacy of federal law. *See, e.g., Lee v. Kemna*, 534 U.S. at 388 (Kennedy, J., dissenting) (noting that the "rule that an adequate state procedural ground can bar federal review of a constitutional claim … respects state rules of procedure while ensuring that they do not discriminate against federal rights"); *Abie State Bank v. Weaver*, 282 U.S. 765, 773 (1931) (determination whether an asserted nonfederal ground adequately supports a judgment is required "in order that constitutional guaranties may appropriately be enforced"); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."). Indeed, the rule of adequacy "rest[s] on nothing less than this Court's ultimate

authority to review state-court decisions in which 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution.'" *Howlett*, 496 U.S. at 366, n.14 (quoting 28 U.S.C. § 1257(a)).

It is not disregard for state tribunals, as the Warden and his *amicus* suggest, but obligation to these constitutionally and legislatively mandated powers that creates for federal courts an "independent duty to scrutinize the application of state rules that bar our review of federal claims." *Cone v. Bell*, __ U.S. __, 129 S. Ct. 1769, 1782 (2009). Viewed in the context of the Court's proper role, it is plain that eliminating or diminishing searching inquiry into the adequacy of state procedural bars to federal review would simply invite discrimination, intended or not, against federal interests.

B. This Court has required the regular application of a state procedural rule among similar cases before the rule may bar federal review.

The Court's requirement that procedural rules be regularly and consistently applied reflects its constitutional and statutory obligation to make certain that state courts do 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), and has long served to strike the proper balance between concerns for comity and federalism and the duty of federal courts to protect and achieve "desirable uniformity in adjudication of

federally created rights," *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 299 (1949); *see also Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (an "*ad hoc* method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved"); *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (observing that "justice is achieved when a complex body of law developed over a period of years is evenhandedly applied") (internal quotation omitted).[6]

It is notable that, in arguing that "fair notice" is the basis for the Court's rulings on the adequacy of state procedural rules, the Warden ignores the overwhelming number of cases discussing the requirement that a rule be regularly applied and instead cites only three cases that address the adequacy of a state procedural rule: *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), *Wright v. Georgia*, 373 U.S. 284 (1963), and *Johnson v. Mississippi*, 486 U.S.

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[6]As one constitutional scholar has explained, such uniformity motivated the creation of a federal judiciary:

> In large part, federal courts were desired to effectively implement the powers of the national government; there was a fear that state courts might not fully enforce and implement federal policies, especially where there was a conflict between federal and state interests. At a minimum, a federal judiciary could help provide the uniform interpretation of the Constitution and laws of the United States.

Erwin Chemerinsky, FEDERAL JURISDICTION 2 (2d ed. 1994).

578 (1988). (Petr.'s Br. at 19-20.) The *NAACP* and *Wright* cases do address circumstances in which there was *no* notice of the state procedural rule prior to its application to bar review of federal claims, but they are among a very small number of cases decided primarily on this basis.[7] In *Johnson v. Mississippi*, however, there is no suggestion that the petitioner lacked notice of the rule applied – a requirement that petitioner's challenge to his sentence should have been raised on direct appeal. *Id.* at 587. Instead, the Court reviewed state court rulings in similar contexts and found "no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied. Rather, the weight of Mississippi law is to the contrary." *Id.*[8]

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[7]In addition to *NAACP* and *Wright*, this category includes *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (rejecting state ruling that claim brought pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), was not timely presented where the rule did not exist when the claim was raised).

