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

BRIEF OF TEXAS, DELAWARE, FLORIDA, KENTUCKY, MAINE, MICHIGAN, MONTANA, NORTH DAKOTA, PENNSYLVANIA, UTAH, WASHINGTON, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Many litigants and jurists have tried to eviscerate the relitigation bar of 28 U.S.C. § 2254(d) by equating it with this Court's pre-AEDPA non-retroactivity jurisprudence. But section 2254(d) imposes restrictions on federal habeas relief that extend beyond the limitations imposed by *Teague v. Lane*, 489 U.S. 288 (1989), and subsequent cases. Amici curiae have an interest in ensuring that federal courts respect and enforce the statutory limits on post-conviction habeas review.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254(d) states:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

After a jury convicted Eric Greene of murder, Greene appealed to the Pennsylvania Superior Court, claiming that prosecutors violated the Confrontation Clause by introducing his co-defendants' redacted confessions. The Pennsylvania Superior Court rejected this claim and affirmed the conviction, and Greene petitioned for allowance of discretionary appeal with the Pennsylvania Supreme Court.

While that petition was pending, this Court clarified the protections of the Confrontation Clause in *Gray v. Maryland*, 523 U.S. 185 (1998). Although the Pennsylvania Supreme Court subsequently granted review, it eventually dismissed the appeal as improvidently granted, and Greene declined to file a petition for a writ of certiorari in this Court.

Greene reasserted his Confrontation Clause claim in federal habeas proceedings, seeking to rely on *Gray*. But the Pennsylvania Superior Court had already adjudicated his Confrontation Clause claim on the merits, triggering section 2254(d)'s relitigation bar. Because *Gray* postdates the decision of the Pennsylvania Superior Court, the Third Circuit held that *Gray* was not "clearly established federal law" under 28 U.S.C. § 2254(d)(1). *See Greene v. Palakovich*, 606 F.3d 85, 98 (3d Cir. 2010). Judge Ambro dissented, arguing that section 2254(d) allows federal habeas courts to consider "clearly established federal law" at the time the conviction becomes final

on direct appeal—even if that includes Supreme Court rulings announced after the state court's adjudication on the merits. *See* 606 F.3d at 109-19. The First Circuit has also adopted the approach in Judge Ambro's dissent. *See Foxworth v. St. Amand*, 570 F.3d 414, 430-32 (2009).

SUMMARY OF ARGUMENT

Section 2254(d) generally blocks federal courts from granting habeas relief on a "claim that was adjudicated on the merits in State court proceedings," but provides an exception if the state-court adjudication "*resulted* in a decision that *was* contrary to, or *involved* an unreasonable application of, clearly *established* Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphases added). The past tense of the verbs "resulted," "was," and "involved" mandates that the "contrary to" and "unreasonable application of" inquiries be evaluated at the time of the state-court decision, rather than the time of federal habeas review. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). And the past tense of the adjective "established" means that the pertinent Supreme Court holdings must predate the relevant state-court adjudication. Greene wants this Court to treat section 2254(d)(1) as if it authorized relief whenever a state-court adjudication "resulted in a decision that *became* contrary to, or *became* an unreasonable application of, clearly established Federal law, *by the time the conviction became final*." But that construction cannot be squared with the statutory

language, and Greene does not even attempt to reconcile his proposed interpretation of section 2254(d)(1) with the statute's use of the past-tense verbs "resulted" and "was."

This Court has repeatedly held that the time for determining "clearly established federal law" is the date of the relevant state-court decision. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The First Circuit had no authority to ignore these decisions, and Judge Ambro had no prerogative to dismiss them as "no more than *dicta*." *Greene*, 606 F.3d at 110 n.7 (Ambro, J., dissenting). Unfortunately, confusion among the lower courts has arisen from this Court's contradictory statements in *Terry Williams v. Taylor*, 529 U.S. 362 (2000). Compare *id.* at 412 (O'Connor, J., for the Court) ("[T]he phrase 'clearly established Federal law' . . . refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."), with *id.* at 390 (Stevens, J., for the Court) ("The threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final."). Yet Justice Stevens's entire *Williams* opinion—both the portion that received five votes and his remaining analysis that spoke for only four members of the Court—reflects a determination to minimize the impact of section 2254(d) by equating it with this Court's pre-

AEDPA *Teague* jurisprudence. Justice Stevens's approach cannot withstand textual analysis of section 2254(d), as this Court's repeated post-*Williams* holdings rejecting his construction of "clearly established federal law" make clear.

