No. 05-8820

IN THE

Supreme Court of the United States

GARY LAWRENCE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as *amicus curiae* in support of petitioner.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys and more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In connection with that mission, NACDL has frequently filed *amicus curiae* briefs in this Court in cases involving the application of the Anti-terrorism and Effective Death Penalty Act (AEDPA) in an effort to further NACDL's substantial interest in ensuring that criminal defendants are able to take advantage of both the state and federal post-conviction review processes. *See, e.g., Rhines v. Weber*, 544 U.S. 269

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

(2005); *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005); *Dodd v. United States*, 545 U.S. 353 (2005); *Pliler v. Ford*, 542 U.S. 225 (2004).

SUMMARY OF ARGUMENT

An "application for State post-conviction or other collateral review" is "pending" under AEDPA, *see* 28 U.S.C. § 2244(d)(2), while this Court is deciding whether to grant certiorari review of that very application. As petitioner explains, a state habeas petition invoking federal law is not decided—and thus remains "pending"—until this Court has decided whether to grant certiorari review.

Although we agree with petitioner that the text and legislative history of AEDPA do not and cannot support the decision of the court of appeals, we write separately to address two related but additional points. First, even if the statute were unclear, any ambiguity should be resolved in petitioner's favor. Since the Founding, state-court decisions implicating federal questions have always been subject to review and reversal by this Court. As a result, state actions involving federal law are not final—and are thus still "pending—until this Court has had the chance to rule. Nothing in the text or the legislative history of section 2244(d)(2) indicates an intent on the part of Congress to depart from this traditional understanding. On the contrary, the text and legislative history cement the conclusion that Congress intended to follow the historical rule.

Second, there is no policy-based justification under AEDPA for interpreting section 2244(d)(2) to exclude the time in which state habeas applications are subject to this Court's review. Because this Court determines the time period during which petitions seeking certiorari review are resolved, there is no risk that construing section 2244(d)(2) to comport with the traditional rule will lead to abuse or undue delay in the habeas process. In fact, it is the State's contrary

position that contravenes AEDPA's principles by inviting conflict between the state and federal judicial systems as prisoners are forced to file precautionary federal habeas petitions while their *state* habeas petitions are still awaiting final determination by this Court. The result will be confusion and a needless waste of party and judicial resources, as federal district courts are forced to contend with a flood of precautionary petitions and requests for stays pending the outcome of Supreme Court review.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO THE PLAIN TEXT AND LEGISLATIVE HISTORY OF THE STATUTE, AND IGNORES THIS COURT'S HISTORIC EXERCISE OF JURISDICTION OVER STATE-COURT DECISIONS.

Section 2244(d)(2) tolls AEDPA's one-year limitations period during the time that a "properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). The court of appeals erred in holding that an application for State post-conviction review invoking federal law is not "pending" while this Court decides whether to grant certiorari review over a state-court decision denying that application.

A. The Eleventh Circuit's Analysis of Section 2244(d)(2)'s Language Is Flawed.

1. The court of appeals based its decision on a purported difference between two provisions of AEDPA: section 2244(d)(2) and section 2244(d)(1)(A). *See Lawrence v. Florida*, 1221, 1225 (11th Cir. 2005) (*citing Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000)). As noted, the former provision—the provision at issue in this case—tolls AEDPA's one-year statute of limitations while a properly filed state habeas petition "is pending." 28 U.S.C. §

2244(d)(2). The latter provision, which the Eleventh Circuit incorrectly referred to as "the provision applicable to tolling during direct appeal," *Coates*, 211 F.3d at 1226, is not a tolling provision at all but instead describes when the limitations period begins to run. *See* 28 U.S.C. § 2244(d)(1)(A). It states that the one-year statute of limitations for filing a habeas petition begins to run, among other possible triggering events, on the date on which the underlying state-court judgment "became final by the conclusion of direct review." *Id.* The court of appeals reasoned that because a judgment against a prisoner "becomes final" only upon the conclusion of this Court's review on direct appeal, Congress's omission of the identical language from section 2244(d)(2) suggests that Congress meant to exclude from the tolling provision this Court's review of applications for state post-conviction relief. *See Coates*, 211 F.3d at 1226-27.