[8]Although the Warden acknowledges that the Court has inquired into "the state court's enforcement of procedural forfeitures" in some cases (Petr.'s Br. at 26), he also suggests that such an inquiry is not conducted in habeas corpus cases, stating that there is "no habeas corpus case in which this Court has invalidated a state procedural rule based upon 'inconsistent' results in the application of the procedural rule in other cases." (Petr.'s Br. at 27). This is simply incorrect. In *Johnson v. Mississippi*, *supra*, a habeas corpus proceeding initiated in state court, this Court declined to give preclusive effect to an application of a state procedural rule because it was not "consistently or regularly" applied. 468 U.S. at 587. In another habeas corpus case, *Dugger v. Adams*, 489 U.S. 401 (1989), the Court similarly addressed whether the state applied its procedural rule

The Warden also confuses requirements under the Court's adequate and independent state ground doctrine with due process, citing without discussion *United States v. Harriss*, 347 U.S. 612, 617 (1954), a case that addresses the constitutional requirements of definitiveness for criminal statutes. (*See* Petr.'s Br. at 9; *see also* Amicus at 19 (similarly referencing another case involving the constitutionality of criminal statutes, *Walker v. Birmingham*, 388 U.S. 307, 320 (1967)).) The constitutional standard for clarity in criminal statutes, as well as the "reasonable opportunity" standard of procedural due process, *Davis v. Scherer*, 468 U.S. 183, 200 (1984), that the *amicus* favors (*see, e.g.*, Amicus at 6), do not address the distinctive role that the federal courts have within the constitutional and statutory framework of state and federal interests, or the long-standing requirements of the adequate and independent state ground doctrine that have developed to serve that role. *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1160 (1986) (observing that the question of whether a state procedural rule is adequate is not the same as the question of whether it violates due process).

Instead, in no less than thirteen cases decided in the past fifty-five years, this Court has inquired into the context in which the state procedural rule was applied and whether the rule was applied in the same manner among similar cases. These civil and criminal cases, decided on direct review with the exceptions of *Johnson v. Mississippi*, *supra*, and *Dugger v. Adams*, *supra*, comprise a significant portion of the Court's precedent

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"consistently and regularly" and found that it had. *Id.* at 410, n.6.

on the adequacy of state procedural rules.[9] They demonstrate that consistent or regular application of state procedural rules has been a critical consideration in determining the adequacy of state defaults:[10]

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[9]In addition to the limited number of cases that address novel procedural rules, *see* note 7, *supra*, there is another subset of cases in which the Court has not inquired into the regularity of the rule's application. In these cases, the Court's ruling on adequacy reflects unique circumstances in which state interest in the asserted rule was not legitimate or the Court viewed the rule as unnecessarily burdening federal rights. *See Osborne v. Ohio*, 495 U.S. 103, 125 (1990) (ruling that the specific objection required would have been futile); *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965) (ruling that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected"); *Shuttlesworth v. Birmingham*, 376 U.S. 339, 339 (1964) (per curiam) (ruling that where the state procedural failing is minor, such as using the wrong type of paper, it is not sufficient to prevent review of a federal constitutional issue); *Brown v. Western Ry. of Ala.*, 338 U.S. at 298 (rule to construe pleadings against pleader was a "[s]trict local rule of pleading [that] cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws"); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (rule of local practice was not sufficient to bar defense provided by federal statute); *Rogers v. Alabama*, 192 U.S. 226, 230 (1904) (ruling that a state court may strike a pleading for prolixity, but not if the pleading is two pages long).

[10]In its Brief *Amicus Curiae*, CJLF attempts to portray great confusion in the Court's precedents regarding the adequacy of state defaults. (Amicus at 10-15.) CJLF's approach, however, focuses mainly on "phrases offered up" in a scattering of cases. (*Id.* at 11.) This method of parsing isolated words and phrases from a group of cases does little to illuminate the Court's precedent and artificially suggests great variance where, as will be demonstrated in the following discussion of cases, there is actually

- *Williams v. Georgia*, 349 U.S. 375 (1955): The state court ruled that a jury composition challenge presented in an extraordinary motion for new trial could not be reviewed because it had not been raised previously. *Id.* at 379. This Court reviewed fifteen state decisions addressing the same type of claim, *id.* at 384-89, and concluded that for such cases, "[i]n practice Georgia appellate courts have not hesitated to reverse and grant a new trial," *id.* at 384. Although the state court ruling at issue was discretionary, the Court questioned the adequacy of the rule because "[a] state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner rule." *Id.* at 383.