Finally, if Greene believes that the decisions of the Pennsylvania courts conflict with *Gray*, then he should have sought correction on direct appeal by filing a certiorari petition with this Court. That is the proper remedy when this Court announces a new decision after the state court rules but before the prisoner's conviction becomes final. Having declined to pursue this corrective mechanism on direct appeal, Greene cannot have the federal habeas courts bail him out by disregarding the language of section 2254(d) and overruling the construction of this statute that this Court has repeatedly endorsed in *Lockyer*, *Yarborough*, *Carey*, and *Pinholster*.

ARGUMENT

I. Greene's Arguments Cannot Be Reconciled With the Past-Tense Verbs in Section 2254(d)(1).

This Court has held many times that statutory construction must begin with the language of the statute. *See, e.g.*, *Michael Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute."); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute."). Yet Greene treats the text

of section 2254(d) as little more than an afterthought. In his brief there is much discussion of this Court's pre-AEDPA case law, the competing opinions in *Williams*, the policy implications of the Third Circuit's ruling, and even ruminations on what Congress might have "intended" or "expected" when it enacted AEDPA. But when it comes to the language that AEDPA added to section 2254(d), and how the text applies to the facts of his case, Greene offers only vague and perfunctory remarks. *See* Pet. Br. 23, 48-49. That fact alone should raise judicial eyebrows.

As it happens, Greene has good reason to downplay the statutory language. Section 2254(d)(1) blocks a federal court from granting habeas relief on a claim that "was adjudicated on the merits in State court proceedings," "unless the adjudication of the claim—"

> *resulted* in a decision that *was* contrary to, or *involved* an unreasonable application of, clearly *established* Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1) (emphases added). Just last Term, this Court noted that "[s]ection 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law," and concluded that "[t]his backward-looking language requires an examination of the state-court decision at the time it was made." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011); *see also id.* at

1399 ("State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003))).

The Third Circuit deemed the ruling of the Pennsylvania Superior Court an "adjudication on the merits" of Greene's Confrontation Clause claim, and Greene does not contest that conclusion. But Greene does not explain how this state-court "adjudication" could have "*resulted* in a decision that *was* contrary to, or *involved* an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," based on an alleged conflict with a later-decided Supreme Court ruling. Greene seems to think that he can escape section 2254(d) by showing that the state-court decision *became* contrary to, or *became* an unreasonable application of, a clearly established Supreme Court holding at the time the conviction became final.

Greene makes no effort to derive this "finality" rule from the text of section 2254(d). On page 23 of his brief, where he quotes the statutory language, Greene offers only the following cryptic remarks:

> To the extent that the new Section 2254(d) indicates that Congress contemplated retroactivity law at all in amending the federal habeas statute, the new provision suggests that Congress envisioned maintaining a cutoff of finality. . . . [T]he statute focuses ultimately on

> the "result[]" of the state-court proceedings—on its "decision," rather than its adjudication or opinion—indicating that it is the outcome of a case, not the state court's treatment of this Court's case law, that a federal court should scrutinize.

Pet. Br. 23. How this proposed distinction between the state court's "decision" and its "adjudication" leads to a "moment of finality" rule Greene does not endeavor to explain. Finality occurs when the Supreme Court of the United States denies certiorari on direct appeal, or when the time for seeking further direct appeals expires. This moment of finality postdates any moment that Greene wants to mark as the time of the state court's "decision." So even if one accepts Greene's questionable efforts to distinguish the moment of the state court's "decision" from the moment of its "adjudication," it still does not get him to the moment-of-finality rule that he asserts throughout his brief.

