No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Federal habeas law in general, and retroactivity law in particular, must balance two competing interests: criminal defendants' interest in trials that comport with constitutional guarantees, and states' interest in repose. After two decades of internal deliberation on this vexing subject, this Court – in *Teague v. Lane*, 489 U.S. 288 (1989) – settled on the date of finality as the retroactivity cutoff that best accommodated these competing objectives. And for the two decades since, this Court and lower courts have implemented that rule with no complaint (indeed, with active support) from the states. Yet the Commonwealth now says that AEDPA, in the midst of establishing a system of substantive deference to state courts' resolutions of constitutional claims, also implicitly "hit the reset button" on this Court's retroactivity jurisprudence. Resp. Br. 9.

The Commonwealth fails to muster the kind of affirmative evidence necessary to support such a contention. To the contrary, the text, structure, and legislative history of 28 U.S.C. § 2254 indicate that Congress intended to retain *Teague*'s finality cutoff in habeas cases and to avoid unleashing the practical and theoretical problems that adopting a new retroactivity rule would generate. Lest there be any doubt, this Court has already once considered the argument that "*Teague* has been replaced by § 2254(d)'s 'clearly established' language." Pet. for Cert. 10-11, *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), *available at* 2002 WL 32135087. This Court summarily rejected it. *Horn v. Banks*, 536 U.S. at 272. Yet the Commonwealth does not even cite *Horn*,

much less offer any compelling reason for reversing course here.

At any rate, even if Section 2254(d) does somehow displace *Teague* when it would move the retroactivity cutoff back (but not, under *Horn* when it would move it forward), it would still not alter the proper outcome here. Contrary to the Commonwealth's arguments, the most that Section 2254(d) could reasonably be read to do would be to forbid relief based on a decision from this Court that postdates the state high court's disposal of the case on direct review. The case upon which petitioner relies, however – *Gray v. Maryland*, 523 U.S. 185 (1998) – *predates* such a cutoff.

I. Section 2254(d) Does Not Alter *Teague*'s Rule That Habeas Petitioners Are Entitled To The Benefit Of New Rules Announced Before Their Convictions Became Final.

The Commonwealth does not dispute that a party arguing that a statutory amendment changed the law must overcome a presumption of continuity – that is, the party must show a "clear" or "specific" congressional intent to change the law. *See* Petr. Br. 16-17 (citing cases). At the same time, the Commonwealth asserts that "[n]o special dispensation from Congress is required" here because Section 2254(d) did not alter *Teague*, but rather merely added another retroactivity rule to the federal habeas statute. Resp. Br. 17. To the extent this assertion is meant to challenge the applicability of the presumption-of-continuity canon here, the challenge is baseless.

Prior to AEDPA, *Teague*'s construction of the federal habeas statute gave habeas petitioners the benefit of any decision that this Court announced before their convictions became final. *See, e.g.*, *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). The Commonwealth contends that this is no longer the law; so long, the Commonwealth maintains, as the state courts rejected a prisoner's claim on the merits, the retroactivity cutoff is no longer finality but rather the date of the last state-court decision on the merits. Put more concretely, the Commonwealth argues that prisoners such as petitioner are no longer entitled to the benefit of decisions upon which they could have sought habeas relief prior to AEDPA. No matter how that argument is packaged or grounded in the new statute, it obviously amounts to an argument that Congress changed the law. *See, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (applying presumption-of-continuity canon to reject an argument that statutory language in a new subsection implicitly trumped prior interpretation of another subsection that remained on the books); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986) (same). Accordingly, the presumption-of-continuity canon applies here.

Applying that canon, none of the Commonwealth's statutory-interpretation arguments shows a clear or specific intent in Section 2254(d) to alter the rule that habeas petitioners are entitled to the benefit of decisions announced before their convictions became final. Nor do any of the Commonwealth's arguments based on Section 2254(d)'s purpose, this Court's precedent, or practical consequences give this Court reason to change the law.

