IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TERRY WILLIAMS,

Petitioner,

—v.—

JOHN TAYLOR, Warden,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. This case involves the potential execution of a person who contends that he was denied effective assistance of counsel in state court and proper consideration of that claim in federal habeas corpus proceedings. It thus raises issues of fundamental importance to the ACLU and its members.

In order to focus our presentation, we limit this brief to the interpretation of 28 U.S.C. §2254(d)(1), newly enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). The brief does not address constitutional considerations.

STATEMENT OF THE CASE

We adopt the petitioner's statement of the case, which explains that the validity of the circuit court's general interpretation of §2254(d)(1) is before the Court for evaluation.

SUMMARY OF ARGUMENT

In *Wright v. West*, 505 U.S. 277 (1992), this Court declined to embrace the view that a federal habeas court should give "deference" to a state court's application of fed-

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

eral law to the facts of a specific case. *Id.* at 284 (plurality opinion announcing the judgment). At that time, Justice O'Connor found it significant that Congress had considered numerous bills that would have established such a "deferential standard of review" but had failed to enact any of them. *Id.* at 305 (O'Connor, J., concurring in the judgment). In this case, the circuit court below has interpreted §2254(d)(1) to be the very statute that was missing seven years ago.

The circuit court is mistaken. In the wake of *West*, Congress continued to debate the effect that a federal habeas court should give to a prior state court judgment. Specifically, Congress considered the Reagan and Bush Administrations' proposal to bar the federal courts from awarding habeas relief with respect to a claim that had been "fully and fairly" adjudicated in state court, as well as a proposal that would have explicitly barred federal courts from granting relief if a state court had reasonably applied federal law "to the facts" of a particular case. Yet, the proponents of those reform programs could not muster majority support in the Senate. Accordingly, Congress again refused to enact a general rule of deference to "reasonable" state court applications of law to fact, *i.e.*, state court determinations of "mixed" questions of law and fact. Instead, the Republican leadership compromised with members who preferred that habeas relief be more accessible. The statute that emerged, §2254(d)(1), abandoned proposals that would have established a general rule of deference to "reasonable" state court judgments on mixed questions in exchange for a codification of the *Teague* doctrine, a judicially crafted doctrine that the leadership wished to preserve from attack.

The circuit court explicitly declined to give the words that appear in §2254(d)(1) their ordinary meaning, particularly as those terms are used in the *Teague* cases. To the contrary, the circuit court insisted that §2254(d)(1) employs conventional terms in an unconventional way, drawing improbable distinctions among the kinds of cases that reach the federal habeas courts. Stripped of its metaphysical abstractions, the circuit court's approach produces one clear practical implication. According to the circuit court, virtually all cases covered by §2254(d)(1) are cases in which a prior state court decision arguably misapplied federal law to the facts of a particular case. The circuit court thus *forces* an extraordinary meaning upon §2254(d)(1): A federal court *cannot* grant habeas relief if a state court was *wrong* regarding a mixed question of law and fact; it can only do so if the state court was *unreasonably wrong*.

The circuit court apparently assumed that Congress meant to enact a general rule of deference to state court determinations of mixed questions. Proceeding from that premise, the circuit court simply imposed that meaning on §2254(d)(1). The circuit court's interpretation: (1) misapprehends the text of §2254(d)(1), both taken as a whole and according to its particular terms; (2) ignores other provisions of AEDPA enacted with §2254(d)(1), as well as adjacent statutes and doctrines with which §2254(d)(1) must be integrated; and (3) neglects the drafting sequence that led to the enactment of §2254(d)(1) as an alternative to earlier proposals.

If the text of this new statute is given its ordinary meaning, §2254(d)(1) plainly does *not* tell a federal habeas court that it must defer to a state court's application of federal law to the facts of a particular case. It tells a federal court that it cannot award relief on the basis of a change in the law. Properly construed, §2254(d)(1) codifies the choice of law rule announced in *Teague*: A federal court cannot award habeas relief simply because the court disagrees with a prior state court decision, but it should award habeas relief if a prior state court decision was erroneous in light of the federal principles that this Court would have applied at the time the state court acted.

ARGUMENT

I. THE TEXT OF §2254(d)(1) CODIFIES THE *TEAGUE* DOCTRINE

The first order of business is to interpret the precise text of the single sentence under examination:

> An application . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court . . . unless the 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.

Taken as a whole, that sentence reaffirms two familiar principles: First, a state court decision regarding the merits of a federal claim is not erroneous merely because it differs from the decision that an inferior federal court would have reached. Inferior federal courts and state courts are co-equals; both answer only to this Court. If, then, a state court determines that a prisoner's claim is without merit and the prisoner turns to a federal habeas court later, the federal court is not entitled simply to substitute its own view of the merits for that of the state court and to award habeas relief on that basis. The federal court can grant relief only if the state court decision was erroneous in light of the authoritative "law" elaborated by this Court.[2]

Second, the purpose of federal habeas corpus is to ensure that state courts respect the principles of federal law that are in place when they determine federal claims. *Teague v. Lane*, 489 U.S. 288, 306 (1989). If, then, a state prisoner seeks federal habeas relief on the basis of a claim

[2] *See* p.13, *infra*.

that the state courts rejected, the federal court can ordinarily award relief only if a judgment for the prisoner was compelled by the "law" that was "clearly established" at the time the prisoner's conviction became final -- namely, the "law" that this Court would have brought to bear if the prisoner's case had come here on direct review of his conviction.