Greene presses an alternative argument that would allow federal habeas courts to consider all "clearly established federal law" that exists at the moment the state supreme court disposes of a case on direct review. Pet. Br. 48-49. But rather than quoting the language of section 2254(d), Greene presents this Court with a paraphrase that changes the statute's verb tense from the past to the infinitive:

> Section 2254(d) requires two things. First, it requires a state court to have "adjudicated" the

> claim on the merits. Second, it requires a state-court "decision" *to be* contrary to or an unreasonable application of, clearly established federal law."

Pet. Br. 48 (emphasis added). By deploying this not-so-subtle shift in verb tense, Greene once again tries to drive a wedge between the moment of "adjudication" and the moment of "decision." Greene acknowledges (as he must) that the state-court "adjudication on the merits" occurred when the Pennsylvania Superior Court rejected his Confrontation Clause claim on direct appeal. *See* Pet. Br. 48. But Greene insists that the relevant state-court "decision" occurred later, when the Pennsylvania Supreme Court denied discretionary review. *See id.* ("The intermediate court decision is an 'adjudication' on the merits, and the denial of discretionary review (especially after reviewing full briefing on the merits) is a 'decision' whose substantive result is contrary to federal law.").

The past-tense verbs in section 2254(d) once again foreclose Greene's construction of the statute. Greene must show that the state-court adjudication "*resulted* in a decision that *was* contrary to, or *involved* an unreasonable application of, clearly *established* Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (emphases added). The decision is the "result[]" of the adjudication, and if the statute envisioned a time lag between the moment of "adjudication" and the moment of "decision," it would have used the present

perfect tense, allowing federal habeas relief if a state-court adjudication "*has resulted* in a decision that" contravenes or unreasonably applies a clearly established Supreme Court holding. By sticking with the past tense throughout, the statute describes a single, specific moment for the "adjudication" and the "decision." The federal habeas court must take a snapshot of the clearly established Supreme Court holdings that existed at that time, and use that to measure the reasonableness of the state court's decision.

II. Section 2254(d) Does Not Alter *Teague*'s Non-Retroactivity Doctrine, But Rather Establishes a Separate and Independent Relitigation Bar to Habeas Relief.

Greene misstates the law and misleads the Court by describing the question presented as whether section 2254(d) "partially altered [*Teague*'s] retroactivity doctrine." Pet. Br. 2. *Teague*'s retroactivity doctrine will remain unaltered no matter how the Court rules in this case. If the Court holds that section 2254(d) excludes *Gray* from the scope of "clearly established Federal law," *Teague* will still operate to bar habeas petitioners from asserting "new rules" in federal habeas proceedings. And *Griffith v. Kentucky*, 479 U.S. 314 (1987), will still allow criminal defendants pursuing direct appeals to rely on any Supreme Court ruling announced before their judgments become final.

This Court has described 28 U.S.C. § 2254(d) as a "relitigation bar," which precludes federal habeas courts from relitigating certain issues decided by state courts. *See Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). This modified collateral-estoppel rule differs significantly from *Teague*'s non-retroactivity regime, which blocks habeas petitioners from asserting "new rules" announced after their convictions become final, regardless whether a state court had previously ruled on the issue. Nothing in AEDPA purports to expand, contract, or codify the retroactivity doctrines announced in *Teague* and developed in subsequent cases. Section 2254(d) simply establishes an independent barrier to habeas relief, which supplements and does not supplant the Court-created non-retroactivity doctrine from *Teague*. As this Court recognized in *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam), "the AEDPA and *Teague* inquiries are distinct."

There are at least five ways in which *Teague*'s non-retroactivity doctrine differs from section 2254(d)'s religitation bar.

First, section 2254(d)'s relitigation bar is triggered only when the habeas petitioner's claim was "adjudicated on the merits in State court proceedings." If the state courts never adjudicated the claim on the merits, then section 2254(d) presents no barrier to relief. *Teague*, by contrast, precludes habeas petitioners from relying on "new rules" regardless whether the state courts have ruled on the petitioner's claim. In this respect, *Teague*'s non-

retroactivity barrier to relief is more expansive than section 2254(d), because it does not depend on a previous state-court adjudication, or on anything that happens in state court.