A. Statutory Interpretation Principles Indicate That Section 2254(d) Does Not Alter *Teague*'s Finality Cutoff.

The Commonwealth does not dispute that no clear intent (indeed, no whisper of any intent at all) to alter habeas retroactivity law can be found in AEDPA's extensive legislative history or its structure. *See* Petr. Br. 25-29. But the Commonwealth argues that a clear indication to do so appears in the text of new Section 2254(d). Specifically, the Commonwealth contends that the statute's words "clearly established" and "unreasonable application" prohibit a "contra-factual" inquiry that asks whether a state-court judgment is compatible with a decision from this Court that did not "exist[] at the time of the state adjudication." Resp. Br. 19, 22-23. Accordingly, the Commonwealth argues that the plain language of Section 2254(d) draws a temporal cutoff at the last state-court decision on the merits. There are three problems with this argument, each of which shows that Section 2254(d) does not contain any retroactivity principle.

1. The Commonwealth's argument violates "the established principle that a court should give effect, if possible, to every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109 (1990) (internal quotation marks and citations omitted). Section 2254(d) forbids granting habeas relief unless the state court's "adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Yet the Commonwealth fails to assign any meaning to the clause "resulted in a decision that." *See* Petr. Br. 23-24 (discussing this clause). If

the Commonwealth were correct that the relevant inquiry under Section 2254(d) is whether the reasoning in the last state-court opinion on the merits contravened then-existing law, the statute would simply ask whether the "adjudication of the claim was contrary to, or involved an unreasonable application of, clearly established Federal law."

There is a good reason why the actual statute does not read that way. A federal habeas court's job is not to grade the state court's paper, but rather to determine whether the state courts had a reasonable basis "to deny relief." *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011); *see also* 28 U.S.C. § 2254(a) (federal habeas court's job is to inquire into the legitimacy of the state court's "judgment"). Accordingly, the clause "resulted in a decision that" makes clear that the statute's focus is not on the state court's adjudication itself, but is limited to the result or outcome in the state courts. Petr. Br. 23.[1]

To be sure, Section 2254(d)'s use of the "past tense" in phrases such as "clearly established" dictates, as the Commonwealth points out (Resp. Br. 22, 28), that this is a backward-looking inquiry. But that actuality, in and of itself, does not require any particular retroactivity cutoff. Federal habeas review

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[1] The Commonwealth's analogy (Resp. Br. 19-20, 34) to the reasonableness standard in the "performance prong" of the test in *Strickland v. Washington*, 466 U.S. 668 (1984), for ineffective assistance of counsel fails for the same reason. That prong focuses merely on the quality of the work of an actor (a lawyer) in a trial. Section 2254(d), however, focuses not on the work of an actor (the state court), but rather on the ultimate result.

of a state-court judgment is, by definition, backward-looking. Indeed, Justice Kennedy has explained that *Teague*'s "purpose is to determine whether application of a new rule would upset a conviction that was obtained in accordance with the constitutional interpretations *existing at the time of the prisoner's conviction.*" *Wright v. West*, 505 U.S. 277, 307 (1992) (opinion concurring in the judgment) (emphasis added). There is no need to create a new retroactivity rule, therefore, to accommodate the verb tense in which Section 2254(d) is written.

Nor, contrary to the Commonwealth's contention (Resp. Br. 22-23), is creating a new retroactivity rule necessary to give "meaning[]" to the phrase "clearly established." As Justice O'Connor explained in her opinion for the Court in *Williams v. Taylor*, 529 U.S. 362 (2000), that phrase prohibits federal courts from giving habeas relief based on dicta or other explanatory language in this Court's case law that falls short of being part of a holding. *Id.* at 412; *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1174-75 (2010); *Carey v. Musladin* 549 U.S. 70, 79 (2006) (Stevens, J., dissenting) (noting that Section 2254(d) prohibits relief based on "explanatory language" in this Court's opinions "that is intended to provide guidance to lawyers and judges in future cases"); Petr. Br. 21, 23. While the Commonwealth asserts that Section 2254(d)'s textual requirement that the state-court decision be contrary to "law" accomplishes that goal on its own (Resp. Br. 22), the word "law" alone is not that powerful. Courts of appeals typically deem explanatory language part of the "law"

that emerges from an opinion from this Court, even when it technically is dictum.[2] Only the addition of the words "clearly established" forbids that default practice.