- *Staub v. Baxley*, 355 U.S. 313 (1958): The state court ruled that a First Amendment challenge to a conviction for union organizing could not be reviewed because of pleading deficiencies. *Id.* at 320. This Court determined that the same form of pleading rejected in Staub's case was recognized as sufficient in a case four years prior that was based on "a long line of [the state court's] own decisions." *Id.* The Court criticized the "meaningless form" adhered to in dismissing the claims and pointed to "arbitrariness" in the application of the rule in determining that the state ruling was "without fair or substantial

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a great deal of consistency.

support." *Id.*

- *Wolfe v. North Carolina*, 364 U.S. 177 (1960): The state court refused to review Fourteenth Amendment and supremacy claims that it did not give conclusive effect to a federal court's fact findings and judgment in a prior civil action because the federal court transcript was not made part of the appellate record. *Id.* at 189. This Court examined the "whole course of North Carolina decisions," *id.* at 194, and cited eight "illustrative decisions" in determining that the court had "consistently and repeatedly held in criminal cases that it will not make independent inquiry to determine the accuracy of the record before it," *id.* at 189. The Court concluded that the state court had not "arbitrarily denied the appellants an opportunity to present their federal claim." *Id.* at 194.

- *New York Times v. Sullivan*, 376 U.S. 254 (1964): The state court held that a claim that it overreached the territorial limits of due process in assuming jurisdiction over the corporate person of the *New York Times* could not be reviewed because the newspaper waived the objection by making a general appearance. *Id.* at 265, n.4. This Court concluded that the ruling had "fair or substantial support" in prior Alabama decisions. *Id.*

- *Barr v. Columbia*, 378 U.S. 146 (1964): The state court asserted that constitutional challenges to a

breach-of-peace conviction could not be reviewed because they were too general to be considered. *Id.* at 149. This Court determined that in four other cases in the course of two months the state court addressed identically-pled claims in similar circumstances without applying this rule. *Id.* The Court concluded that the rule was not "strictly or regularly followed" so as to bar review of federal claims. *Id.*

- *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964): The state court refused to review a challenge to the constitutional validity of a restraining order preventing the NAACP from doing business in state because of a pleading deficiency. *Id.* at 295. This Court reviewed twelve similarly pled cases as well as a number of other cases raised by the state. *Id.* at 297-301. The Court concluded that the rule was not adequate because the "Alabama courts have not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown here." *Id.* at 297.

- *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969): The state court ruled that discrimination claims raised by an African American family prevented from using a community swimming pool could not be reviewed because of a failure to provide sufficient notice for opposing counsel to object to the transcript submitted as the record on appeal. *Id.* at 233. This Court cited three previous decisions that applied the rule in a

contrary fashion. *Id.* Although the Court commented that the rule was "more properly deemed discretionary than jurisdictional," it ruled that the state court "has not consistently applied its notice requirement as to amount to a self-denial of the power to entertain the federal claim." *Id.* at 233-34.

- *Hathorn v. Lovorn*, 457 U.S. 255 (1982): The state court held that claims under the Voting Rights Act could not be reviewed because they were raised for the first time in a petition for rehearing. *Id.* at 363. This Court noted that the cases provided to support the rule did not address its application after 1969 and cited twelve contrary cases decided more recently in which the state court "regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions." *Id.* The Court concluded that the rule was not "consistently relie[d] upon," was applied "only irregularly," and that it could not be said to be "strictly or regularly followed." *Id.* at 264-65.

- *James v. Kentucky*, 466 U.S. 341 (1984): The state court ruled that a constitutional violation based on denial of the defendant's request that the jury be admonished from drawing an adverse inference from his decision not to testify could not be reviewed because he was entitled to ask for an "instruction" rather than "admonition," but did not do so. *Id.* at 344. This Court reviewed

and discussed the state law at length, concluding that the rule was "not always clear or closely hewn to," *id.* at 346, and thus was not "firmly established and regularly followed" so as to bar review, *id.* at 348.