The court of appeals' reasoning is incorrect. Although language appearing in one provision of a statute but not another may in some cases suggest that Congress intended to exclude that language from the latter provision, *see Russello v. United States*, 464 U.S. 16, 23 (1983), no cannon of statutory construction requires a court to decide that *any* difference in the language of distinct provisions of a statute necessarily means that Congress intended them to have *opposite* meanings. In *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), this Court refused to invoke the *Russello* cannon of construction because doing so would have resulted in an interpretation of the statute that read the language too "restrictively." *Id.* at 435. As *City of Columbus* makes clear, the mere fact that two provisions in a statute are worded differently does not *ipso facto* mean they have opposite meanings. Rather, courts must be deliberate when applying the *Russello* presumption and must remain mindful of the overall statutory scheme in interpreting the meaning of any one particular provision.

The court of appeals failed to do so in this case. Instead of engaging in a rigorous analysis of the words Congress used in the context of the overall statutory scheme, the court of appeals essentially punted, simply *assuming* that the linguistic difference between sections 2244(d)(2) and 2244(d)(1)(A) showed that Congress intended antithetical meanings. *Coates*, 211 F.3d at 1226. But that is not remotely the only (or even the best) logical inference to draw from the statutory language. These two provisions can much more sensibly be read together as stating that an application for state habeas relief is "pending" until the decision denying that application is "final." After all, the word "pending" means "[n]ot yet decided or settled; awaiting conclusion or confirmation." American Heritage Dictionary 1299 (4th ed. 2000). Indeed, this Court has expressly held as much with regard to this very provision of AEDPA. *See Carey v. Saffold*, 536 U.S. 214, 219 (2002) (indicating that the words "is pending" in section 2244(d)(2) mean "not yet decided."). And, as the court of appeals agreed, a state-court decision involving a federal question is not "final"—*i.e.* is "not yet decided"—until this Court has decided whether to take jurisdiction over the case. *See Coates*, 211 F.3d at 1226; *see also infra* at 7-11. Thus, under the plain meaning of the statute and this Court's precedent in *Carey*, an application for State post-conviction review is "pending" until a decision denying that application is *final*, which occurs only when this Court has decided whether to grant certiorari review. This reading of the statute harmonizes the two provisions' shared use of the concept of finality, rather than presuming that a slight distinction in their language suggests they have diametrically opposite meanings.

Indeed, there is no reason to believe that Congress intended the word "pending" to exclude altogether the concept of finality expressed in section 2244(d)(1)(A). The linguistic distinction between "is pending" and "became final" instead

most likely reflects nothing more than the different subjects of the two subsections. The subject of section 2244(d)(1)(A) is a "judgment," which this Court has held "becomes final" when it concludes its direct review. *See Clay v. United States*, 537 U.S. 522, 527-28 (2003). The subject of section 2244(d)(2), in contrast, is an "application for post-conviction or other collateral review." And an *application* does not "become final"; rather, it is "granted," "denied," "dismissed," or the like. Read in light of the pertinent subjects set forth in sections 2244(d)(1)(A) and 2244(d)(2), the linguistic difference relied on by the court of appeals does not indicate that Congress intended "becomes final" and "is pending" be interpreted differently; those phrases are merely a product of the different subjects of the two subsections: a "judgment" and an "application." *Cf. City of Columbus*, 536 U.S. at 435-36 ("The *Russello* presumption—that the presence of a phrase in one provision and its absence in another reveals Congress' design—grows weaker with each difference in the formulation of the provisions under inspection.").

