05-15275

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL MERTON IRONS, II,

Petitioner-Appellee,

v.

TOM L. CAREY, Warden,

Respondent-Appellant.

On Appeal from the United States District Court
for the Eastern District of California
No. CV-04-00220-LKK
The Honorable Lawrence K. Karlton, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

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INTRODUCTION

By Order dated May 18, 2005, Judges Reinhardt and Noonan directed the parties to submit supplemental briefs "discuss[ing] the constitutionality of the standards that Congress has set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), 28 U.S.C. § 2254(d)(1)." More specifically, the parties were instructed to "discuss in light of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), whether AEDPA unconstitutionally prescribes the sources of law that the Judicial

Branch must use in exercising its jurisdiction or unconstitutionally prescribes the substantive rules of decision by which the federal courts must decide constitutional questions that arise in state habeas cases" and "whether, under the separation of powers doctrine or for any other reason involving the constitutionality of 28 U.S.C. § 2254(d)(1), this court should decline to apply the AEDPA in this case."

As we shall explain, § 2254(d)(1) is not unconstitutional in any respect.

DISCUSSION

1. "It is well-established that acts of Congress enjoy a strong presumption of constitutionality and that newly-passed statutes do not require judicial ratification in order to take effect. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994)." *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000). The presumption is unrebutted here.

2. Adherence to AEDPA generally, and to 28 U.S.C. § 2254(d)(1) in particular, is the established law of this Circuit. *E.g., Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) ("This Court . . . has held that, because of the 1996 AEDPA amendments, it can no longer reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on a federal constitutional issue. . . . Rather, the writ will issue only when the state court

decision is 'contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.'"). Moreover, this Court has explicitly held that § 2254(d)(1) does not violate Article III. *Id.* at 601.

"It is well established in this and other federal courts of appeals that three-judge panels are bound by the holdings of earlier three-judge panels." *See United States v. Camper,* 66 F.3d 229, 232 (9th Cir. 1995); *see also, e.g., Indus. Turnaround Corp. v. NLRB,* 115 F.3d 248, 254 (4th Cir. 1997) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court.") (internal quotation marks omitted). Therefore, this Court is wholly without authority to "decline to apply the AEDPA in this case." Rather, the Court's review must proceed faithfully in accordance with AEDPA, regardless of any doubts some members of this panel might seek to raise about its constitutionality. *Accord, Corwin v. Johnson*, 150 F.3d 467, 471-472 (5th Cir. 1998) ("Corwin's appeal must be reviewed in accordance with this Circuit's interpretation of the AEDPA, as established in *Drinkard* [*v. Johnson*, 97 F.3d 751, 767-768 (5th Cir. 1996)]") (applying, without

considering the constitutionality of, § 2254(d)(1)).[1/]

3. Any suggestion that § 2254(d)(1) improperly impinges on the federal judiciary's authority under Article III to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177, has also been refuted—implicitly, yet unmistakably—by the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000), in which the Court roundly rejected a narrow construction of AEDPA proposed by a four-member minority to satisfy their misgivings that the statute, unless so construed, might impinge on a court's Article III prerogatives.

The four-member minority in *Williams* argued that § 2254(d)(1) does not require federal courts to "defer to state judges' interpretations of federal law," for construing the statute otherwise, they suggested, "would be inconsistent with the

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1. *Drinkard*'s construction of § 2254(d)(1) was ultimately overruled in part in *Lindh v. Murphy*, 521 U.S. 320 (1997), but not on any grounds casting doubt on the propriety of *Corwin*'s characterization of that decision as binding law of the circuit. In any event, *Duhaime*'s construction of § 2254(d)(1), as well as its holding rejecting the Article III attack, remains wholly undisturbed (and thus clearly binding) to this day. Moreover, unlike the Fifth Circuit's treatment of *Drinkard* in *Corwin*, this Court's decision in *Duhaime* explicitly rejected Duhaime's Article III challenge (*see* 200 F.3d at 601 n.5) and explained, in equally explicit terms, the precedential import of earlier cases from the circuit that informed that holding: "Although our cases do not address in detail the exact arguments posed by Duhaime, they implicitly reject the argument that § 2254's rule directing us to look to Supreme Court law when deciding habeas petitions is unconstitutional under . . . Article III . . . ." *Duhaime v. Ducharme*, 200 F.3d at 601 (citing *Moore v. Calderon*, 108 F.3d 261 (9th Cir. 1997); *Furman v. Wood*, 190 F.3d 1002 (9th Cir.1999)).

practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution." 529 U.S. at 377-78 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.). "When federal judges exercise their federal-question jurisdiction under the 'judicial Power' of Article III of the Constitution," the four Justices noted, "it is 'emphatically the province and duty' of those judges to 'say what the law is.' At the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the courts of the several states—to interpret federal law." *Id.* at 37-379. "We are convinced," the four Justices concluded, "that in the phrase 'clearly established law,' Congress did not intend to modify that independent obligation." *Id.* at 384. On the basis of that understanding, the four Justices opined that a decision of a state court on a question of federal law that was "simply 'erroneous' or wrong" would qualify as an "unreasonable" one, and thus remain subject to remediation on federal habeas corpus, even after the enactment of AEDPA. *Id.* at 389.

As the majority in *Williams* aptly noted, however, this construction of AEDPA would "give[] the 1996 amendment no effect whatsoever." *Id.* at 403 (O'Connor, J., joined by Rehnquist, C.J., Scalia, Kennedy, and Thomas, JJ.) Accordingly, the majority emphatically rejected the notion that § 2254(d)(1) "does not alter the

previously settled rule of independent review." *Id.* at 403; *see also Lindh v. Murphy*, 521 U.S. at 333, n.7 (1997) (noting that §2254(d) establishes a "new, highly deferential standard for evaluating state-court rulings"). Rather, the High Court has determined, § 2254(d)(1) "places a new *constraint on the power* of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." 529 U.S. at 412 (emphasis added). More specifically, "§ 2254(d)(1)'s language . . . makes clear . . . that an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law," and federal interference with a state's criminal judgment is warranted only upon a determination that a state court had committed the former. *Id.* (emphasis in original). In addition, the majority held, "the statutory language makes clear . . . that § 2254(d)(1) *restricts the source* of clearly established law to this Court's jurisprudence." *Id.* (emphasis added). By these authoritative pronouncements, made in the face of the minority's expression of misgivings, the Court effectively put to rest any suspicion that its adopted construction of § 2254(d)(1) unconstitutionally interferes with federal judges' "duties under Article III of the Constitution."

4. But even if the constitutionality of § 2254(d)(1) were an open question, it must surely be resolved in the statute's favor.

a. Federal courts, of course, lack any "inherent power" to award writs of habeas corpus, as that power exists only to the extent it is "given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807). And the Supreme Court has "likewise recognized that judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)); *see Brown v. Allen*, 344 U.S. 443, 499 (1953) ("Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the States courts.") (Frankfurter, J.).[2/] Indeed, were it ever so

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2. This follows from the general proposition that "[t]here is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); see *Schlup v. Delo*, 513 U.S. 298, 319 (1995) ("[H]abeas corpus is, at its core, an equitable remedy."). As *Lockerty* explains:

> All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. . . . . The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of

inclined, Congress could altogether divest lower federal courts of jurisdiction to entertain habeas petitions from state prisoners,[3] just as it has divested federal courts of jurisdiction in other contexts. *E.g.*, 29 U.S.C. § 101 (Norris-LaGuardia Act limitation on injunctions relating to labor disputes)[4]; *see also* 28 U.S.C. §1341 (Tax Injunction Act); 28 U.S.C. § 1342 (Johnson Act). To be sure,

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> withholding jurisdiction from them *in the exact degrees and character which to Congress may seem proper for the public good.*"

319 U.S. at 187 (citations omitted; emphasis added).

3. The power of federal courts to issue the writ on behalf of state prisoners did not exist until Congress created it in 1867. Act of Feb. 5, 1867, c. 28, § 1, 14 Stat. 385. The wisdom of *that* "modification in the law [wa]s for Congress to consider," *Brown*, 344 U.S. at 500 (Frankfurter, J.). So too with any decision to repeal or procedurally curtail that grant of authority.