- *Johnson v. Mississippi*, 486 U.S. 578 (1988): The state court refused to review petitioner's constitutional challenges to a sentence based on a prior, invalid conviction because they should have been raised on direct appeal. *Id.* at 587. This Court found "no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied" and determined that "the weight of Mississippi law is to the contrary." *Id.* at 587. The Court concluded that the rule was not "strictly or regularly followed" so as to bar review. *Id.*

- *Dugger v. Adams*, 489 U.S. 401 (1989): The state court ruled that petitioner's claim brought pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), could not be reviewed because it was not raised on appeal. 489 U.S. at 410, n.6. This Court cited seventeen cases addressing this rule, finding that "[i]n the vast majority of cases … the Florida Supreme Court has faithfully applied its rule." *Id.* The Court concluded that the rule was "consistently and regularly" applied and was adequate to bar review. *Id.*

- *Jimmy Swaggart Ministries v. Bd. of*

Equalization, 493 U.S. 378 (1990): The state court concluded that due process and Commerce Clause challenges to taxation were procedurally barred because they had not been administratively exhausted. *Id.* at 399. The Court concluded that there was no indication that the state rule was applied in an "irregular, arbitrary, or inconsistent manner," and that it was adequate to bar review. *Id.* at 399.

- *Moore v. Texas*, 535 U.S. 1110, 122 S. Ct. 2350 (2002): The state court concluded that successive habeas petitions could not be reviewed because they were an abuse of the writ under state law. *Id.* at 2352. Justices dissenting from a stay of execution determined that the rule "has been regularly followed by Texas courts" and concluded that the rule was adequate to bar review. *Id.*

Although these cases are primarily civil and criminal cases decided on direct review, they provide the requirement for regular and consistent application of state procedural rules that is utilized by the federal courts in their review of procedural defaults in cases brought pursuant to 28 U.S.C. § 2254.[11]

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[11] *See, e.g., Janosky v. St. Amand,* 594 F.3d 39, 44 (1st Cir. 2010) ("We have held, with a regularity bordering on the monotonous, that the Massachusetts requirement for contemporaneous objections is an independent and adequate state procedural ground, firmly established in the state's jurisprudence and regularly followed in its courts.") (citing *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *Bronshtein v. Horn*, 404

In recent cases in which the Court did not need to inquire into the adequacy of the state procedural rule, it nonetheless acknowledged that the test for adequacy includes a requirement that the rule is regularly followed. *See Lee v. Kemna*, 534 U.S. at 381 ("Ordinarily, violation of 'firmly established and regularly followed' state rules – for example, those involved in this case – will be adequate to foreclose review of a federal claim."); *Smith v. Texas*, 550 U.S. 297, 313 (2007) ("In order to be 'adequate,' a state rule must be a 'firmly established and regularly followed state practice,' and should further a legitimate state interest."); *Beard v. Kindler*, ___U.S.___, 130 S. Ct. 612, 617 (2009) ("We have framed the adequacy inquiry by

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F.3d 700, 708 (3rd Cir. 2005) (citing this Court's direct review cases and observing that "[t]he 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"); *McNeill v. Polk*, 476 F.3d 206, 211 (4th Cir. 2007) (state procedural rule "is adequate if it is regularly or consistently applied by the state courts") (citing *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *Henderson v. Cockrell*, 333 F.3d 592, 604 (5th Cir. 2003) ("state procedural rule is adequate if it is 'firmly established' and regularly and consistently applied by the state court") (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984) and citing *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *Haliym v. Mitchell*, 492 F.3d 680, 693, n.6 (6th Cir. 2007) ("[T]he dismissal of a claim pursuant to a state procedural rule does not bar federal habeas review if that state rule is not 'consistently or regularly applied.'") (quoting *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *Barnett v. Roper*, 541 F.3d 804, 808 (8th Cir. 2008) (state procedural rule "is adequate only if it is a 'firmly established and regularly followed state practice'") (quoting *James v. Kentucky*, 466 U.S. 341, 348-49 (1984)).