Second, when section 2254(d) applies, it limits habeas petitioners to "clearly established federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d) (emphasis added). *Teague*, by contrast, allows habeas petitioners to rely on any "old rule" that predates finality, and it does not purport to limit these old rules to holdings of the Supreme Court. In this respect, section 2254(d)'s barrier to relief is more expansive than *Teague*.

Third, when section 2254(d) applies, it allows habeas petitioners to escape its relitigation bar if they can satisfy the exceptions in section 2254(d)(1) or section 2254(d)(2). *Teague*, by contrast, requires a habeas petitioner to show that the result that he seeks was "dictated by precedent" existing at the time his conviction became final. *Teague*, 489 U.S. at 301. One could, for example, establish that a state-court decision unreasonably applied clearly established Supreme Court precedent, even if a habeas petitioner would be unable to show that a contrary result was "dictated by" prior precedent. In addition, section 2254(d)(2) allows habeas petitioners to surmount the relitigation bar by establishing that a state-court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding," even if the petitioner is relying on a "new rule" under *Teague*.

Section 2254(d)(2) has nothing to do with *Teague*'s distinction between "new rules" and "old rules"; it looks only to how the state court determined the facts.

Fourth, when section 2254(d) applies, it provides no allowance for either of the two "*Teague* exceptions" that this Court has recognized in its non-retroactivity jurisprudence. *See Teague*, 489 U.S. at 288. If a state-court adjudication triggers section 2254(d), and the habeas petitioner cannot satisfy (d)(1) or (d)(2), then habeas relief is blocked, even if he relies on a "watershed rule[] of criminal procedure." 489 U.S. at 311. In this respect, section 2254(d)'s barrier to relief is more expansive than *Teague*.

Fifth, and finally, when section 2254(d) applies, it limits habeas petitioners to clearly established federal law that existed at the time of the state court's adjudication on the merits. *See Pinholster*, 131 S. Ct. at 1398. Under *Teague*, by contrast, a habeas petitioner may rely on any law that existed at the time the petitioner's conviction became final—the moment when the Supreme Court denied certiorari or when the time for filing a certiorari petition expired.

The upshot is that some habeas claims will be blocked only by *Teague* and not by section 2254(d). Others will be blocked by section 2254(d) but not by *Teague*. And still others will be blocked by both. But the scope of the *relitigation bar* in section 2254(d) differs from the *non-retroactivity doctrine* of *Teague*. *Teague* and section 2254(d) are independent doctrines that only partially overlap.

Justice Stevens's opinion in *Terry Williams v. Taylor*, 529 U.S. 362 (2000), only some of which represents the opinion of this Court, ignores almost all of these differences between section 2254(d) and *Teague*, and asserts that section 2254(d) did little more than codify the Court's *Teague* jurisprudence. Justice Stevens thus both understates and overstates the scope of section 2254(d). Consider this passage from his opinion:

> It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.

Williams, 529 U.S. at 380 (opinion of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.). Not so. Section 2254(d)'s relitigation bar does not codify *Teague*'s general prohibition on "new rules"; its statutory prohibition on habeas relief cannot even apply unless the state courts have adjudicated the petitioner's claim on the merits. Justice Stevens is giving section 2254(d) a more expansive scope than the statutory language warrants, on account of his efforts to equate it with this Court's pre-AEDPA jurisprudence.

Justice Stevens's analysis of "clearly established Federal law" likewise reflects this misguided and textually unsupportable effort to collapse section 2254(d) into *Teague*. This time writing for a majority

of the Court, the opinion claims that "[t]he threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams*, 529 U.S. at 390. On this point, Justice Stevens is giving section 2254(d) too narrow a construction and, much like Greene in this case, he never reconciles this moment-of-finality test with the past-tense verbs in section 2254(d).