The circuit court below proceeded on the assumption that §2254(d)(1) effects a radical change in the scope of federal habeas corpus for state prisoners. It dissected the single sentence in §2254(d)(1), construing each of its terms in isolation from the others. *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998); *Green v. French*, 143 F.3d 865, 868-74 (4th Cir. 1998).[3] That formalistic methodology operated as a self-fulfilling prophecy, producing precisely the result that the circuit court set out to achieve.

It is not true that the congressional proponents of §2254(d)(1) intended to adopt a general rule of deference to state court determinations of mixed questions.[4] Even more to the point, the circuit court is not entitled to enforce a statute that it *expected* Congress to enact or, certainly, a statute that the circuit court thinks Congress *should have enacted.* Only the statute that Congress actually placed on the books counts as law.

The circuit court candidly acknowledged that it read §2254(d)(1) to establish the "deferential standard of review" that Justice O'Connor found not to exist when *West* was decided.[5] But that is not what this new provision

[3] The panel below accepted wholesale the construction of §2254(d)(1) that another panel of the same court had previously offered in *Green*.

[4] *See* Point III, *infra*.

[5] *West*, 505 U.S. at 303 (O'Connor, J., concurring in the judgment)(ex-
(continued...)

says.[6] By its explicit terms, §2254(d)(1) bars a federal court from awarding habeas relief if a state court previously rejected the claim in conformity to the law that was "clearly established" at the time.

The circuit court in this case explicitly resisted a construction of §2254(d)(1) that reflects the conventional understanding of federal habeas under the *Teague* doctrine. *See Green*, 143 F.3d at 873-74. Yet, §2254(d)(1) plainly instructs a federal habeas court to do precisely what *Teague* prescribes: If the respondent contends that the prisoner seeks federal relief on the basis of a claim that a state court properly rejected, the federal court must examine the precedents that existed at that time and determine whether those precedents compelled a different judgment. The federal court can grant habeas relief only if the state court decision against the prisoner was erroneous at the time it was rendered.[7]

Section 2254(d)(1) requires a federal habeas court to make as many as four determinations: (1) whether the state court decision was "contrary to" federal law; (2) whether the decision "involved an unreasonable application" of federal law; (3) whether the federal law in question was "clearly established"; and (4) if so, whether it was clearly established

[5] (...continued)
plaining that *Teague* does not establish a deferential "standard of review" under which federal habeas courts examine state court determinations of mixed questions of federal law).

[6] *See Lindh v. Murphy*, 96 F.3d 856, 868 (7th Cir. 1996)(explaining that the term "deference" is nowhere to be found in this new provision), *rev'd on other gr'ds*, 521 U.S. 320 (1997). The conference report *did* use the term "deference," but in an entirely different way. *See* pp.25-26, *infra*.

[7] *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

"by the Supreme Court." The court below failed to grasp that those four inquiries are intimately connected. They jointly advance §2254(d)(1)'s function to identify a state court decision that a federal habeas court is entitled to reject as erroneous under *Teague*.

A. The "Contrary To" Formulation

According to the circuit court, a state court decision was "contrary to" law if it was in "square conflict" with a precedent of this Court that was "controlling as to law and fact." *Williams*, 163 F.3d at 865. If no such precedent existed, the court below presumes a state court decision was "contrary to" law only if it was "an objectively unreasonable" derivation of legal principles from this Court's "relevant" precedents. *Id.* Again, that is not what §2254(d)(1) says. The text of this new provision is sufficient to convey its own meaning and needs no judicially supplied exegesis. The "contrary to" formulation is a term of art, commonly understood to describe simple judicial error.[8]

The "contrary to" formulation in §2254(d)(1) thus allows a federal court to grant relief with respect to a claim, notwithstanding a prior state court adjudication on the merits -- if that state court adjudication produced an erroneous decision. Importantly, however, the state court decision must have been erroneous in light of "clearly established" law at the time it was rendered. The "contrary to" formulation thus explicitly incorporates the *Teague* doctrine -- namely, the established understanding that federal habeas courts should not surprise state courts by setting state prisoners free on the basis of changes in the law.[9]

[8] *E.g.*, 28 U.S.C. §636(b)(1)A) (instructing district courts to review magistrate judge rulings to determine whether they are "contrary to law").

[9] The drafting sequence supports this interpretation. *See* p.28, *infra*.

B. The "Unreasonable Application" Formulation

The "contrary to" phrase is followed immediately in the same sentence by the "unreasonable application" phrase. The circuit court nonetheless broke that sentence down into two insular parts. By the circuit court's account, §2254(d)(1) describes two different ways in which a previous state court decision may be found wanting and prescribes different standards for a federal court to apply to each. Specifically, the circuit court read the "contrary to" formulation to apply only to the extraordinary case in which a state court decision rested either on a mistaken articulation of a "pure" legal rule or on a misapplication of a precedent set by this Court on the "identical" issue. *Green*, 143 F.3d at 870. The circuit court then read the "unreasonable application" formulation to establish an entirely independent test to be applied in all other cases -- cases in which a state court decision rested on an unreasonable "extension" of a legal rule, or a failure to apply a rule in a context in which it was reasonable that it should apply, or an unreasonable application of a legal rule to the facts of a particular case. *Id.* Once again, that is not what §2254(d)(1) says.

If the "contrary to" and "unreasonable application" formulations described entirely different ways in which state court decisions may be erroneous, they would appear under separate headings that would convey that meaning. They do not. Instead, they appear brigaded together in a single sentence. The most straightforward interpretation, then, is that they work in tandem to make a single point -- namely, that a federal court can grant relief in the face of a prior state court adjudication if (and only if) the state court made a serious mistake *either* in identifying the governing legal rule *or* in applying the proper rule in the instant case.[10]

[10] The drafting history also supports this interpretation. *See* p.29, *infra*.