asking whether the state rule in question was 'firmly established and regularly followed.'").[12]

The complaint that specific words, such as "strictly" in *Barr v. Columbia*, 378 U.S. at 149, have "been the source of much mischief" (Amicus at 14), finds no support in the Court's precedent, which demonstrates the same inquiry for adequacy over time, one focused on state law and practice among similar cases to determine whether a state procedural rule is regularly and consistently applied.[13] Not surprisingly, this is the same inquiry that was employed by the Ninth Circuit in this case. *Martin v. Walker*, 357 Fed. Appx. 793, 794 (2009) (inquiring whether California's

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[12]Although the Court's inquiry has long addressed whether a rule is regularly or consistently followed, the "firmly established" component of the Court's current formulation of the rule appears to address the fact that novel rules may not bar federal review.

[13]*See Moore v. Texas*, 535 U.S. 1110, 122 S. Ct. 2350, 2353 (2002) (state rule "regularly followed"); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 399 (1990) (state rule not applied in an "irregular, arbitrary, or inconsistent manner"); *Dugger v. Adams*, 489 U.S. 401, 410, n.6 (1989) (state rule was "consistently and regularly" applied); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state rule not "consistently or regularly applied"); *James v. Kentucky*, 466 U.S. 341, 351 (1984) (state rule not "regularly followed"); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (state rule not "consistently relie[d] upon"); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 234 (1969) (state rule not "consistently applied"); *Barr v. Columbia*, 378 U.S. 146, 149 (1964) (identically-pled claims treated differently in different cases); *Staub v. Baxley*, 355 U.S. 313, 320 (1958) (state rule applied arbitrarily); *Williams v. Georgia*, 349 U.S. 375, 383 (1955) ("kindred issues raised in the same manner" treated differently).

rule was "well established and consistently applied") (internal quotation omitted).[14]

III. The contention that adequacy is a judge-made doctrine designed to combat racial bias is both historically inaccurate and a distortion of relevant statutory language.

The Warden and his *amicus* attribute the doctrine of adequacy to the Court's reaction to invidious discrimination during the civil rights era and its suspicion of state court hostility to federal law during that time. (*See* Petr.'s Br. at 23-24; Amicus at 17.) They argue that because such discrimination no longer exists, inquiry into the adequacy of state rules has

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[14]Petitioner's claim that the cause and prejudice exception to permit review despite a state procedural default is a sufficient replacement for the current adequacy inquiry is without merit. The cause and prejudice exception presupposes a state court's invocation of a valid procedural bar. Inadequate rules are not valid bars, for "if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *County Ct. of Ulster County v. Allen*, 442 U.S. 140, 154 (1979). Moreover, unlike the adequacy inquiry, which functions to ensure similar treatment of federal claims across many cases, the cause and prejudice exception addresses deficiencies in individual cases based on "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (citing interference by officials or incompetence of counsel). The existence of a cause and prejudice exception to address these individual circumstances is wholly unrelated to the inquiry for adequacy of state procedural defaults.

outlived its usefulness. This view of the doctrine not only is contrary to the Court's duty to ensure uniform adjudication of federal rights, discussed above, but also ignores the role of the Court in preventing discrimination against federal interests in a wide variety of contexts. Viewing the historical role of the doctrine of adequacy, it is apparent that the Court protects a variety of federal rights from states' failure to adjudicate them on the basis of procedural rulings, including the following:

- Federal property disputes, *see Tyler v. Magwire*, 84 U.S. at 287 (holding inadequate a state ruling that suit for transfer of land title could not be maintained because it was brought in the wrong court);

- Rights of incorporation under federal law, *see Creswill v. Grand Lodge*, 225 U.S. 246, 261 (1912) (holding inadequate a state's refusal to consider statute of limitations as a defense in suit over organizational incorporation);

- Federal immunities, *see Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (holding inadequate state pleading requirements that precluded federal immunity limitation);