This interpretation of "clearly established Federal law" has been as aberrational as it is atextual. In numerous post-*Williams* cases, this Court has held that section 2254(d) requires courts to consider "clearly established federal law" at the moment of the relevant state-court decision. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Pinholster*, 131 S. Ct. at 1398. And in *Williams* itself, Justice O'Connor's majority opinion contradicts Justice Stevens's analysis on this point, although elsewhere the O'Connor opinion includes language that could be read to support the Stevens approach. *Compare id.* at 412 (O'Connor, J., for the Court) (declaring that the term "clearly established Federal law" means "the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*") (emphasis added), *with id.* (declaring that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the

Supreme Court of the United States' under § 2254(d)(1)"). We are not aware of any post-*Williams* opinion from this Court that has endorsed Justice Stevens's construction of the statute. Still, Justice Stevens's opinion has produced lingering tension in this Court's jurisprudence, as well as confusion in the lower federal courts. The most sensible resolution of these problems would repudiate Justice Stevens's interpretation of section 2254(d) once and for all.

III. This Court's Interpretations of Section 2254(d) in *Lockyer*, *Yarborough*, *Carey*, and *Pinholster* Represent Holdings, Not Dicta.

Four decisions of this Court declare that section 2254(d)'s relitigation bar requires courts to examine the clearly established federal law at the time of the relevant state-court decision. *See Lockyer*, 538 U.S. at 71-72 ("'[C]learly established federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."); *Yarborough*, 541 U.S. at 660-61 ("For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by this Court 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'"); *Carey*, 549 U.S. at 74 ("In *Williams v. Taylor* . . . we explained that 'clearly established Federal law' in § 2254(d)(1) 'refers to holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."); *Pinholster*, 131 S. Ct. at 1399 ("State-court decisions are measured against this Court's

precedents as of 'the time the state court renders its decision.'") (quoting *Lockyer*, 538 U.S. at 71-72). Judge Ambro's dissenting opinion acknowledges most of these decisions, but declares that "the selection of a cutoff date in [those] cases is no more than *dicta*." *Greene*, 606 F.3d at 110 n.7 (Ambro, J., dissenting). The First Circuit's opinion in *Foxworth* does not even acknowledge the existence of *Lockyer* and *Carey*, and although it cites *Yarborough*, it ignores the crucial passage from *Yarborough* that defines "clearly established federal law."

Judge Ambro's dissent offers only one reason for fobbing off these passages as dicta: The Supreme Court was not "required to determine the cutoff date" in those cases. *Greene*, 606 F.3d at 110 n.7 (Ambro, J., dissenting). This understanding of dicta would mark a revolutionary change in the relationship between this Court and the federal courts of appeals. On this logic, *Roper v. Simmons*'s prohibition on the juvenile death penalty is dictum and can be ignored by lower courts, because this Court was not "required to determine" whether *everyone* under the age of 18 should be exempt from the death penalty. 543 U.S. 551 (2005). *Roper* needed only to resolve whether murderers of Christopher Simmons's precise age and circumstances should be eligible for capital punishment, yet this Court opted for a broader-than-necessary holding in that case. Broader-than-necessary holdings, however, are not dicta. If they are, then it is open season not only on *Roper* but also on rulings such as *Mapp v. Ohio*, 367 U.S. 643 (1961),

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Roe v. Wade*, 410 U.S. 113 (1973). Every decision of this Court would automatically be converted into a "minimalist" ruling, as lower courts could ignore as dicta any statements that extend beyond the issues that were "required" to be determined. *See generally* Cass R. Sunstein, *One Case At A Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).

Any proposition that leads to and explains a court's judgment is a holding, even if its resolution is unnecessary to resolve the case. *See generally* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005). Thus broader-than-necessary explanations cannot be ignored at will by other state and federal courts. Dicta can arise if a court writes or implies that the judgment would have been different if certain circumstances were met, but that does not describe the situation in *Lockyer*, *Yarborough*, *Carey*, or *Pinholster*.