The circuit court acknowledged that the "contrary to" and "unreasonable application" formulations overlap with each other in "common legal parlance." *Green*, 143 F.3d at 869-70. But the circuit court nonetheless construed §2254(d)(1) to *defy* common usage -- invoking the canon that each term in a statute must be accorded an "independent" meaning. *Id.* at 870. That will not do. No canon obligates a court to pound common meaning out of statutory language.[11] When Congress employs familiar terms, the controlling canon is that those terms are to be given their conventional meaning.[12]

The circuit court's construction virtually reads the "contrary to" phrase out of §2254(d)(1). This Court does not sit to review state court decisions for error on a case-by-case basis. If the circuit court is right and §2254(d)(1) really *does* establish two different tests for state court decisions to pass in habeas cases, it is inconceivable that one of those tests (the "contrary to" test) should be virtually a null set -- capturing only cases in which a state court failed to articulate accurately a legal rule established by this Court or reached a decision in "square conflict" with an "all fours" precedent of this Court.

By contrast, the circuit court's construction converts the "unreasonable application" phrase into a grab bag containing all cases in which a state court decision may ordinarily be

[11] The canon the circuit court purported to follow addresses a different kind of case -- where Congress uses distinctly different terms that, in a well-drafted statute, presumably carry distinct meaning. *Green*, 143 F.3d at 870. That canon does not insist that a court must break a single sentence down, word-by-word, and demand that each term must be assigned a meaning that is mutually exclusive of the meaning assigned to others. *Cf. Lindh v. Murphy*, 521 U.S. at 336 (finding it necessary to leave a statutory phrase in another section of AEDPA unaccounted for).

[12] *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83 (1991).

considered erroneous.[13] Initially, the circuit court put two quite different kinds of cases in that grab bag: (1) cases in which a state court decision rested on an unreasonable "extension" of a legal rule outside its proper purview, and (2) cases in which a state court decision rested on an unreasonable application of a legal rule to the facts of an individual case. *Green*, 143 F.3d at 870. Compounding that error, the circuit then inexplicably merged the two, first reading the unreasonable "extension" cases into the mixed question cases and then declaring that the "unreasonable application" category refers to cases in which a state court unreasonably applied a legal rule to the facts of an instant case. *Williams*, 163 F.3d at 865. That is not what §2254(d)(1) says.

The "unreasonable application" formulation *does* refer to unreasonable extension cases. The text is perfectly clear on that point, and the consequence is likewise clear: Here again, §2254(d)(1) employs terms that have a settled meaning in the *Teague* cases. When a habeas court extends a settled legal rule to a truly novel context, it does not merely misapply the rule to the facts of a particular case, but rather creates a new substantive rule.[14] That result is prohibited by both *Teague* and §2254(d)(1). On the other hand, when a state court upholds a conviction by extending an established rule of federal law beyond its proper purview, the state court has acted unreasonably and neither *Teague* nor §2254(d)(1) stands in the way of habeas relief.

It is equally important to recognize, however, that the "unreasonable application" formulation does *not* refer to mixed question cases. By its terms, §2254(d)(1) states only that federal relief must be withheld in light of a prior state court decision, unless that decision "involved" an unreasonable "application" of federal law. Congress did not specify that an "application" must necessarily be an application of law *to the facts of a case*. It may seem plausible to read the term "application" to mean "application *to the facts*." But to do that, the circuit court itself supplied language that does not appear in the enacted statute.[15]

Here, too, the circuit court was at pains to impose on §2254(d)(1) a meaning that does not comport with *Teague*, notwithstanding the statute's use of *Teague* terminology. By merging extension cases with mixed question cases, the circuit court not only read an express reference to the *Teague* doctrine *out* of §2254(d)(1), but read *into* this new provision an idea that *Teague* and its progeny *reject*. *See Graham v. Collins*, 506 U.S. 461, 506 (1993)(Souter, J., dissenting)(explaining that one "general rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will not amount to announcing a new rule").

Even if the "unreasonable application" formulation referred to a state court decision resting on an application of a legal rule to the facts, it would not follow that §2254(d)(1) distinguishes neatly between a state court decision resting on the identification of an abstract legal standard, on the one hand, and one resting on the application of a legal standard to the facts of a particular case, on the other. By its explicit terms, §2254(d)(1) instructs a federal court to withhold habeas relief in light of a prior state court "decision." A "decision" necessarily embraces both the state court's identification of the pertinent legal rule and the court's application of

[13] For the drafting history, *see* p.29, *infra*.

[14] *Stringer v. Black*, 503 U.S. 222, 228 (1992).

[15] This is one instance in which the drafting history is especially probative in that it demonstrates that the statute Congress enacted, §2254(d)(1), differs from an unsuccessful alternative precisely on this ground. *See* pp.29, *infra*.

that rule to the facts.[16] Section 2254(d)(1) merely employs two mutually reinforcing phrases (the "contrary to" and the "unreasonable application" formulations) to express the basic principle in *Teague*: A previous state court decision was not correct (enough) if it was reasonable; it was reasonable only if it was correct (in light of federal law as it stood at the time).[17]

The circuit court plainly went beyond the text of §2254(d)(1) when it insisted that a state court decision cannot constitute an "unreasonable application" of federal law unless the decision is one that "reasonable judges would all agree is unreasonable." *Williams*, 163 F.3d at 865. That is circular. Once a state court has rendered a decision rejecting a claim, it follows by hypothesis that "reasonable" jurists could take that position. They already have. By the circuit court's account, then, §2254(d)(1) would never permit federal habeas relief.[18]

C. The "Clearly Established Federal Law" Formulation

The circuit court acknowledged that the reference in §2254(d)(1) to state court departures from "clearly established" law reflects the *Teague* doctrine. *Green*, 143 F.3d at

[16] A "decision" also encompasses a determination of the underlying facts. Yet, since 28 U.S.C. §2254(e) independently addresses the effects of a state court's findings of fact, a state court's "decision" for purposes of §2254(d)(1) must be limited to the judgment the state court made regarding the legal significance of the facts.