2. The court of appeals' decision to place load-bearing emphasis on section 2244(d)(1)(A) is also misplaced because section 2244(d)(2) tolls AEDPA's one-year limitations period while a state habeas petition is "pending," not while it is "pending *in State court*." *Compare* 28 U.S.C. § 2244(d)(2) *with Coates*, 211 F.3d at 1227 (holding that application is pending "only so long as the case *is in the state courts*") (emphasis added). In fact, the court overlooked a more suitable linguistic comparison that provides a better indication of Congress's intent. As noted above, the court of appeals wrongly described section 2244(d)(1)(A) as "the provision applicable to tolling during direct appeal." *Coates*, 211 F.3d at 1226. There *is*, however, another tolling provision in AEDPA. Section 2263(b)(2), which is part of AEDPA's so-called "opt-in" provisions for capital cases, tolls the statute of limitations while prisoners exhaust their state remedies—

just as section 2244(d)(2) does for prisoners in states that do not follow the opt-in requirements. But unlike section 2244(d)(2), the language of section 2263(b)(2) states that the time for seeking certiorari in this Court after the denial of post-conviction relief by the state's highest court should *not* be tolled:

> The time requirements established by subsection (a) shall be tolled . . . from the date on which the first petition for post-conviction review or other collateral relief is filed until the final *State court disposition* of such petition . . . .

28 U.S.C. § 2263(b) – (b)(2) (emphasis added). This language provides a far more relevant basis for comparison than does section 2244(d)(1)(A). Accordingly, to the extent that the *Russello* rule of construction applies here, it favors petitioner's reading of the statute.

B. Section 2244(d)(2) Should Be Read In Light of This Court's Time-Honored Role Within the State Appellate Process.

But perhaps the most fundamental error in the decision of the court of appeals was its failure to read section 2244(d)(2) in a manner consistent with centuries of traditional practice and understanding. A bedrock principle of American federalism is that, because state courts are authorized to decide questions of federal law, any such state-court decisions are subject to certiorari review by this Court. *See, e.g.*, Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 4 (1927) (describing the Supreme Court's appellate jurisdiction over state courts as "one of the most important nationalizing influences in the formative period of the Republic."). Respondent has not shown (and cannot show) that, in drafting the language of section 2244(d)(2), Congress intended to deviate from that traditional understanding. Accordingly, even if section 2244(d)(2) were oth-

erwise ambiguous, it would be appropriate to assume that Congress intended to incorporate into section 2244(d)(2) this Court's traditional and consistent understanding that a state-court decision is not final—and thus remains pending—until this Court has itself either declined review or decided the case on the merits.

1. The Framers believed that state-court enforcement of national law was fundamental to the federal system they created:

> When . . . we consider the state governments and the national governments as they truly are, in the light of kindred systems and as parts of ONE WHOLE, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

The Federalist No. 82, at 555 (Alexander Hamilton) (J.E. Cooke ed., 1961); *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981) ("Permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights."). It was repeatedly affirmed in the early years of the Republic that "the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816); *see also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("we have consistently held that state courts have inherent authority . . . to adjudicate claims arising under the laws of the United States.").

But as the Framers recognized, this principle could not be effectuated unless there was also a mechanism to ensure uniformity in the enforcement of federal law. They therefore vested this Court with appellate jurisdiction over state-court decisions implicating federal law or the Constitution. *See* The Federalist No. 82, at 555 ("what relation would subsist

between the national and state courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the supreme court of the United States."); *see also* Judiciary Acts, 1 Stat. 73, 85-86 (1789) (giving this Court appellate jurisdiction over state courts in certain types of cases); Frankfurter & Landis, *The Business of the Supreme Court* 13 ("[The Supreme Court's] appellate jurisdiction was fed by two streams, one running from the lower federal courts, the other from the state courts.").

