No. 12-794

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY WHITE, Warden,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

JUSTIN F. MARCEAU
Counsel of Record
University of Denver
Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80210
(303) 871-6449
jmarceau@law.du.edu

LEE KOVARSKY
University of Maryland
Francis King Carey
School of Law
500 W. Baltimore St.
Baltimore, MD 21201
(434) 466-8257

Counsel for Amicus Curiae
[Additional Counsel Listed On Inside Cover]

BARBARA BERGMAN
Co-Chair, NACDL Amicus Committee
University of New Mexico School of Law
Albuquerque, NM 87131
(502) 277-4700

QUESTIONS PRESENTED

I. Whether the Sixth Circuit violated 28 U.S.C. § 2254(d)(1) by granting habeas relief on the trial court's failure to provide a no adverse inference instruction even though this Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances.

II. Whether the Sixth Circuit violated the harmless error standard in *Brecht* v. *Abrahamson,* 57 U.S. 619 (1993), in ruling that the absence of a no adverse inference instruction was not harmless in spite of a guilty plea to the crimes and aggravators.

This brief *amicus curiae* addresses Question 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

No. 12-794

RANDY WHITE, Warden,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") regularly participates in litigation regarding the fair administration of capital punishment.[1] The *NACDL* has prepared this brief in order to specifically respond to some of the contentions contained in *amicus* briefs in support of the Petitioner, Warden Randy White.

[1.] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than *amicus*, their members, or their counsel made such a contribution. All parties consented to the filing of this brief. Letters granting consent have been filed with the Clerk.

The NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, the NACDL's approximately 10,000 direct members in 28 countries – and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys – including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges are committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes the NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

The NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the proper construction of the habeas corpus statutes and common law. In furtherance of this and its other objectives, the NACDL files approximately 50 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

SUMMARY OF ARGUMENT

Under 28 § U.S.C. 2254(d)(1), a federal court may review a *claim* on the merits if the state *decision* "involves an unreasonable application of * * * clearly established Federal law, as determined by the Supreme Court of the United States[.]" Although the

Question Presented for certiorari review is limited to the meaning of the phrase "clearly established federal law," the Warden and aligned *Amici*[2] are asking that the Court venture beyond the issues fairly subsumed by the certiorari grant and effectively overrule the definitive interpretation of the "unreasonable-application" clause, *Williams* v. *Taylor*, 529 U.S. 362, 407-14 (2000). This Brief addresses two features of the inquiry with which the Warden and aligned Amici would replace *Williams.*

First, the Warden and aligned *Amici* want to slice the unreasonable-application clause in half. *Williams* interpreted the unreasonable-application clause symmetrically, holding that a state court might apply law unreasonably either because it applies a principle too broadly or because it applies a principle too narrowly. *See Williams*, 529 U.S. at 408. The briefs of the Warden and, in particular, the Criminal Legal Justice Foundation ("CJLF") urge this Court to interpret the unreasonable-application clause asymmetrically, such that it would not cover unreasonably narrow applications of legal principles. The Court should preserve the clause's symmetric operation, which reflects statutory text, logic, and precedent.

Second, even in situations where the unreasonable-application clause controls the inquiry, the Warden and aligned *Amicus* propose new ideas about how federal courts should perform it. In their view, a federal court should not ask whether the *actual*

[2.] Three *amicus* briefs have been filed in support of the Warden: the Criminal Justice Legal Foundation ("CJLF"); the State of Texas; and the State of Arizona and Thirteen Other States.

reasoning in the state opinion is a reasonable application of law; it should instead ask whether *any hypothetical reasoning could be* a reasonable application of law. TX Br. at 4. The Warden and aligned *Amicus* also opine that a state decision applies law reasonably as long as a single "fair-minded" jurist might agree with that application. Pet. Br. at 43. Both features of this type of unreasonable-application inquiry represent substantial departures from *Williams* and from newer, more granular precedent.

ARGUMENT

Title 28 U.S.C. § 2254(d) limits the federal post-conviction relief available to state inmates. If a state decision is on the merits, then section 2254(d) permits substantive review of the claim only if the inmate can satisfy one of the two subsections. Subsection (1) is the provision at issue here, and it permits merits review if a state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" For many years, the leading case interpreting the unreasonable-application clause has been *Williams* v. *Taylor*, 529 U.S. 362 (2000) (announcing operation of unreasonable-application clause). *See id.* at 407-14.