[17] *West*, 505 U.S. at 305 (O'Connor, J., concurring in the judgment).

[18] Section 2254(d)(1) contemplates that a state court "decision" must "involve" an unreasonable application of federal law. That focuses on the accuracy of a judicial *judgment* in the conventional way. The circuit court has it that federal relief can be granted only if state *judges themselves* are unreasonable.

873. That has to be right. The *Teague* doctrine asks a federal habeas court to evaluate the precedents that existed at the time a state court acted and to determine whether those precedents compelled a judgment favorable to the prisoner. That is the sense (and the only sense) in which §2254(d)(1) and *Teague* "validate reasonable, good-faith interpretations of existing precedents made by state courts . . . ." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

D. The "By The Supreme Court" Formulation

The circuit court read the phrase "by the Supreme Court" to mean that federal habeas relief is barred unless a prior state court decision departed from this Court's precedents. That is not what §2254(d)(1) says. Section 2254(d)(1) bars federal habeas relief if a prior state court decision departed from (clearly established) federal "law" as determined by this Court. The "law" this Court determines is found not only in the decisions this Court itself renders, but also in the decisions that other courts, federal and state, render in conformity with this Court's guidance.[19] Section 2254(d)(1) merely states that a state court's failure to follow precedents in the lower federal courts is insufficient to condemn its judgment as mistaken. A state court decision was erroneous only if it neglected federal *law* as it then stood -- *i.e.*, the law that this Court would have brought to bear, if the case had reached this Court on direct review of the state court decision.

[19] The circuit court's contrary construction needlessly raises constitutional questions about §2254(d)(1) that the straightforward construction easily avoids. Article III judges at every level operate as independent jurists, not as agents of this Court. They are bound to make their best judgments about what federal law demands, and those judgments stand until they are overturned, either at the circuit level or in this Court. Congress cannot presume to prescribe the sources that federal judges can consult -- even if the statute specifies this Court's precedents *en masse*.

II. THE CONTEXT IN WHICH §2254(d)(1) OPERATES REINFORCES THE VIEW THAT IT CODIFIES *TEAGUE*

Section 2254(d)(1) must be read in the context provided by the other provisions with which it was adopted, and adjacent statutes and doctrines with which it must operate.

A. The Other Provisions In AEDPA

The bulk of AEDPA is devoted to reforms in the process by which the federal courts adjudicate habeas corpus cases. Those procedural adjustments plainly contemplate that a federal court may determine the merits of mixed questions. They would make no sense if, after a claim has cleared all procedural hurdles, §2254(d)(1) nonetheless forced the federal habeas court to rubber-stamp a previous state court application of federal law to the facts of a particular case.

Moreover, under an amendment to the pre-existing provision on the effect of state court factfinding, the new Act empowers a federal court to presume that state findings are correct. 28 U.S.C. §2254(e)(1). If §2254(d)(1) established a similar presumption in favor of state court decisions on mixed questions of law and fact, there would be no explanation for two separate sections.

B. Adjacent Statutes And Doctrines

The circuit court's construction of §2254(d)(1) fails to take proper account of related bodies of federal law that AEDPA leaves undisturbed. This single provision of the new Act does not sweep away all that preceded it, but rather presupposes the statutes and judicial decisions next to which it must take its place.

1. The *Teague* Doctrine

Obviously, §2254(d)(1) must be reconciled with

Teague. Two things are clear at the outset. One is that §2254(d)(1) operates in territory that *Teague* occupies. The other is that the two cannot function sequentially: Section 2254(d)(1) cannot take the *Teague* doctrine as it finds it and simply establish other questions for a federal court to answer after the court is satisfied that *Teague*, for its part, allows the court to proceed. The questions that *Teague* and §2254(d)(1) contemplate overlap too much to make any *seriatim* analysis a sensible exercise. The available possibilities are obvious enough. Section 2254(d)(1) either vanquishes *Teague* or folds *Teague* into its own regime. Only the latter possibility makes sense.[20]

The circuit court below resisted the relationship between §2254(d)(1) and *Teague* on three grounds: (1) §2254(d)(1) does not explicitly refer to the two *Teague* exceptions;[21] (2) it does not employ the "new rule" language used in *Teague*; and (3) it does not reach all the ground that *Teague* covers. *Green*, 143 F.3d at 873-74. None of those explanations survives scrutiny.

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[20] Congress often codifies doctrines that this Court has developed, particularly where habeas corpus is concerned. The statute that states the exhaustion doctrine, 28 U.S.C. §2254(b)-(c), is an illustration. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947)(explaining that "[t]his section is declaratory of existing law as affirmed by the Supreme Court"). What was formerly §2254(d) largely incorporated the standards this Court had previously developed for evidentiary hearings in *Townsend v. Sain*, 372 U.S. 293 (1963). *See La Vallee v. Delle Rose*, 410 U.S. 690 (1973). For evidence from legislative history that the current §2254(d)(1) codifies *Teague*, *see* pp.27-28, *infra*.