By the early nineteenth century, this Court had affirmed its prerogative to review state-court decisions raising federal questions. *See, e.g.*, *Martin*, 14 U.S. (1 Wheat.) at 342 (the "very terms of the constitution" compel the conclusion that "the appellate power of the United States . . . extend[s] to state tribunals."). And over the last two centuries, this Court has consistently reaffirmed that principle. *See, e.g.*, *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 29 (1990) ("the exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to two conditions: State courts must interpret and enforce faithfully the 'supreme Law of the Land,' and their decisions are subject to review by this Court." (footnote omitted)); *Gulf Offshore*, 453 U.S. at 478 n.4 ("state courts stand ready to vindicate . . . federal right[s], subject always to review, of course, in this Court."). This Court has also recognized the importance of that principle to the federal system, emphasizing "the necessity of an appellate power in the Federal judiciary to revise the decisions of State courts in cases arising under the Constitution and laws of the United States, in order that the constitutional grant of judicial power . . . may have full effect." *Claflin v. Houseman*, 93 U.S. 130, 142 (1876); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415 (1821) (Marshall, C.J.) ("The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution

or laws of the United States, is, we believe, essential . . . ."); *see also generally* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study In Interactive Federalism*, 19 Ga. L. Rev. 861, 864 (1985) (concluding that an expansive view of the Supreme Court's jurisdiction to review state-court decisions that touch upon federal law is "a proper application of accepted theoretical principles of American federalism."). Thus, for more than two hundred years, the Supreme Court has stood as the highest "court of *appeal* from the State courts." *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 613 (1874).

It follows that a state-court decision involving federal or constitutional matters is ordinarily not final—in the sense of being beyond alteration—unless this Court has had, or has foregone, the opportunity to reverse or modify the decision. *See, e.g.*, *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (holding that a state-court decision is final when the "time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied"); *McKesson Corp.*, 496 U.S. at 31 n.12 ("'[T]he plaintiffs' claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final.'") (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681 (1930)). For instance, in *Robb v. Connolly*, 111 U.S. 624 (1884)—which involved a petition for habeas relief filed in this Court—Justice Harlan noted that state-court decisions that allegedly violate the Constitution lack a certain degree of finality: "If [state courts] . . . withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court *for final and conclusive determination*." *Id.* at 637 (emphasis added).

2. Under established principles of statutory construction, the long-standing view that the Supreme Court is the

highest court of appeal in the state appellate system (at least with respect to federal questions) should be read into section 2244(d)(2). *See Clay*, 537 U.S. at 527 ("th[is] Court presumes 'that Congress expects its statutes to be read in conformity with this Court's precedents . . . .'" (quoting *United States v. Wells*, 519 U.S. 482, 495 (1997). In other words, it is presumed that Congress legislates within the legal framework established by this Court and incorporates this Court's pronouncements on rules, judicial procedures, and statutory and constitutional meaning into every statute it enacts.

Instead of reading section 2244(d)(2) with historical practice in mind, the court of appeals ignored the unbroken line of cases in which this Court has expounded the importance of its jurisdiction to review state-court decisions that implicate federal law. As a result, the court of appeals effectively read this Court's role out of the state post-conviction review process, losing sight of the fact that "the time-honored practice of appellate review of state-court judgments [is] consistent with this Court's role in our federal system." *McKesson*, 496 U.S at 28. This error, as well as the errors in its linguistic analysis, reveal that the decision of the court of appeals is incorrect and should be reversed.

II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE PRINCIPLES UNDERLYING AEDPA.

In addition to reflecting longstanding historical practice, petitioner's proposed construction of section 2244(d)(2) is preferable to the court of appeals' interpretation because it is more consistent with AEDPA's underlying principles. Tolling AEDPA's limitations period during the time that state habeas petitions are being considered by this Court furthers comity and avoids conflict between federal and state judicial systems, and it also promotes the efficient use of party and court resources. The rule endorsed by the court of appeals,

by contrast, would do none of these things. As a result, it would undermine rather than further the purposes of AEDPA.

1. This Court has noted that, in considering competing constructions of an AEDPA provision, it is important to view the relevant provision in light of, among other interests, "AEDPA's purpose to further the principles of comity, finality, and federalism." *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 436 (2000)). As this Court has held, it would be inconsistent with those interests for federal courts to upset state convictions before state remedies have run their course. *Duncan*, 533 U.S. at 179-80.