2. The Commonwealth's argument ignores this Court's decision in *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), in which this Court sanctioned – indeed, required – the very type of "contra-factual" inquiry that the Commonwealth asserts that Section 2254(d)'s language precludes. In *Packer*, a federal court had granted habeas relief because the last state-court decision on the merits "failed to cite . . . the controlling Supreme Court precedents." *Id.* at 8 (quoting lower court decision). This Court reversed, explaining that it is irrelevant under Section 2254(d) whether a state court was even "aware[]" of relevant federal cases. *Id.* All that matters is whether "the result of the state-court decision contradicts them." *Id.*; *accord Richter*, 131 S. Ct. at 784. This, again, is because the point of Section 2254(d) is not to "tar[]"

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[2] *See, e.g.*, *Igartua v. United States*, 626 F.3d 592, 605 n.15 (1st Cir. 2010) ("Carefully considered Supreme Court dicta, though not binding, must be accorded great weight and should be treated as authoritative," because "[a]lthough the Supreme Court may ignore its own dicta, we are a lower court bound by the Supreme Court") (internal quotation marks and citation omitted); *ACLU v. McCreary County*, 607 F.3d 439, 448 (6th Cir. 2010) ("Lower courts are obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.") (internal quotation marks and citation omitted); *Oyebanji v. Gonzales*, 418 F.3d 260, 264-65 (3d Cir. 2005) ("[A]s a lower federal court, we are advised to follow the Supreme Court's considered dicta.").

state judges (Resp. Br. 18) for issuing careless opinions, much less for sometimes exhibiting a lack of foresight. The point is to allow prisoners to obtain fair trials when initial proceedings in state courts clearly contravened constitutional principles announced before the case became final.

3. The Commonwealth's argument contravenes the "cardinal rule" that "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Indeed, even when words "in isolation" give rise to a potential reading of a statute, this Court rejects that reading when it conflicts with the structure of the statute. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330-31 (2011); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted). As petitioner's opening brief explained, two structural aspects of the federal habeas statute – (1) its continued reliance on *Teague*'s regime for determining the retroactivity of "new rules," and (2) its use of finality as a trigger for its limitations period – show that Congress assumed in enacting AEDPA that *Teague*'s finality cutoff would continue to control situations like this one. Petr. Br. 25-27. Neither the Commonwealth nor its amici even attempt to refute this reality.

Nor does the Commonwealth attempt to square its argument with this Court's decision in *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam). In that case, this Court held that state prisoners seeking

federal habeas relief are still not entitled to the benefit of "new rules" under *Teague*, even when this Court announced the rule before the last state-court decision on the merits (a denial of post-conviction relief) and the state court applied the rule. In other words, *Horn* squarely rejected the argument that "*Teague* has been replaced by § 2254(d)'s 'clearly established' language." Pet. for Cert. 10-11, *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), *available at* 2002 WL 32135087; *see also* Petr. Br. 24-25. If Section 2254(d) does not displace *Teague* when such a displacement would help a state prisoner, there is no principled reason why it somehow displaces *Teague* when it would hurt a prisoner. The words "clearly established" – both as a matter of text and structure – must operate consistently in both situations.

B. The Purpose Of Section 2254(d) Does Not Require Any Alteration To *Teague*'s Finality Cutoff.

The Commonwealth also contends that *Teague*'s finality cutoff is inconsistent with this Court's recent observation that Section 2254(d) is designed to operate as a "relitigation bar," or a "modified form of res judicata." Resp. Br. 9, 15 (quoting *Richter*, 131 S. Ct. at 785-86). Given that statutory purpose, the Commonwealth maintains that the statute must "necessarily" be construed as including a new and additional retroactivity rule on top of *Teague*'s regime – a rule that moves the "temporal cutoff" back to the last state-court decision on the merits. Resp. Br. 15-16. This argument does not make sense.

It does not matter whether Section 2254(d) is labeled a res judicata rule, a standard of review, or

something else. The key fact, as the Commonwealth itself repeatedly emphasizes, is that it is a "deference provision." Resp. Br. 9, 15; *see also id.* at 17 (calling Section 2254(d) a "deference rule"). And the concept of "deference" is different than "retroactivity." *West*, 505 U.S. at 307-08 (Kennedy, J., concurring in the judgment); *see also id.* at 305 (O'Connor, J., concurring in the judgment) ("As Justice Kennedy convincingly demonstrates," the *Teague* doctrine "is not the same as deference."). A deference provision dictates that when "the question is close" the state-court decision should not be upset. *Id.* at 308 (Kennedy, J., concurring in the judgment); *see also Richter*, 131 S. Ct. at 786 (purpose of Section 2254(d) is to bar relief when "fairminded jurists could disagree on the correctness of the state court's decision") (internal quotation marks and citation omitted). By contrast, a retroactivity rule simply decides the "threshold" question of what law applies to one court's review of another's decision. *Teague*, 489 U.S. at 300.