[21] This Court has recognized two exceptions to the general rule in *Teague* that "new rule" claims are unenforceable in federal habeas: (1) new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; and (2) rules "without which the likelihood of an accurate conviction is seriously diminished." *See Teague*, 489 U.S. at 311, 313.

The circuit court is simply wrong on the first point. Section 2254(d)(1) does *not* jettison the *Teague* exceptions.[22] While §2254(d)(1) does not mention the exceptions explicitly, other provisions of AEDPA *do*.[23] The point of those provisions is to allow access to federal court when a prisoner advances a claim that depends on a "new rule" that fits one of the *Teague* exceptions and is therefore retroactively applicable. Here again, the circuit court refused to construe §2254(d)(1) in light of the other provisions with which it was enacted. In this instance, the circuit court managed to generate a construction that, if accepted, would render those other provisions unintelligible.

The court below was correct that §2254(d)(1) does not mention "new rules." But it hardly follows that this new provision cannot codify the *analysis* in *Teague*. Under the

[22] If §2254(d)(1) *did* abolish the *Teague* exceptions, it would scarcely follow that this new provision cannot codify the baseline *Teague* rule from which those exceptions depart. It would only follow that Congress has decided that federal habeas relief should be barred in every case in which a previous state court adjudication of the merits reached a decision that was true to the law as it was when the state court acted, irrespective of the considerations that this Court has thought to warrant the enforcement of new rules retroactively. Of course, that policy would be subject to constitutional limitations.

[23] For example, §2244(b)(2)(A) (as amended) allows a prisoner to excuse a failure to raise a claim in a prior federal petition on the ground that the claim depends on a "new" rule that was "previously unavailable" but has been made "retroactive to cases on collateral review." *See* §2244(d)(1)(C) (as amended)(employing a similar test with respect to filing deadlines); §2254(e)(2)(A)(i) (as amended)(using the same test with respect to the development of facts in prior state proceedings); §2255 (as amended)(incorporating the same standard with respect to the filing deadlines for §2255 motions and also with respect to the acceptability of second or successive §2255 motions); §2264 (employing the same test with respect to the acceptability of claims that were not raised and decided on the merits in state court).

Teague doctrine, a state court is expected to have recognized a rule of federal law that was well established at the time the defendant's conviction became final. *Teague* does not contemplate that a state court judgment was correct merely because it was "reasonable." If, however, a state court reached a decision regarding a federal claim for which it was reasonable to rely on existing precedents, a federal habeas court coming to the claim later often can reach a different outcome only by creating a new rule of law. The *Teague* doctrine thus factors attention to a state court's reasonable understanding of extant precedent into the definition of what counts as a new rule. That is all that §2254(d)(1) says or means to say.

Likewise, the court below was correct that §2254(d)(1) addresses only cases in which a state court previously adjudicated the merits of a claim and does not deal explicitly with cases in which no such state court adjudication occurred.[24] The obvious illustration is a case in which the state court declined to consider a claim because the prisoner committed procedural default as a matter of state law.[25] If §2254(d)(1) fails to occupy the entire field in which *Teague* operates, however, it scarcely follows that this new statute must necessarily have an entirely different meaning and purpose, notwithstanding the many respects in which it plainly codifies *Teague*.

[24] The circuit court assumed that *Teague* will continue to bar federal habeas relief when a prisoner advances a "new rule" claim, even when the custodian fails to prove a qualifying prior state court adjudication on the merits that defeats habeas relief under §2254(d)(1). That question is not presented in this case.

[25] The universe of cases that the circuit court had in mind is extremely small. The claims that §2254(d)(1) does not reach (for want of a state court adjudication on the merits) are almost always precluded on procedural grounds. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

The circuit court hinted at (but did not squarely take) the position that Congress cannot possibly have codified *Teague* in some instances (*i.e.*, in cases in which a state court previously determined the merits), but not in others (*e.g.*, default cases). That does not follow at all. A federal statute can easily establish a policy in one class of cases, while judicially crafted doctrine advances the same policy in a different, but related, class of cases. Arrangements of that kind are common, particularly where Congress and this Court have labored together to forge and enforce a uniform policy across a range of cases implicating similar federalism concerns. Habeas corpus is the preeminent illustration of a body of federal law that draws on both statutes and judicial decisions in the service of similar themes.[26]

The reason that §2254(d)(1) governs only cases in which a state court adjudicated the merits is apparent: The point this new provision makes is that a federal habeas court should not ignore a state court judgment regarding a federal claim when the state court has labored to arrive at a correct decision. If, however, the state court made no attempt to

[26] Another example is the interplay between the Anti-Injunction Act, 28 U.S.C. §2283, and the *Younger* abstention doctrine. See *Younger v. Harris*, 401 U.S. 37 (1971). Since §2283 does not apply to a federal suit advancing a federal claim pursuant to 42 U.S.C. §1983, that statute does not bar a federal court from enjoining a pending state court suit in which the same federal claim is due to be determined. Nevertheless, the *Younger* doctrine does often bar such an injunction. This Court plainly has not thought that, in that context, the limited reach of a statute somehow affects the operation of similar judge-made doctrine in cases the statute does not itself control. Cases in which this Court has fashioned federal common law to complement federal statutory policy make the same point. *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 468-70 (1942)(Jackson, J., concurring)(explaining that statutes typically leave gaps that the courts must fill in to effectuate congressional policy).

adjudicate the merits (for whatever reason), there is no state court judgment on the claim for the federal court to acknowledge.[27]

2. Qualified Immunity

Not only did the circuit court fail to acknowledge the congruence between §2254(d)(1) and *Teague*, but it adopted a construction of the new statute that suggests a relationship between §2254(d)(1) and the quite different doctrine governing executive officers' immunity in actions for damages. No such relationship is tenable. Here again, the circuit court failed to work through the way §2254(d)(1) fits into the wider landscape.