The Warden and aligned *Amicus* seek to upend the established understanding of the statutory text, as interpreted in *Williams*. Specifically: (1) they argue that the unreasonable-application clause does not operate on state decisions that under-apply rather than over-apply a principle; and (2) they propound precedentially unsupported steps by which the operation should be performed.

I. THE QUESTIONS PRESENTED DO NOT SUBSUME THE ISSUE OF WHETHER, UNDER § 2254(d)(1), THE STATE DECISION INVOLVED AN "UNREASONABLE APPLICATION" OF FEDERAL LAW

Although the "unreasonable application" and "clearly established federal law" questions arise under the same statutory provision and both limit federal habeas relief, they are analytically distinct. *See Williams* v. *Taylor*, 529 U.S. 362, 413 (2000) (recognizing the need to first "identif[y] the correct governing principle" and *then* to assess whether it was "unreasonably applie[d] * * * to the facts of the prisoner's case.") (emphasis added).[3] Circuit courts are in agreement that these two questions are analytically distinct steps and ought to be addressed separately. *See*, *e.g.*, *Chester v. Thaler*, 666 F.3d 340, 345 (5th 2011) ("The first step * * * is to identify the Supreme Court holding that the state court supposedly unreasonably applied."). Through the Questions Presented, Kentucky has asked this Court to find that there is no clearly established federal law; they have not asked for a disposition on the unreasonable-application clause.[4] Accordingly, the unreasonable-

---

[3] Consistent with *Williams'* bifurcation of the issues, one line of doctrine has developed addressing what is clearly established law, *see*, *e.g.*, *Wright* v. *Van Patten*, 552 U.S. 120 (2008); *Carey* v. *Musladin*, 549 U.S. 70 (2006), and a separate, conceptually distinct line of cases has emerged addressing the proper meaning of the unreasonable-application clause, *see*, *e.g.*, *Harrington* v. *Richter*, 131 S.Ct. 770 (2011).

[4] The pertinent Question Presented reads: "Whether the Sixth Circuit, violated 28 U.S.C. § 2254(d)(1), by granting habeas relief * * * even though this Court has not 'clearly established'

application issues addressed by the Warden and aligned *Amici* should be treated as outside the scope of the Questions Presented and this Court's review should be limited to the question of "clearly established federal law" for which *certiorari* was granted. It should avoid a far-reaching decision on the "unreasonable-application" clause.[5] *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The fact that the "unreasonable-application" clause appears in the same statutory provision as the clearly established law requirement does not mean that it is fairly subsumed by the Question Presented; its resolution would have to be logically necessary to resolve the clearly-established-federal-law issue. *Cf. Day* v. *McDonough*, 547 U.S. 198, 203 n.2 (2006) (refusing to consider the underlying timeliness of a habeas petition when presented with the question of whether the district court properly gave effect to the state's waiver of the timeliness defense); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.* 510 U.S. 27, 31-32 (1993) ("A question which is merely complementary or related to the question presented in the petition for certiorari is not fairly included therein.") (internal citations omitted).

---

that such an instruction is required * * * ." The Warden simply failed to ask the Court to review the Sixth Circuit interpretation of the unreasonable-application clause. The question of unreasonableness is not subsumed by the question of clearly established law.

[5] The CJLF spends several pages of its brief advocating for a new reading of the "contrary to" clause. CJLF Br. at 7-10. This clause of the statute is also not at issue, was not litigated below, and is not subsumed by the Questions Presented.

Accordingly, the Court should not reconsider the issues of interpretation regarding the "unreasonable application" clause addressed in *Williams*. However, in the event the Court does consider these questions, the remainder of this brief explains why the readings of § 2254(d)(1) offered by the *Amici* aligned with the warden are incorrect.