What is more, a deference provision does not necessarily need to include any particular retroactivity regime. A rule of deference could be paired with a finality cutoff just as easily as it could be coupled with a cutoff pegged to the last state-court decision on the merits. So AEDPA's addition of a deference provision to the federal habeas statute does not dictate that any particular retroactivity regime must now exist.

That leaves the analysis where it started, still posing the question whether anything *specific* about Section 2254(d)'s purpose requires this Court to abandon *Teague*'s retroactivity cutoff in cases in

which state courts rejected the claim at issue on the merits. The Commonwealth's only real attempt to address that question is its assertion that "[a]n indispensible element of [Section 2254(d)'s] deference was to prevent the use of habeas review to blindside state court judges with evidence and rules that were not before them at the time." Resp. Br. 10. But this contention is unavailing. Before AEDPA, *Teague*'s finality cutoff was already serving that "comity interest" by "not subjecting the States to a regime in which finality is undermined by [this Court's] changing a rule once thought correct but now understood to be deficient on its own terms." *West*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment).

At bottom, therefore, the Commonwealth's true contention is not that Section 2254(d) created a new state interest that must be accommodated here. Rather, the Commonwealth is complaining that in a "twilight zone" situation such as this, *Teague*'s finality cutoff does not sufficiently serve its pre-AEDPA interest in repose. That complaint has nothing to do with Section 2254(d). The Commonwealth might like this Court to reconstruct the retroactivity regime that this Court has carefully crafted in *Teague* and its progeny, but Section 2254(d) does not give this Court license – indeed, any good reason at all – to do so.

C. This Court's Prior Cases Do Not Require Setting The Cutoff At The Last State-Court Decision On The Merits.

Last year, in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010), this Court expressly characterized the

question presented here as an open one and assumed that the position petitioner advocates here is correct. The Commonwealth nonetheless argues that pre-*Spisak* case law settles the issue and would have to be "overrule[d]" to hold that *Teague*'s finality cutoff controls the temporal universe of "clearly established" law under Section 2254(d). Resp. Br. 27-35. Petitioner has already explained why that is not so. *See* Petr. Br. 31-34. Suffice it to say here, therefore, that this Court does not treat as binding precedent "isolated statements" in prior cases that "did not squarely address, much less resolve" an issue, *Alden v. Maine*, 527 U.S. 706, 735-37 (1999) – especially when, as here, other isolated statements in other cases point in the opposite direction.

Nothing in this Court's post-*Spisak* decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), resolves the question presented either. The state prisoner in that case – as in the pre-*Spisak* cases just referenced above – sought the benefit of a decision, *Strickland v. Washington*, 466 U.S. 668 (1984), announced long before his trial took place. So the question presented here did not arise in *Pinholster* either.

The Commonwealth insists, however, that in light of *Pinholster*'s holding that Section 2254(d) limits the applicable facts to those that were known at the time of the relevant state-court decision, the statute must also "limit[] the applicable law in the same way." Resp. Br. 29. But facts and law need not become locked in at the same time. To the contrary, facts frequently become locked in before the law does. Appellate courts, for example, prohibit reliance on new evidence but routinely apply intervening legal authority to trial-court or administrative rulings.

Federal courts can do the same thing in the federal habeas context, provided the intervening decision was announced before the prisoner's conviction became final.