It is true that this Court's decisions elaborating the qualified immunity doctrine also attach significance to departures from "clearly established" law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Yet, there the similarities end. This Court has never merged habeas corpus and qualified immunity, but rather has carefully kept them apart. Different considerations drive the two bodies of law. In habeas corpus, the Court has attended to "certain special

[27] The drafting sequence also helps to explain why §2254(d)(1) is limited to cases in which a state court previously adjudicated the merits. The two competing reform proposals to which §2254(d)(1) responded both hoped to prescribe the effect a federal habeas court should give to such a prior state court adjudication. *See* pp.24-25, *infra*. When the proponents of AEDPA fashioned §2254(d)(1) as a less drastic alternative to those proposals, they naturally started with a model contemplating a previous state court decision and worked from there. Importantly, there is no general provision on procedural default in AEDPA. *Cf.* 28 U.S.C. §2254(e)(2) (dealing only with default regarding factfinding in state court). Clearly, then, the proponents of §2254(d)(1) did not have default cases in view. That undoubtedly accounts for their failure to build any reference to default cases into §2254(d)(1).

concerns" touching the availability of collateral relief from state judgments and has fashioned the *Teague* doctrine to strike the proper balance. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). In the qualified immunity cases, the Court has addressed equally "special" (but different) "federal policy considerations" relating to civil suits for damages. *Id.*

The concern underlying qualified immunity doctrine is that executive officers may not perform their duties if they face the "specter of damages liability for judgment calls made in a legally uncertain environment." *Ryder v. United States*, 515 U.S. 177, 185 (1995). It is to deal with problems of that kind that the Court has created a "well-established, independent rule of law" that protects defendants from liability, unless they violated clearly established law. *Reynoldsville Casket*, 514 U.S. at 758.

In habeas corpus proceedings, by contrast, the state officers in question are judges who have the time, resources, and professional credentials to make reasoned judgments. State judges are not put on trial. Nor are they exposed to personal liability for their decisions. Indeed, they are not formally involved. The dispute with which the federal district court is concerned is between the petitioner and the custodian, who defends the prisoner's detention on the basis of what state judges have done and thus places their work under examination only indirectly.

These differences have important consequences when courts decide the level of generality at which a legal rule must be stated in order to rank as "clearly established." *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). There is no more basis for invoking qualified immunity doctrine to shield state judicial judgments in federal habeas corpus cases than there would be for invoking that doctrine to insulate

any other ordinary, though perhaps defective, judicial decision from later appraisal.[28]

A construction of §2254(d)(1) that relies upon an analogy to qualified immunity would also conflict with this Court's interpretation of 42 U.S.C. §1983 -- another statute with which this new provision governing habeas relief must be reconciled. This Court has labored long and hard to make habeas corpus and §1983 actions compatible. In *Heck v. Humphrey*, 512 U.S. 477 (1994), for example, the Court held that a §1983 suit for damages is unavailable to a prisoner whose claim goes to the validity of a criminal judgment -- unless the prisoner first undermines that judgment by some other means, typically a habeas corpus action.

Heck envisions that a prisoner will initially seek and obtain a favorable decision in habeas (in which case qualified immunity will play no role). Then (and only then), the prisoner will be entitled to sue the offending state executive officer for damages (in which case that officer *will* be entitled to defend on the basis of immunity). If §2254(d)(1) were construed to incorporate the qualified immunity standard into the prisoner's habeas action in the first instance, *Heck* would no longer make sense. An issue that *Heck* reserved for the subsequent §1983 suit would be jammed into the previous habeas proceeding -- making the §1983 suit's treatment of it superfluous.

A serious contextual interpretation of §2254(d)(1) thus renders a sensible result: This new statute codifies the habeas corpus analysis this Court has fashioned (the *Teague* doctrine) and preserves the distinction this Court has drawn between the analysis appropriate in habeas cases, on the one

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[28] *Cf. Ryder*, 515 U.S. at 185-88 (adopting precisely this reasoning in rejecting an argument that a judgment rendered by unqualified military judges might be sustained by analogy to the qualified immunity cases).

hand, and the analysis appropriate in suits for damages, on the other. In a habeas case, the new statute requires a federal habeas court to decide whether a state court decision on a federal claim conformed to the law as it was when the state court acted. This Court's precedents under the heading of the *Teague* doctrine will provide a ready source of guidance for making that inquiry. The federal habeas court will conduct a conventional appraisal of the contemporaneous precedents and determine whether they were distinguishable from the prisoner's case in a meaningful way.[29] In a §1983 case in which a plaintiff seeks damages from an executive officer, by contrast, immunity doctrine will continue to hold the officer liable only for objectively unreasonable behavior that an officer should have known was unlawful.

III. THE DRAFTING SEQUENCE THAT PRODUCED §2254(d)(1) FORTIFIES THE UNDERSTANDING THAT IT CODIFIES *TEAGUE*

The circuit court below apparently proceeded from the erroneous premise that Congress meant §2254(d)(1) to instruct federal courts to defer to state court determinations of mixed questions. In fact, the drafting process that generated this new statute fortifies the interpretation that flows naturally from its enacted text: Section 2254(d)(1) codifies, and was meant to codify, the *Teague* doctrine.