II. SECTION 2254(d)(1)'S "UNREASONABLE APPLICATION" CLAUSE REACHES APPLICATIONS OF CLEARLY ESTABLISHED FEDERAL LAW THAT ARE EITHER TOO BROAD OR TOO NARROW

Williams repeatedly underscores that a state decision could involve an unreasonable application of law because it applied a principle too broadly or too narrowly. *See* 529 U.S. at 407-08. This Court did note reservations about a strict dichotomy between law and fact questions, but it did not—as the CJLF brief suggests—express *any* uncertainty about the fact that the unreasonable-application clause operated symmetrically. *See ibid.*; CJLF Br. at 10-15. Since *Williams,* it has been accepted doctrine that a state court adjudication could be unreasonable if it applied a legal principle too broadly or too narrowly. *See*, *e.g.*, *Ramdass v. Angelone,* 530 U.S. 156, 166 (2000) (plurality opinion) (reiterating that a state court can act unreasonably "in refusing to extend the governing legal principle to a context in which the principle should have controlled.").

The Warden and aligned *Amici*, in particular the CJLF, argue for an abandonment of *Williams*'

central framework. CJLF Br. at 10-15. In a striking disregard for the accepted wisdom of every circuit court,[6] they argue that the *Williams* rule should be abridged such that only unreasonably broad but not unreasonably narrow constructions of federal law will justify federal habeas relief. CJLF Br, at 4 (declaring that the "unreasonably refuses to extend" half of the *Williams* decision should be "expressly disapproved").

This Court should not use this case as a vehicle to halve the coverage of the unreasonable-application clause. Even assuming *arguendo* that the interpretive issue is fairly presented, the test set forth in *Williams v. Taylor*—which provides that the clause reaches both unreasonably narrow and unreasonably broad applications—remains the appropriate standard.[7] The symmetric interpretation in *Williams* has served as the baseline for every federal court interpreting § 2254(d)(1) for more than a decade. There are at least three reasons that this Court should reject the narrow

---

[6] With varying degrees of exactitude, every federal court of appeals has embraced the notion that a principle is unreasonably applied when a state court unreasonably fails to extend the principle. *See*, *e.g.*, *Yeboah-Sefah* v. *Ficco*, 556 F. 3d 53,70-71 (1st Cir. 2009); *Richard S.* v. *Carpinello*, 589 F. 3d 75, 80 (2d Cir. 2009); *Brinson* v. *Vaughn*, 398 F. 3d 225 (3d Cir. 2005); *DeCastro* v. *Branker*, 642 F. 3d 442, 449 (4th Cir. 2011); *Fratta* v. *Quarterman*, 536 F. 3d 485, 502 (5th Cir. 2008); *Franklin* v. *Bradshaw*, 695 F. 3d 439, 446 (6th Cir. 2012); *Morgan* v. *Hardy*, 662 F. 3d 790, 797 (7th Cir. 2011); *Moussa Gouleed* v. *Wengler*, 589 F. 3d 976, 980 (8th Cir. 2009); *Gautt* v. *Lewis*, 489 F.3d 993, 1002 (9th Cir. 2007); *Bledsoe* v. *Bruce*, 569 F. 3d 1223, 1231 (10th Cir. 2009); *Green* v. *Nelson*, 595 F. 3d 1245, 1248 (11th Cir. 2010).

[7] NACDL assumes for the sake of this argument that there is clearly established federal law. As to this point, NACDL fully endorses Respondent's articulation of the relevant clearly established law.

reading of the unreasonable-application clause.

First, the Court should reject an asymmetric interpretation that distinguishes between decisions applying principles too broadly and decisions applying principles too narrowly—because the distinction is conceptually meaningless.[8] Every legal principle is capable of being described in both ways. Every body of precedent has animating principles and limiting principles, and so every decision can be described *both* as an unreasonable application of the animating principle in one direction and an unreasonable application of the limiting principle in the other. For that reason, *Williams* and its progeny treat the distinction as immaterial. In this case, for example, one could fairly characterize the question as one of the state court's unreasonable failure to extend the underlying Fifth Amendment right, or its unreasonable application of a limiting principle from the relevant cases.