D. Practical And Constitutional Considerations Reinforce The Wisdom Of Retaining *Teague*'s Finality Cutoff.

The Commonwealth argues that leaving *Teague*'s finality cutoff in place in the context of Section 2254(d) "would provide a powerful incentive" for state prisoners "*not* to seek state collateral review" because a state-court decision that predates a relevant new case from this Court "will be presumptively unreasonable." Resp. Br. 39. The Commonwealth is incorrect. Even when a state-court opinion fails to apply a relevant decision from this Court, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 131 S. Ct. at 784; *accord Packer*, 537 U.S. at 8. So a state prisoner has nothing to gain – and, indeed, much potentially to lose – under *Teague*'s retroactivity cutoff by foregoing an opportunity to seek state collateral review based on a "twilight zone" decision from this Court.[3]

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[3] Contrary to the impression that the Commonwealth's brief might give, Resp. Br. 39, petitioner himself sought state collateral relief. He did not, however, press his Confrontation Clause claim because he lacked the assistance of counsel and likely believed (probably correctly) that it would have been barred on the ground that he had already pressed it and lost on direct review. *See* Petr. Br. 39-40; Pet. App. 63a n.13 (Ambro, J., dissenting).

By contrast, the Commonwealth's proposed rule would have a dramatic effect on current practices, unleashing an array of equitable and constitutional problems. For starters, the Commonwealth acknowledges that its proposed rule would cause petitioner and others with "deserving claim[s]" – that is, with claims that are clearly meritorious, were properly preserved, and were vindicated in a constitutionally timely manner under *Griffith v. Kentucky*, 479 U.S. 314 (1987) – to "fall through the cracks." Resp. Br. 43. The Commonwealth tries to justify this jarring concession by asserting that federal habeas review "is not for 'ordinary error correction'; its function is to 'guard against extreme malfunctions in the state criminal justice systems.'" *Id.* (quoting *Richter*, 131 S. Ct. at 786). But the Commonwealth misunderstands the quotations it crops from *Richter*. For over fifty years, state prisoners have been entitled to federal habeas relief when they show that their trial violated any constitutional right (save the Fourth Amendment's exclusionary rule), *see Brown v. Allen*, 344 U.S. 443, 482-87 (1953), and that the violation had a substantial and injurious effect on the outcome, *see Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). AEDPA does not change that. *Richter* simply emphasized that new Section 2254(d) requires such a constitutional violation to be more plainly apparent than it needed to be before. The Commonwealth does not dispute that petitioner (and others like him) can satisfy that requirement.

Nor, on a more fundamental level, does the Commonwealth dispute that its rule would create a serious disjoint between habeas law and the retroactivity rule that governs direct review

(*Griffith*). *See* Petr. Br. 37-40. The Commonwealth suggests that state habeas review could mitigate this problem. Resp. Br. 37. But, as the Commonwealth is also forced to acknowledge, states need not – and some do not – provide such an avenue of relief. *Id.*; Petr. Br. 39-40. Indeed, Pennsylvania law itself is fuzzy on the issue. *Compare* Pet. App. 34a & n.12, *with* Pet. App. 63a n.13 (Ambro, J., dissenting). And the Commonwealth's amici conspicuously refrain from endorsing the prospect of seeking such relief in any of their own state courts.

Instead, the amici suggest that this Court's GVR practice could mitigate the disjoint between their proposed habeas retroactivity cutoff and the direct-review cutoff established by *Griffith*. Br. of Texas et al. 21. But the amici provide no answer whatsoever to the serious practical and constitutional problems (including the need to guarantee counsel at the certiorari stage) that petitioner has explained would follow from such a state of affairs. Petr. Br. 40-43. Once again, this silence is telling.

In short, the Commonwealth and its amici are asking this Court to abandon decades of painstakingly designed retroactivity law without any workable plan for implementing their proposed new regime. This Court should turn away that request.

II. Even If Section 2254(d) Alters *Teague*'s Finality Cutoff, A Decision From This Court That Predates A State High Court's Disposal Of The Case Should Qualify As "Clearly Established Law."

The Commonwealth has very little to say about petitioner's alternative argument – namely, that even

if Section 2254(d) does somehow contain a new retroactivity rule that is keyed to when the state courts last decided the prisoner's claim, that rule should be satisfied here. Instead, the Commonwealth primarily acts as though petitioner's alternative argument is part of his main argument that Section 2254(d) does not change retroactivity law at all and, thus, that it somehow undermines that main argument. Resp. Br. 23-26, 42 n.14. To be clear: petitioner argues that the cutoff for clearly established law is the state high court's disposal of the case *only insofar as this Court disagrees with his primary argument that Section 2254(d) does not contain any retroactivity rule at all.*

The Commonwealth's statutory and practical responses to *that* argument in the alternative are unpersuasive.