Section 2254(d)(1) embodies a compromise solution to a controversy that raged for years. As Justice O'Connor explained in *West*, Congress had often considered legislative bills that would have required federal habeas courts to defer to previous state court judgments. Both the Reagan and Bush Administrations proposed that the federal courts

[29] *See West*, 505 U.S. at 304 (O'Connor, J., concurring in the judgment).

should be barred from awarding habeas relief with respect to a claim that had been "fully and fairly adjudicated" previously in state court.[30] In an accompanying commentary, the Justice Department explained that a state adjudication would be "full and fair" in the sense of that bill if the state court's decision was "reasonable."[31]

Many Democrats (and some Republicans) opposed the "full and fair" program, because they thought it would circumscribe federal habeas. Some Democrats advanced alternative plans, which focused on the delays and procedural snarls in habeas litigation. Those bills not only failed to include the "full and fair" provision, but took aim at the *Teague* doctrine in an effort to make federal habeas relief more readily available.[32]

In the 104th Congress, which produced AEDPA, the Republican leadership hoped finally to muster the votes nec-

[30] *See, e.g.*, S.2216, 97th Cong., 2d Sess. (1982); H.R.2709, 101st Cong., 2d Sess. (1989).

[31] Specifically, the Department said that a state court adjudication would be full and fair if: "(i) the claim at issue was actually considered and decided on the merits in state proceedings; (ii) the factual determination of the state court, the disposition resulting from its application of the law to the facts, and its view of the applicable rule of federal law were reasonable; (iii) the adjudication was consistent with the procedural requirements of federal law; and (iv) there is no new evidence of substantial importance which could not reasonably have been produced at the time of the state adjudication and no subsequent change of law of substantial importance has occurred." The Habeas Corpus Reform Act" of 1982: Hearings on S.2216 Before the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess., at 98 (1982).

[32] *E.g.*, H.R.5269, 101st Cong., 2d Sess. §1305 (1990)(defining a "new rule" as a "sharp break from precedent"). *See* H.R. Rep. No. 681, 101st Cong., 2d Sess, pt.1, at 126 (1990)(explaining that the "sharp break" definition was meant to disclaim this Court's more fluid definitions).

essary to enact reform legislation. There was substantial support for procedural measures to expedite habeas cases. But members who wished to establish a deferential standard of review still could not command a majority in the Senate. The leadership therefore discarded proposals of that nature and advanced a bill that would codify *Teague*, thus preserving a doctrine that most Republicans regarded as salutary.

The original "Contract with America" bill in the House contained only procedural measures and thus plainly relied on *Teague* to limit the occasions on which federal courts might award habeas relief.[33] During the debate on that bill, Representative Cox introduced an amendment that would have restricted the federal courts' authority to award habeas relief in much the manner of the "full and fair" proposal (as that proposal had been explained by the Justice Department in 1982):

> 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 decided on the merits in State proceedings unless the adjudication of the claim -- (1) resulted in a decision that was based on an arbitrary or unreasonable interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; (2) resulted in a decision that was based on an arbitrary or unreasonable application *to the facts* of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; or (3) resulted in a decision that was based on an arbitrary or unreasonable determination of the facts in light of the evidence presented in the State proceeding.[34]

[33] H.R.3, 104th Cong., 1st Sess. (1994).

The House adopted the Cox amendment,[35] but the bill of which it was a part went no further.

The original bill in the Senate included the familiar "full and fair" provision.[36] But in light of the strong opposition to that idea, the floor manager, Senator Hatch, negotiated a compromise with Senator Specter, which substituted what is now §2254(d)(1) for the "full and fair" provision and, effectively, for the Cox amendment recently approved in the House.[37] The departures that the Hatch/Specter compromise made from those unsuccessful proposals became the basis for obtaining the support needed to pass general reform legislation. Those departures plainly made habeas relief more accessible than would have been the case under either the "full and fair" plan or the Cox amendment.[38] The means to that end was the codification of *Teague*.

Neither the Senate nor the House produced a committee report explaining §2254(d)(1). The conference report did use the term "deference" in its summary: "[The Act] requires deference to the determinations of state courts that

[34] 141 Cong.Rec. H1424 (Feb. 8, 1995)(emphasis added).

[35] *Id.* at H1427.

[36] S.3, 104th Cong., 1st Sess. (1994).

[37] S.623, 104th Cong., 1st Sess. (1995). Senator Hatch explained the compromise on the floor. 141 Cong.Rec. S7597 (May 26, 1995).

[38] The compromise was incorporated into the Senate anti-terrorism bill, which won initial passage in 1995, S.735, 104th Cong., 1st Sess. (1995); 141 Cong.Rec. S7857 (June 7, 1995), and later was enacted as part of AEDPA.

are neither 'contrary to,' nor an 'unreasonable application of,' clearly established law."[39] Similarly, Senator Hatch explained on the floor that §2254(d)(1) would require federal courts to "defer" to state courts, "*if* they . . . properly applied Federal law."[40] Read in context, those references to "deference" contemplated that federal courts would decide for themselves whether state courts have "properly" applied the federal law that existed at the time they acted and, if so, would *then* acknowledge the state courts' work and would withhold federal habeas corpus relief.

At one point, Senator Kyl offered an amendment that would have provided that "an application" for the writ "shall not be entertained," unless state court opportunities are "inadequate or ineffective to test the legality of the person's detention."[41] Senator Hatch opposed that proposal because it would restrict federal jurisdiction to determine the merits of claims.[42] Hatch reiterated: "I believe there needs to be postconviction habeas corpus review."[43] The Kyl amendment was defeated by an overwhelming margin.[44]

[39] House Conf. Rep. No. 518, 104th Cong., 2d Sess. 111, *reprinted in* 1996 U.S. Code & Admin. News 944.