4. 29 U.S.C. § 101 provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

In *Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo P. & W.R. Co.*, 321 U.S. 50 (1944), the Court observed that this provision affected "merely . . . one form of remedy which the Congress, exercising its plenary control over the jurisdiction of the federal courts, has seen fit to withhold. With the wisdom of that action we have no concern. It is enough, for its enforcement, that it is written plain and does not transcend the limits of legislative power. Cf. Lauf v. Shinner & Co., 303 U.S. 323 [(1938)]." 321 U.S. at 63-64 (footnote omitted).

Congress chose not to go that far with § 2254(d); instead, it achieved the less drastic aim of merely limiting the circumstances and conditions under which federal courts can confer the habeas remedy. Reform of this general and far more modest design, of course, is also constitutionally valid. *See, e.g.*, 28 U.S.C. § 2283 (Anti-Injunction Act).[5/] In short, "just as Congress may restrict the jurisdiction of inferior Article III courts, so it may prescribe limits on the granting of the extraordinary relief provided by the writ of habeas corpus." *Lindh v. Murphy*, 96 F.3d 856, 869 (7th 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

Judge Easterbrook's en banc decision for the Seventh Circuit in *Lindh* eloquently explains why there is no merit to the argument that "§ 2254(d)(1) is unconstitutional to the extent it requires anything less than plenary review [by Article III judges] of all contentions based on federal law." 96 F. 3d at 871.

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5. 28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

In *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939), the Court described a predecessor version of this measure as "a mere limitation upon the general equity powers of the United States courts and may be varied by Congress to meet the requirements of federal litigation." *Id.* at 74 (footnote omitted).

Acceptance of such a proposition would have ramifications well beyond the habeas context: "It would mean that deference in administrative law under *Chevron* [*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] is unconstitutional; that the respect accorded to Congress when it speaks on constitutional questions . . . must be abandoned; and that the Full Faith and Credit Clause (Art. IV, § 1) conflicts with Article III." 96 F. 3d at 871 (citations omitted). Judge Easterbrook further outlined the multitude of respects in which "[t]his position would demolish numerous doctrines in the law of collateral attack that no one (until now) has supposed pose constitutional difficulties":

> Consider *Stone v. Powell,* 428 U.S. 465, 482, 96 S.Ct. 3037, 3046, 49 L.Ed.2d 1067 (1976), which holds that when a "State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at the trial." *Stone* contemplates—indeed it requires—that a federal court refrain from issuing a writ under § 2254 even though the court is convinced that the state judges erred on the law, and even though the error altered the outcome of the case. On several occasions the Supreme Court has treated *Stone* as a doctrine that on grounds of prudence could be extended to other subjects (although the Court has not so extended it). See *Reed v. Farley,* 512 U.S. 339, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) (claims under the Interstate Agreement on Detainers); *Withrow v. Williams,* 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (claims based on *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). If the Court could adopt *Stone* and consider extending its scope, creating a gap between the "merits" and the obligation to issue a writ, then Congress may do the same by amending § 2254.

> *Teague* [*v. Lane*, 489 U.S. 288 (1989)] likewise establishes a disjunction between the meaning of the Constitution and the use of habeas corpus. If a state judgment becomes final in 1992, and the Supreme Court articulates a new rule of constitutional law in 1993, then a petition for collateral review in 1994 will fail—not because the state court was "right" on the merits, but because some errors of constitutional law do not support collateral relief. Section 2254(d)(1) codifies and extends the principle of *Teague,* and if *Teague* is consistent with Article III, then so is § 2254(d)(1) as we have construed it.