A. Such A Rule Would Comport With The Text Of Section 2254(d).

Neither of the Commonwealth's textual attacks on a retroactivity cutoff pegged to the state high court's disposal of the case withstands scrutiny.

First, the Commonwealth asserts that petitioner's argument improperly assumes that a state high court's denial of discretionary review is a ruling "on the merits." Resp. Br. 23. But petitioner does not make this assumption at all. To the contrary, petitioner's alternative rule assumes that *the state intermediate court's ruling* rejecting a claim in a case such as this is an "adjudication on the merits." Petr. Br. 48-49. The state high court's denial of review is a "decision" that can be contrary to

clearly established federal law existing at that time. *Id.*

Second, the Commonwealth argues that the words "adjudication" and "decision" cannot apply to two different points in the direct review process. Resp. Br. 26. Instead, the Commonwealth contends, those two words must refer to the legal "process" and the "result" of a single proceeding in a single state court. *Id.* There is no good reason, however, why that must be the case. The phrase "adjudication on the merits" could refer to the proceedings in one court, while the term "decision" could refer to the outcome in another. Indeed, given that this Court ordinarily "refrain[s] from concluding" that "differing language" in two places in a statute "has the same meaning in each," *Russello v. United States*, 464 U.S. 16, 23 (1983), such a construction makes more sense than the Commonwealth's suggestion that the words should be viewed "interchangeably," Resp. Br. 26.[4]

B. Such A Rule Would Comport With AEDPA's Purpose.

The Commonwealth argues that counting a decision announced before a state high court denied discretionary review as "clearly established law" would intrude on state supreme courts' "unreviewable power simply to step aside and leave the resolution below as the last decision in the case."

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[4] Respondent's amici contend additionally that petitioner's alternative argument disregards Section 2254(d)'s use of the "past tense." Br. of Texas et al. 9. As noted above, however, Section 2254(d) remains backward-looking no matter where the retroactivity cutoff is placed. *See supra* at 5-6.

Resp. Br. 24. To the extent that the Commonwealth suggests that state high courts should have the all-purpose ability to lock in applicable law as of the time of the state intermediate court decision, they lack that power under *Griffith*, and will continue to lack it no matter what happens in this case. *See Powell v. Nevada*, 511 U.S. 79, 83-84 (1994). To the extent that the Commonwealth means merely to suggest that when a state high court denies discretionary review, it should not be saddled with the presumption that it had a "fair opportunity" to pass on the prisoner's claim, this suggestion lacks force. Such a circumstance obviously affords a fair opportunity to pass on the claim, and that is all any amendment AEDPA made to retroactivity law could plausibly require.

To be sure, if a procedural defect legitimately causes a state high court to deny review, it is perfectly free to say so, and federal courts will honor that invocation by deeming the claim procedurally defaulted. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Harris v. Reed*, 489 U.S. 255, 264-65 (1989). Even if a state high court does not express any reason for denying review, this Court held long ago that a federal court on habeas review may find a claim procedurally defaulted when the state intermediate court rejected the prisoner's claim on the merits but a procedural glitch became apparent in briefing to the state high court. *See Ylst*, 501 U.S. at 804-05; *Coleman v. Thompson*, 501 U.S. 722, 740 (1991).

But despite various loose rhetoric in its statement of the case, the Commonwealth never attempts to make such a showing here. Nor could it.

As the Third Circuit held, Pet. App. 15a, and as elaborated in petitioner's opening brief at 4-6, petitioner fairly presented his Confrontation Clause claim to the Pennsylvania Superior Court, and that court rejected it on the merits. Nothing in the Pennsylvania Supreme Court's order dismissing petitioner's appeal suggests otherwise. J.A. 216. Under these circumstances, neither AEDPA nor any other tenet of federalism is transgressed when a federal court reaches the merits of a prisoner's claim and applies all of this Court's decisions that existed at least when the state high court elected not to address his claim.

In sum, the purpose of federal habeas review is not – as the Commonwealth seems to think – to upbraid insolent state courts. Rather, it is to allow defendants to obtain fair trials in the rare situations in which they objected to procedures that not only were unconstitutional, but whose unconstitutionality was apparent while the case was still in the state-court system. When these circumstances are present, and a state court declined to remedy the situation despite having had a fair opportunity to do so, nothing more should be required for a federal court to grant relief.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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