Stated differently, it is accepted wisdom that the "difference between applying a rule and extending it is not always clear." *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004). The creation of any per se rules in this context, then, threatens greater rather than less

[8] Inherent in this framework is a degree of symmetry that is well suited for the reasonableness inquiry commanded by the statutory text. In this way, a narrow conception of the settled principles of, for example, *Strickland v. Washington*, 446 U.S. 668 (1984), so as to deny its application in a new context is unreasonable. And likewise, an overly broad conception of what is required in order to demonstrate prejudice under *Strickland* is unreasonable. *Cf. Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion) (reiterating the refusal to extend standard).

uncertainty in habeas doctrine.[9] Indeed, the very per se rule advocated by the CJLF brief was considered and rejected by this Court in *Yarborough* because the Court recognized that such an approach is impractical for the lawyers and judges working on these cases in lower courts. *Id.* at 666 (recognizing that because the difference between applying and expanding a rule is often elusive, it was necessary to reject the view that any extension of a principle was impermissible).

Second and closely related, the asymmetric interpretation of the unreasonable-application clause will constantly plunge federal courts into meaningless litigation over whether a principle should be characterized as an unreasonably narrow application of an animating principle or an unreasonably broad application of a limiting principle. CJLF's own brief reveals how cumbersome the asymmetric interpretation would be. CJLF proposes that lower

---

[9] Amicus CJLF laments the "increased delay" under the AEDPA regime. CJLF Br. At 5. But for any organization whose members actually litigate these cases, as is the case with the NACDL, it is obvious that much of the complained of delay results from frequent rulings that require the parsing of needlessly subtle distinctions. When new cases emerge in this field, even those designed to limit habeas relief, such as *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), considerable and time consuming litigation ensues. Any change in the seminal *Williams v. Taylor* framework will result in the very delays that CJLF seeks to avoid insofar as lower courts will be forced to reset and relearn federal habeas yet again.

courts first distinguish between broad and narrow rules, and then distinguish between rule applications and rule extensions. CJLF Br. at 14. Under this conceptual framework, broad rules can be applied unreasonably, at least sometimes, when they are not extended, but narrow rules require a distinct analysis: to wit, was it applied. *Id.* Such a system is patently unworkable, and federal habeas will not be made more efficient by asking lower courts to apply this four-part classification in each case.

To put the matter as plainly as possible, the Warden and aligned Amici erroneously argue that the core defect with modern habeas is the passage in *Williams* suggesting that relief must be available when a state "unreasonably refuses to extend" a legal principle to a new context. *See*, *e.g.*, CJLF Br. at 4. In reality, however, any application of law to facts could be characterized as under-extending one principle, or over-extending a separate counter-vailing principle. Tasking lower courts with sorting out this semantic distinction between extending one principle and refusing to extend a different principle would be a mistake.

Third, as a matter of statutory construction, such a distinction is unfounded. Section 2254(d)'s plain text encompasses all "unreasonable applications" of federal law by the state court, whether overly narrow or overly broad. Constructing "unreasonable application" so as to bar only unreasonably broad applications of federal law threatens to "sap * * * the unreasonable application clause of any meaning."

Williams, 529 U.S. at 407. If unreasonably broad state court adjudications typically inure to the benefit of defendants, then it is unlikely that such claims will be raised on federal habeas. Alternatively, if unreasonably broad state court adjudications include things like overly broad conceptions of what is required for prejudice under *Strickland*, then it is likely that most such claims will be classified as instances where the state court decision was "contrary to" federal law, rather than an "unreasonable application" of it. Either way, if only unreasonably broad (and not narrow) applications of federal principles qualify for relief, then the two clauses – "unreasonable application" and "contrary to" – no longer enjoy the sort of independent meaning this Court has required. *Williams*, 529 U.S. at 407 (noting the importance of reading the statute so as to "give meaning to every clause of the statute").

The CJLF tries to create space to reinterpret *Williams* by suggesting that this Court equivocated in its symmetric reading of the unreasonable-application clause. The excerpted passage expresses some uncertainty, but it has nothing to do with symmetry. *See Williams*, 529 U.S. at 408; CJLF Br. at 10-11. Even a cursory read of the passage reveals that it is nothing more than a concession that, just as it is difficult to distinguish "a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of legal principle (or an unreasonable failure to apply a legal principle) to a new context." *Williams*, 529 U.S. at 408. Even

though the Court was plainly uncomfortable committing to a clear rule for distinguishing legal-application questions from pure-law questions, the excerpted text does not evince a preference for the rule of asymmetric operation proposed by CJLF. That line drawing question is difficult whether the Court confronts the application of a legal principle that is too broad or too narrow.