96 F.3d at 871-72. "Regulating relief," the Seventh Circuit explained, "is a far cry from limiting the interpretive power of the courts, . . . and Congress has ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed." In amplification of that distinction, the court observed:

> This distinction between rights and remedies is fundamental. Every day, courts decline to disturb judgments that they *know* are wrong. This is the principal function of the law of judgments. Suppose *A* and *B* are plaintiffs in the same lawsuit, which they lose; *A* appeals and wins, while *B* does not appeal. It has now been established that the judgment against *B* is wrong. May *B* file a new suit to obtain the benefit of *A*'s victory? The answer is "no." *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The Full Faith and Credit Clause is designed to make this result a matter of constitutional entitlement. And although today we think of claim preclusion (res judicata) as a specialty of civil law, it is only in this century that courts have treated civil and criminal judgments differently. . . . See also *Felker,* 518 U.S. at ----, 116 S.Ct. at 2340; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv.L.Rev. 441, 465-99 (1963) (tracing the history).
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> In suits under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), courts frequently rule for the defendant even though the plaintiff may be right on the merits. Public employees receive the benefit of the doubt on legal

> questions and must pay damages only when the legal right has been sufficiently well established and particularized that a reasonable official would have understood that what he is doing violates that right. See *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Auriemma v. Rice,* 910 F.2d 1449 (7th Cir. 1990) (en banc). Section 2254(d)(1) creates a related approach and is no less consistent with Article III. Even in criminal cases, courts sometimes enforce decisions they would not have made in the first instance. *Stone, Teague, Leon* [*United States v. Leon*, 468 U.S. 897 (1984)], *Nix* [*Nix v. Williams*, 467 U.S. 431 (1984)], and the harmless-error cases, e.g., *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), are among many illustrations of the gap between having a good legal argument and winning release from custody. *X* and *Y* are indicted for a joint crime. *X* pleads guilty; *Y* pleads double jeopardy and wins, whereupon *X* claims that his sentence is illegal and asks for relief. *United States v. Broce,* 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), holds that *X* must serve his sentence, because the plea of guilty waives even arguments that in retrospect are known to be correct.

96 F.3d at 872-73 (emphasis in original).

Nor does the "sources of law" limitation imposed by § 2254(d)(1) create any constitutional problem:

> Section 2254(d)(1)'s requirement that judges apply "Federal law, as determined by the Supreme Court of the United States," rather than their own understanding of the law, is consistent with the hierarchical nature of the federal judiciary. Judges of the inferior courts must implement the views of their superiors, from which it follows that many decisions of the lower courts will be inconsistent with the conclusions their judges would have reached, if unfettered by precedent. Applying, even predicting, the work of other judges, rather than reaching independent conclusions, makes up the bulk of the work of a federal judge—not only when interpreting the decisions of the Supreme Court, but also when deciding cases under the diversity jurisdiction, see *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and when coping with federal law that is not uniform geographically, see *Eckstein v. Balcor Film*

> *Investors,* 8 F.3d 1121, 1126-27 (7th Cir. 1993); *Olcott v. Delaware Flood Co.,* 76 F.3d 1538, 1544-48 (10th Cir. 1996). See also *Lehman Brothers v. Schein,* 416 U.S. 386, 390-91, 94 S.Ct. 1741, 1743-44, 40 L.Ed.2d 215 (1974); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 17A *Federal Practice and Procedure* § 4248 (2d ed. 1988), discussing a circumstance under which a state court's decision is directly binding in federal litigation: the certification of a question of law to a state court. Article III does not establish a system under which judges of the inferior federal courts always must render judgment without regard to the conclusions of other courts.

96 F.3d at 873.

The history of habeas corpus, the court went on to explain, fully supports its understanding of AEDPA's constitutional validity:

> Shortly before *Brown v. Allen* changed the rules, Learned Hand could write with confidence that
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> > upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights.
>
> *Schechtman v. Foster,* 172 F.2d 339, 341 (2d Cir. 1949). This expression of the longstanding distinction between unlawful *custody,* which supported a writ of habeas corpus, and unlawful *procedure* in the course of a trial, which did not, reflected the law of the United States until 1953.