Yet such inter-system conflict is precisely what will occur if the court of appeals' approach is ratified by this Court. In the Eleventh Circuit, state prisoners who wish to exhaust all their available remedies now face a choice following the denial of state habeas relief by the state court of last resort. First, they may file a petition for certiorari with this Court and wait as long as possible for its disposition prior to filing their initial federal habeas petition. Second, they may file a petition for certiorari with this Court and simultaneously or soon thereafter file a petition for federal habeas relief under 28 U.S.C. § 2254. Either scenario is unfair, inefficient, and contrary to AEDPA's purposes.

a. *Waiting.* For prisoners who choose, in deference to this Court, to wait as long as possible for its ruling on their petitions, there is a substantial risk that the opportunity to file federal habeas petitions will be lost altogether. The process of petitioning for certiorari before this Court typically takes more than three months. *See* Sup. Ct. R. 13.1 (petition must be filed within 90 days of entry of judgment by state court of last resort). Given that a petitioner has a year to file a federal habeas petition, and given that some of that time will almost always be lost at other stages of the federal and state habeas

processes, waiting for this Court's resolution of a petition for certiorari—when the time spent waiting is not tolled—can easily push even the most well-intentioned state prisoner over the one-year limit.

The court of appeals' only answer to that problem was that "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Lawrence*, 421 F.3d at 1225 n.1 (quoting *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983)). That analyis completely overlooks the state prisoner's own substantial interest in actually obtaining federal habeas review, which as a practical matter will often be the only real opportunity to receive meaningful review by a federal court of a state conviction. *Cf. Duncan*, 533 U.S. at 191 (Breyer, J., dissenting) (noting that the purpose of AEDPA is "to grant state prisoners a fair and reasonable time to bring a first federal habeas corpus petition"). Under the court of appeals' rule, the ability to secure federal review might depend on how quickly this Court can dispose of petitions for certiorari from state court denials of state collateral review, a process that state prisoners of course "have no way of controlling." *Rhines v. Weber*, 544 U.S. 269, 275 (2005). And given the fact that it is the Court, and not the prisoner, who controls the certiorari clock, any concern that capital petitioners will engage in dilatory tactics is misplaced.

Just as important is that the court of appeals' rule would apply, of course, to non-capital petitioners as well as capital petitioners. Any delay in the post-conviction relief process for non-capital petitioners results in no "commutation" of sentence. On the contrary, non-capital petitioners—who constitute the vast majority of habeas petitioners—have no incentive whatsoever to engage in dilatory tactics. For them, the point is to move as quickly as possible toward potential relief. In that substantial majority of cases, the state interest

in finality and the prisoner's interest in speedy review (indeed, in *any* federal review) are precisely coterminous.

b. *Multiple simultaneous filings.* The course more likely to be taken by state prisoners is fraught with even greater difficulties. Under the court of appeals' approach, risk-averse state prisoners (including those represented by counsel) would in most circumstances take the precaution of filing federal habeas petitions early and simply asking district courts to stay their petitions pending this Court's disposition of their petitions for certiorari—thereby securing on an *ad hoc* basis the exact same arrangement that petitioner's proposed interpretation would more formally provide.

The difference, however, is that petitioner's position is far more efficient—it would avoid the needless litigation and potential friction between various courts inherent in the court of appeals' approach. If state habeas petitioners concerned about AEDPA's time limits are compelled to file "precautionary" federal habeas petitions while certiorari petitions are still pending before this Court, district courts will be required to entertain motions to stay those petitions pending this Court's resolution of the certiorari petition. As this Court has explained, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co.*, 249 U.S. 134, 146 (1919) (power to stay proceedings is "inherent in every court"); *Clinton v. Jones*, 520 U.S. 681, 683 (1997) (district court has "broad discretion to stay proceedings as an incident to control of its own docket"). Moreover, this Court has held that district courts would have discretion to entertain such motions to stay in other contexts. *See, e.g., Rhines*, 544 U.S. at 276-77 (holding that district courts may stay partially unexhausted petitions pending exhaustion).