[40] 142 Cong.Rec. S3447 (April 17, 1996)(emphasis added). Senator Specter explained §2254(d)(1) in much the same way: "*Unless it is unreasonable*, a State court's decision applying the law to the facts will be upheld." According to Senator Specter, §2254(d)(1) would leave federal courts with "sufficient discretion to ensure that convictions in State court have been obtained in conformity with the Constitution." *Id.* at S3472 (emphasis added).

[41] 141 Cong.Rec. S7829 (June 7, 1995)(emphasis added).

[42] *Id.* at S7835.

[43] *Id.* at S7836.

[44] *Id.* at S7828-35, S7849.

A. Endorsement Of *Teague*

Senator Hatch explained in committee that he and Senator Specter had departed from prior Republican initiatives. But he was adamant in his refusal to accept Democrats' proposals to open federal habeas more widely to "new rule" claims. In that vein, he declared explicitly that the compromise bill did "not retreat from the principles established by *Teague v. Lane* . . . ."[45] Later in those proceedings, Senator Thurmond ensured that everyone knew what was intended by §2254(d)(1). He asked the witnesses in no uncertain terms whether the bill would "codify the *Teague* doctrine."[46] In answer to that question, four state attorneys general (all proponents of the bill) responded that it would do precisely that.[47]

Still later, former Attorney General Katzenbach (who opposed the bill) asked why, if the idea was to codify *Teague*, §2254(d)(1) did not simply "restate" the *Teague* decision verbatim. Picking up on that, Senator Biden invited Mr. Katzenbach to say that §2254(d)(1) would actually jettison *Teague* and enact the "full and fair" proposal, after all. To that, however, Mr. Katzenbach answered that if *Teague*

[45] Hearing on S.623 Before the Committee on the Judiciary, United States Senate, 104th Cong., 1st Sess., at 3 (1995).

[46] *Id.* at 71.

[47] Mr. Lungren of California: "I am satisfied . . . that it does." *Id.* Mr. Morales of Texas: "[W]e . . . have a position that is not dissimilar from that of General Lungren . . . ." *Id.* Ms. Norton of Colorado: "[I]t appears that the current State [sic] legislation does embody the gains that States have made in the U.S. Supreme Court, so I am satisfied." *Id.* Mr. Stenberg of Nebraska: "I think the point perhaps that you are making, Senator, is that in reforming habeas we should preserve those things that the U.S. Supreme Court has done to benefit this review process . . . and I think this bill appropriately does that as far as *Teague* is concerned." *Id.*

was to be abandoned, it would not be "accomplished by words" -- namely, the words of §2254(d)(1).[48]

B. The "Contrary To" Formulation

During the floor debates, Senator Biden protested that §2254(d)(1) would be satisfied if a state court behaved "reasonably -- not correctly, reasonably."[49] Senator Hatch rejected that characterization:

> I notice [that Senator Biden's] . . . poster says that Specter-Hatch requires Federal courts to defer to State courts in almost all cases, even if the State is wrong about the U.S. Constitution. *That is absolutely false.* [The standard now in §2254(d)(1)] is a wholly appropriate standard. It enables the Federal court to overturn State court positions that clearly contravene Federal law. *Indeed, this standard essentially gives the Federal court authority to review de novo whether the State court decided the claim in contravention of Federal law* . . . What does this mean? It means that if the State court reasonably applied Federal law, its decision must be upheld. Why is that a problematic standard? After all, Federal habeas review exists to correct fundamental defects in the law. If the State court has reasonably applied Federal law it is hard to say that a fundamental defect exists.[50]

[48] *Id.* at 102.

[49] 141 Cong.Rec. S7843 (June 7, 1995).

[50] *Id.* at S7846-48 (emphasis added). The floor manager in the House, Representative Hyde, defended the compromise bill in much the same way. Responding to the dire predictions of some Democrats, Rep. Hyde (continued...)

C. The "Unreasonable Application" Formulation

The link between the "contrary to" and the "unreasonable application" formulations was also quite clear. There were two principal differences between the Cox amendment in the House and §2254(d)(1), which ultimately passed in both bodies. First, the Cox amendment put state court decisions based on incorrect interpretations of law and state court decisions based on unreasonable applications of law in different categories, indicating that they were conceived to advance different ideas. In §2254(d)(1), by contrast, the "contrary to" and "unreasonable application" formulations appear together. To treat them as separate, the circuit court must impose the structure of the failed Cox amendment on the quite different structure of the statute that Congress actually enacted.

Second, the unsuccessful Cox amendment in the House referred to a state court's "unreasonable application" of clearly established law "to the facts." Section 2254(d)(1) dropped the phrase "to the facts." To read the "unreasonable application" formulation in §2254(d)(1) to refer to state court determinations of mixed questions, the circuit court must resuscitate language that failed to win approval in Congress.

[50] (...continued)
said that, under §2254(d)(1), "the Federal judge always reviews the State court decision to see if it is in conformity with established Supreme Court precedence [sic], or if it [sic] has been misapplied." 142 Cong. Rec. H3602 (April 18, 1996). President Clinton placed the same interpretation on §2254(d)(1) when he signed AEDPA into law. Statement of the President, 1996 U.S. Code & Admin. News 961-1, at 961-3 (disclaiming the notion that §2254(d)(1) would prevent federal courts from bringing "their own independent judgment to bear on questions of law and mixed questions of law and fact").

CONCLUSION

For the reasons stated above, this Court should reject the view that §2254(d)(1) establishes a general rule of deference to state court determinations of mixed questions of law and fact, and thus should reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted.

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