96 F.3d at 873 (emphasis in original). "We would have to cast history to the winds to say that [§2254(d)(1)], which respects fully-litigated judgments unless

the state court has gone seriously wrong, transgresses constitutional limitations." 96 F.3d at 873-74.

b. Nothing said in *City of Boerne v. Flores*, 521 U.S. 507 (1997) casts any doubt on the constitutionality of § 2254(d)(1). Indeed, if *City of Boerne* has any bearing on the subject of this Court's inquiry, it would suggest only that the reforms effected by AEDPA might actually be *essential* to the constitutional viability of the federal habeas corpus scheme more generally.

City of Boerne concerned the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq*. By enacting RFRA, Congress sought to (1) abrogate the United States Supreme Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which "held that neutral, generally applicable laws may be applied to religious practices even when not supported by compelling governmental interest," *City of Boerne*, 521 U.S. at 514, and thus (2) "provide a claim or defense to persons whose religious exercise is substantially burdened by government," 42 U.S.C. § 2000bb(b). "[I]n enacting the most far-reaching and substantial of RFRA's provisions, *those which impose its requirements on the States*," 521 U.S. at 516 (emphasis added), Congress relied on its power conferred by section 5 of the Fourteenth Amendment to enforce constitutional guarantees

"'by appropriate legislation.'" *Id.* at 517 (quoting Amend. XIV, § 5). But section 5 enforcement power, it has long been recognized, is "remedial" rather than substantive or definitional, 521 U.S. at 519 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)), and the Supreme Court in *City of Boerne* made it clear that for legislation enacted under that provision to be valid, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. RFRA, the Court held, could not meet that standard:

> . . . RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood or responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. . . . . Remedial legislation under § 5 "should be adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against." . . . .
>
> RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.

Id. at 532 (citations omitted); *see also id.* at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes

a constitutional violation.").[6]

At bottom, the Court deemed RFRA to be "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534. As the Court explained: "The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith.*" *Id.* Because RFRA lacked "congruence and proportionality" and because it sought to define the substantive contours of constitutional protections, rather than merely achieve their enforcement, it "contradict[ed] vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536.

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6. The Court in *City of Boerne* acknowledged that "[t]here is language in . . . *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1996), which could be interpreted as acknowledging a power in Congress to enact legislation that *expands* the rights contained in § 1 of the Fourteenth Amendment." 521 U.S. at 527-528 (emphasis added). But the Court rejected this as neither a necessary, nor the best, reading of *Morgan.* And nothing, of course, suggests that when Congress does choose to exercise its section 5 enforcement powers it is required to do so to the maximum extent permitted, or that Congress, having initially chosen to exercise that power in a relatively sweeping way, cannot thereafter adopt a less sweeping enforcement scheme or eliminate it altogether.

AEDPA, by contrast, attempts no substantive redefinition of any constitutional provision.[7] Rather, it merely circumscribes the conditions under which the federal habeas remedy will be made available; that is, it limits "the scope of the writ"—precisely the type of judgment that is "normally for Congress to make." To the extent warranted, federal courts retain full authority under AEDPA to interpret the Constitution. *E.g., Weeks v. Angelone*, 528 U.S. 225, 237

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7. It certainly reflects no effort on Congress's part to "expand" any rights contained in the Fourteenth Amendment, and thereby occasion a corresponding "intrusion into the States' traditional prerogatives," as had occurred with the enactment of RFRA. Quite to the contrary, AEDPA's reforms impose *limitations* on the availability of statutory habeas relief, thereby striking a balance more respectful of comity, federalism, and state sovereignty. *See Duckworth v. Egan*, 494 U.S. 195, 210 (1989) (O'Connor, J., concurring) (describing pre-AEDPA habeas corpus as "'intrud[ing] on state sovereignty to a degree matched by few exercises of federal judicial authority'"). Thus, the enactment of AEDPA raises no concern that Congress "exceeded" its enforcement powers, as it had done when enacting RFRA. Indeed, we question whether Congress enacted AEDPA pursuant to its section 5 enforcement power at all. Whether Congress acted pursuant to section 5 when enacting previous versions of the federal habeas corpus scheme is also unclear. *Compare Richardson v. Miller*, 716 F.Supp. 1246 (W.D. Mo. 1989) ("The Habeas Corpus Act of 1867 was enacted by the Congress pursuant to the power vested in it by Section 5 of the Fourteenth Amendment.") *with* 14 Stat. 385 (showing that the Habeas Corpus Act of 1867 was enacted more than one year *before* ratification of the Fourteenth Amendment on July 21, 1868). In all events, in light of the reference in the May 18 briefing order to *City of Boerne*, a case interpreting the scope of Congress's authority under section 5, we shall assume for present purposes that federal habeas review of state judgments, both before and after AEDPA, is conducted under a Fourteenth Amendment enforcement scheme enacted pursuant to section 5. The scope of such an enforcement scheme would be for Congress to devise, revise, or repeal as it sees fit. *See* discussion *ante*, note 6.