- Federal tort claims, *see Brown v. Western Ry. of Ala.*, 338 U.S. 294, 299 (1949) (holding inadequate state construction of pleadings that barred claim);

- Constitutional challenge to moral character requirements for state bar, *see Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 258 (1957) (holding inadequate state rule that failure to plead with specificity precluded review of claims);

- Voting rights, *see Hathorn v. Lovorn*, 457 U.S. 255, 263-64 (1982) (holding inadequate state rule for timely presentation of claims); and

- Federal pre-emption, *see Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388-89 (1986) (holding inadequate state ruling that failure to raise pre-emption under the National Labor Relations Act as an affirmative defense resulted in its waiver).

Of course, the view of the Warden and his *amicus* also ignores the Court's statutory obligations in federal habeas proceedings and the importance of the writ in American history and contemporary society. In amending the statutory scheme governing federal habeas review in the Antiterrorism and Effective Death Penalty Act of 1996, Congress apparently altered the grant of jurisdiction over cases that come within the requirements of Chapter 154 of Title 28, limiting the federal courts' review to claims decided on the merits in state court. *See* 28 U.S.C. § 2264(a). By making no similar alteration for cases brought pursuant to 28 U.S.C. § 2254, Congress effectively codified the Court's existing approach to abstention in those cases, namely, the adequate and independent state ground doctrine. *See, e.g., Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir.

1998) (recognizing that Congress left intact pre-AEDPA procedural default law for cases raised under § 2254); *Truesdale v. Moore*, 142 F.3d 749, 752, n.2 (4th Cir. 1998) (same).

In spite of statutory limitations on habeas corpus jurisdiction and this Court's own restraint through the adequate and independent state ground doctrine, the writ of habeas corpus remains an important feature of our legal system. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) ("the essential design of the Constitution … ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty.") (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)). Extending federal abstention in the manner proposed by the Warden and his *amicus* implies that the Court's role is inconsequential in the protection of federal rights and interests. The traditions and history of Anglo-American jurisprudence dictate otherwise.

IV. The application of procedural defaults in federal cases does not justify modifying the test for adequacy that federal courts apply to state rules.

The Warden and his *amicus* also assert that the inquiry into the adequacy of state procedural rules should be truncated or eliminated because it is inconsistent with this Court's treatment of federal procedural defaults, particularly those allowing for

judicial discretion. (*See* Petr.'s Br. at 12, 26, 33.) According to Warden's view, "[i]t does not appear that federal courts hesitate, and undertake a review of their 'consistent' enforcement of such rules in other cases before accepting their procedural rules as valid." (*Id.* at 26.) In fact, application and review of procedural default in the federal courts *is* carefully guided and reviewed to ensure consistent enforcement of procedural rules.

Plain error review under Federal Rule of Criminal Procedure 52(b), an example cited by the Warden of a rule for which "there apparently is no 'adequacy' scrutiny into 'consistent' application" (*id.* at 33), is "strictly circumscribed," *Puckett v. United States*, ___U.S.___, 129 S. Ct. 1423, 1428 (2009). This Court oversees appellate courts' application of the plain error exception to procedural default with a multi-part test that inquires into whether "legal error" exists that is "clear or obvious" and "affected the appellant's substantial rights." *Id.* at 1429. If these three elements are satisfied, the appellate court has discretion to remedy the error only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*; *see also United States v. Frady*, 456 U.S. 152, 163 (1982) ("recourse may be had to the Rule [52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it"). This Court has noted that "[m]eeting all four prongs is difficult, as it should be," *Puckett*, 129 S. Ct. at 1429, and the Court is vigilant in its review of Rule 52(b) cases and resolution of circuit splits to further ensure the narrow and consistent application of the Rule, *see, e.g., id.* at 1428 (resolving a

circuit split as to whether Rule 52(b) applied to a forfeited claim that the Government failed to meet its obligations under a plea agreement); *Johnson v. United States*, 520 U.S. 461, 465 (1997) (resolving a circuit split as to whether relief for a plain error should issue where the evidence of the defendant's guilt was overwhelming); *Frady*, 456 U.S. 152 (granting certiorari to clarify that Rule 52(b) did not apply to cases brought under § 2255, but only to cases brought on direct appeal).