No choice is a good one for a district court confronted by such a situation. If a district court chooses, on one hand, to stay a petition, the court of appeals' rule will accomplish nothing while at the same time amounting to a wildly inefficient procedure and a dependable source of collateral litigation and docket crowding. If a district court chooses instead not to stay a petition, it risks "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)). In particular, it risks clashing with this Court's decision in some cases to grant review of—or grant some other relief concerning—a state habeas petition. This Court could grant certiorari over a state habeas petition and reverse the judgment of a state court, remanding the case for further review while a federal application is *already* moving forward in federal district court. The district court would then be confronted with a difficult and awkward question of how to proceed, particularly if it had already granted some form of relief.[2] *See Duncan*, 533 U.S. at 179 (noting that it would be "unseemly in our dual system of government" for a federal district court to upset a state court conviction whose validity was being considered in state court) (quotation omitted). The court of appeals' rule thus works against AEDPA's underlying interests and invites conflict between sovereigns.[3]

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[2] Federal courts entertaining a federal habeas petition have the power to stay related state-court proceedings under 28 U.S.C. § 2251.

[3] It is true that the Eleventh Circuit's rule will encourage state prisoners who choose this path "'to file their federal habeas petitions more quickly.'" *Duncan*, 533 U.S. at 181 (quoting appellate court's decision). But as this Court concluded in *Duncan*, federal courts should not slavishly pursue that interest at the expense of full deference to state review. *Cf. id.* ("Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage

This is not mere conjecture. At least one federal district court has already confronted this issue. *See Coleman v. Davis*, 175 F. Supp. 2d 1109, 1109-11 (N.D. Ind. 2001) (confronting the problem of "simultaneous review of the same Indiana Supreme Court decision by both the United States Supreme Court and this court" when the Supreme Court had vacated the final judgment of a state court on state-post-conviction relief, and employing "retroactive tolling" as the *deus ex machina* to avoid it); *see also Abela v. Martin*, 348 F.3d 164, 172 (6th Cir. 2003) (en banc) (criticizing retroactive tolling and observing that a "statute of limitations should be clear").

Quite apart from those problems, the path of multiple simultaneous filings offers a distinct set of practical complications for petitioners and courts alike. In addition to having to confront the strategic choices already outlined, habeas petitioners will also face significant logistical barriers to filing their petitions in federal court, because neither state nor federal procedural rules are designed to accommodate multiple simultaneous filings. The rules of procedure governing section 2254 applications, for example, contemplate the availability of transcripts and exhibits that will have formed part of the record in state proceedings. *E.g.*, Rules Governing Section 2254 Cases, Rule 4, 1976 advisory committee notes (consideration of habeas petition "may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition"); 28 U.S.C. § 2254(g) (certified state records admissible in federal proceedings). But while certiorari petitions are pending, this Court's rules provide that the "clerk of the

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litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible.").

court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it." Sup. Ct. R. 12, ¶ 7. Thus, state prisoners who file federal habeas petitions while awaiting this Court's disposition of their certiorari petitions following the denial of post-conviction relief in state courts will likely encounter resistance from those courts when trying to transfer their records to federal district court. These petitioners will be needlessly hampered in their efforts to present evidence in support of their petitions in federal court.

2. Finally, it bears reiterating that petitioner's interpretation creates no opportunity for abuse of the writ. Under the rule urged by petitioner, AEDPA's one-year statute of limitations would continue to toll while this Court considers a petition for certiorari following state post-conviction review. A habeas petitioner would thus be under no pressure to file a federal petition prior to this Court's disposition of the certiorari petition. If the Court denied the petition, the clock would start ticking on federal habeas relief. If it granted certiorari and ultimately remanded the case to state court, it could do so without any risk of conflict with ongoing federal habeas proceedings. State post-conviction proceedings would resume without any complicated tolling question—the one-year statute of limitations would continue to toll. For federal and state courts, attorneys, and *pro se* habeas petitioners alike, petitioner's rule would thus be clearly marked and tolling questions easy to answer.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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