(2000). But even before AEDPA, entitlement to habeas relief did not turn singularly on the "meaning" of the Constitution. *See, e.g., Stone, Teague, Brecht.* Nor does it now. Instead, for purposes of conferring federal relief, "the only question that matters" is whether the state court's previous denial of relief was "contrary to, or involved an unreasonable application of, clearly established federal law." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). This no more violates Article III than do any number of other rules and standards that foreclose relief notwithstanding a federal court's belief that a violation of federal constitutional law has occurred. *See generally Lindh*, 96 F.3d at 871-73 and authorities cited therein; *see also* Fed. R. Crim. Proc. 52(a); *United States v. Camper,* 66 F.3d at 229 (three-judge panels bound by holdings of earlier three-judge panels.).

To be sure, "§ 2254(d)(1) *restricts the source* of clearly established law to" Supreme Court cases. *Williams*, 529 U.S. at 412 (emphasis added). That Congress should impose this limitation is not surprising. If habeas corpus review of state convictions exists to ensure that "trial and appellate courts throughout the land . . . conduct their proceedings in a manner consistent with established constitutional standards," *Teague*, 489 U.S. at 306, it would be well to remember that the only constitutional teachings binding on state courts are those pronounced by *the Supreme Court of the United States. See Arizonans for Official English v.*

Arizona, 520 U.S. 43, 58 (1997); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970); *People v. Bradley*, 1 Cal.3d 80, 86 (1969) ("[A]lthough we are bound by decisions of the United States Supreme Court interpreting the federal Constitution . . . , we are not bound by the decisions of the lower federal courts even on federal questions" (citations omitted).); *cf. ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *see generally Sawyer v. Smith*, 497 U.S. 227, 241 (1990) ("State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution."). Were Congress to authorize federal courts to release a state prisoner on account of a state court's earlier "failure" to adhere to a lower federal court's *non-binding* construction of federal law, the habeas scheme would lack "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. Put differently, *without* AEDPA, the substantial costs exacted by the habeas scheme, "both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional . . . power" to prosecute and punish criminals, would "far exceed any pattern and practice of unconstitutional conduct" by the state judiciaries (at least as those institutions exist in 2005); in short, such

an unrestricted scheme would be "so out of proportion to any supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 520, 532, 534. Properly understood, § 2254(d)(1) is not only plainly constitutional, but quite possibly *essential* to maintaining the appropriate balance between state and federal sovereigns.

CONCLUSION

Section 2254(d)(1) is not unconstitutional.

Dated: June 20, 2005

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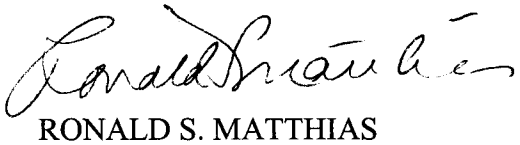

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05-15275

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL MERTON IRONS, II,

Petitioner-Appellee,

v.

TOM L. CAREY, Warden,

Respondent-Appellant.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: June 20, 2005

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CERTIFICATE OF COMPLIANCE
For Case Number 05-15275

Certificate of Compliance With Volume Limitation,
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1. This supplemental brief is 20 pages in length, and thus complies with the 25-page limitation prescribed by order of the Court dated May 18, 2005.

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