The same key features apparent in Rule 52(b) – express standards combined with regular appellate oversight to clarify the application of procedural rules – ensure that other federal rules are governed in a manner that is similar to federal court review of state rulings. For example, in addressing dismissal of habeas petitions for delay under former Habeas Rule 9, the Court highlighted the fact that "Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise." *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996).[15] In reversing the lower court's dismissal of a petition because it was based on an "ad hoc departure from settled rules," *id.* at 324, the Court in *Lonchar* cited the "importance, in order to preclude individualized enforcement of the Constitution in

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[15] *Amicus* CJLF asserts that pre-AEDPA Habeas Rule 9 is similar to California's timeliness rule. (Amicus at 26.) As the discussion in *Lonchar* demonstrates, however, discretion under the Rule was guided according to principles that governed the district courts.

different parts of the Nation, of lay[ing] down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts." *Id.* at 323-24.

The application of additional federal rules that the Warden cites – discretion to excuse a state's failure to raise affirmative defenses as addressed in *Granberry v. Greer*, 481 U.S. 129, 136 (1987), and *Day v. McDonough*, 547 U.S. 198, 210-11 (2006) – is similarly circumscribed. The Court in *Granberry* explained that excusing the failure to exhaust claims was guided by a "strong presumption in favor of requiring the prisoner to pursue his available state remedies." 481 U.S. at 131. This general guidance was further directed by examples provided by the Court, such as the following:

> If, for example, the case presents an issue on which an unresolved question of fact or of state law might have an important bearing, both comity and judicial efficiency may make it appropriate for the court to insist on complete exhaustion to make sure that it may ultimately review the issue on a fully informed basis. On the other hand, if it is perfectly clear that the applicant does not raise even a colorable federal claim, the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will all be well served even if the State fails to raise the exhaustion defense.

Id. at 134-35. The guidelines discussed in *Granberry* later were referenced and utilized in *Day* in the context of excusing untimely petitions. 547 U.S. at 208.

The important role of appellate guidance for, and review of, federal courts' application of discretionary rules recently was recognized by this Court in *Holland v. Florida*, ___U.S.___, 130 S. Ct. 2549 (2010), which addressed equitable tolling of the one-year statute of limitations for habeas corpus petitions arising from state convictions. The Court noted that "given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments." *Id.* at 2563. Furthermore, the circuit courts, in turn, similarly guide and circumscribe the district courts' discretion in this arena. *See, e.g., Valverde v. Stinson*, 224 F.3d 129, 133, 134 (2nd Cir. 2000) (reversing district court ruling after determining that confiscation of a prisoner's legal papers by a corrections officer shortly before the filing deadline justified equitable tolling); *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (reversing district court in holding that equitable tolling was warranted where petitioner did not receive timely notice of the denial of his state habeas petition despite his multiple inquiries to the Court of Criminal Appeals); *Spottsville v. Terry*, 476 F.3d 1241, 1245 (11th Cir. 2007) (reversing district court in holding that equitable tolling was appropriate when *pro se* petitioner's delay was due to actively misleading filing instructions).

The framework of appellate review, clearly guided and limited discretion, and uniformly applicable resolution of discrepancies in the federal courts' applications of federal rules by this Court, function to

ensure consistent application of procedural default in federal cases. The Warden and his *amicus* err in claiming disparate treatment of federal and state defaults, and that such supposed treatment justifies elimination of an adequacy inquiry, which, contrary to their allegations, functions much like federal courts' review of federal defaults.

CONCLUSION

The Court's existing doctrine regarding the treatment of state procedural defaults is well established, well understood, and has successfully served the federal courts in the exercise of their constitutional and statutory authority. The Warden and his *amicus* offer no compelling reason to disrupt it.

Respectfully submitted,

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