Greene is correct to characterize Justice O'Connor's discussion in *Williams* as dictum, because the judgment in that case awarded habeas relief, and her statements that narrowly construe section 2254(d) do not lead to that judgment. *See* Pet. Br. 31-32. But Greene wisely refrains from attempting to characterize the discussions of section 2254(d) in *Lockyer*, *Yarborough*, *Carey*, or *Pinholster* as dicta. Instead, he suggests that these rulings need not be given *stare decisis* effect because the meaning of

"clearly established federal law" "was not before the court." Pet. Br. 33 & n.5. But this is just another way of saying that this Court's broader-than-necessary holdings can be disregarded by future courts. This Court often chooses to resolve cases based on principles that extend beyond the bare minimum necessary to decide the case. That does not convert a ruling into dicta that can be ignored by inferior federal judges, nor does it liberate this Court from the norms of *stare decisis*. As best we can tell, Greene does not dispute this general point, but he does not admit (as he must) that a ruling in his favor will cause this Court to overrule *holdings* in *Lockyer*, *Yarborough*, *Carey,* and *Pinholster*.

Both Greene and Judge Ambro acknowledge this Court's decisions in *Lockyer*, *Yarborough*, and *Carey* and make a good-faith effort to distinguish them. The First Circuit's opinion in *Foxworth*, by contrast, ignores the discussion of section 2254(d) in these decisions, and declares its construction of section 2254(d) to be "dictated by precedent" in the teeth of these unacknowledged rulings.[1] *Foxworth v. St.*

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[1] The First Circuit cites *Yarborough* twice but ignores *Yarborough*'s discussion of the meaning of "clearly established Federal law," even though the respondent provided a block quotation of the relevant excerpt from *Yarborough* in his brief. *See* Resp't Br. in *Foxworth* at 30. ("For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by this Court 'refers to the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*.' *Williams v. Taylor* 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000). We look for 'the governing legal principle or

Amand, 570 F.3d 414, 432 (1st Cir. 2009). The First Circuit's disregard of *Lockyer*, *Yarborough*, and *Carey* does not reflect unawareness of those decisions; the respondent cited all three cases prominently in his brief.[2] Apparently the First Circuit's "close perscrutation" of Justice O'Connor's *Williams* opinion does not carry over to other on-point precedents of this Court that counsel brought to its attention. *Foxworth*, 570 F.3d at 431. The First Circuit had a responsibility to acknowledge *Yarborough*, *Lockyer*, and *Carey*, and to explain to the litigants and this Court why it did not regard those rulings as dispositive.

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principles set forth by the Supreme Court *at the time the state court renders its decisions*.' *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L.Ed.2d 144 (2003).") (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004) (emphasis supplied). The First Circuit did not even cite *Lockyer* or *Carey*.

[2] *See* Resp't Br. in *Foxworth* at 32 ("Since the *Williams* decisions, the Court has repeated Justice O'Connor's formulation as authoritative no [fewer] than three times, and has not repeated Justice Stevens' formulation, leaving no doubt that O'Connor's view is that of the Court. *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 653 (2006)."); *id.* at 30 (quoting language from both *Yarborough* and *Lockyer* supporting the State's interpretation of section 2254(d)).

IV. Greene Had the Opportunity to Seek Correction of the State-Court Rulings By Filing a Certiorari Petition With This Court.

This Court announced its ruling in *Gray* after the Pennsylvania Superior Court's adjudication on the merits but before the Pennsylvania Supreme Court's dismissal of Greene's appeal. Greene could have asked this Court to reverse the state court's decision, but he declined to petition for writ of certiorari. Greene's failure to take advantage of this remedy does not justify his current request to ignore the text of section 2254(d) as well the previous constructions of that statute that this Court adopted in *Lockyer*, *Yarborough*, *Carey*, and *Pinholster*. And section 2254(d) does not permit this Court to export decision costs to the federal habeas courts simply to reduce pressure on its summary-reversal or grant, vacate, and remand (GVR) practices. *See generally* Pet. Br. 36.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted.

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