Finally, the Warden and aligned Amicus resort to the familiar argument that the State should win all contested interpretive questions because AEDPA's "purpose" is to restrict relief. Just as principles have both animating and limiting purposes, so too do statutes. AEDPA's text reflects multiple purposes, and the intedeterminacy-goes-to-the-state rule is utterly useless in sorting out meaning in cases where those purposes are in tension. AEDPA, in particular, represents the legislative output of many brokered compromises. Lee Kovarsky, AEDPA's Wrecks: Comity, Finality, and Federalism, 82 TUL. L. REV. 443, 459 (2007) (summarizing the compromises in the legislative history and discussing the folly of relying on interpretation based on "legislative mood"). To extract a single purpose from that multi-dimensional compromise is farce.[10] Of course, Congress intended section 2254(d) to be restrictive, but that proposition is

[10.] It is also thoroughly inconsistent with this Court's precedent. In addition to *Williams* itself, this Court has frequently rejected broad interpretations of the AEDPA advanced by the state and grounded in little more than an abstract desire to "limit" relief. *See*, *e.g.*, *Hohn* v. *United States*, 524 U.S. 236 (1998), *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), and *Felker* v. *Turpin*, 518 U.S. 651 (1996).

not helpful when the question for the Court is "how restrictive?" The Court should continue to act with the same judiciousness that it has demonstrated so far and decide the meaning of the unreasonable-application clause through established practices—by resort to text and precedent—and not by reference to an interpretive presumption against habeas relief on all contested questions.

In short, there is nothing in doctrine, text, or commonsense that supports the proposed artificial distinction between unreasonably narrow applications of federal principles and unreasonably broad applications of federal principles. But the cost in terms of increased confusion and delay that will be generated by such a shift in doctrine cannot be gainsaid.

III. WHEN A COURT ANALYZES A REASONED OPINION UNDER 28 U.S.C. § 2254(d)(1), IT ASKS WHETHER THE DECISION IS OBJECTIVELY UNREASONABLE

This Court has held that a reasoned state decision involves an "unreasonable application" of clearly established federal law if that application is objectively unreasonable. *See Williams*, 529 U.S. at 409-10. *Williams* expressly rejected the proposition that a state decision could be unreasonable only if "all reasonable jurists" disagreed with it. *See ibid.* The Warden and aligned *Amici* rely heavily on *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), for two propositions: (1) that a state decision involves a reasonable application if *any potential basis justifying the result*

is reasonable, TX Br. (passim); and that (2) in practice, the unreasonable-application clause should work as an all-reasonable-jurist standard rejected by *Williams*. Pet. Br. at 44.

A. A Federal Court Does Not Formulate Hypothetical Justifications for the State Court Outcome if the State Decision Provides a Written Account of Its Reasons.

Richter involved a one-sentence state summary order that failed to disclose the basis of decision. 131 S. Ct. at 783. The *Richter* question was whether the summary order was a merits decision subject to the limits of § 2254(d) and, if so, how the unreasonable-application inquiry should proceed when the decision is accompanied by an unreasoned opinion. *Id.* at 783-85 (holding that a state summary order does trigger the limits in section 2254(d)); *id.* at 785-87 (explaining how the unreasonable-application clause operates in those cases). In cases where the state basis of decision is not disclosed because the state opinion is unreasoned, a federal court must evaluate whether any *potential* basis of decision was reasonable. *Id.* at 786.

The Warden and aligned *Amici* are quietly asking for an enormous expansion of that rule, to situations where the state court has *actually explained* the reasons for its judgment denying relief. The State of Texas urges, even for reasoned opinions, that a federal court ought to determine what hypothetical arguments "could have supported" the ultimate state result, and

deny relief if any of those hypothetical arguments are reasonable. TX Br. at 5-6.

The statute directs federal courts to determine whether the state decision "involves" an unreasonable application of law, and that verb selection demonstrates that Congress did not intend the interpretation that the Warden and aligned *Amici* request. The notion that federal courts must always hypothesize about potentially supportive reasoning not only conflicts with statutory text, but also with the cases. *Williams*, for example, is wildly incompatible with a could-have-supported rule. If section 2254(d)(1) requires a court to exhaust all hypothetical support even for a reasoned state opinion, then *Williams* itself would be insufficient to support the order granting relief in that case. If Texas's interpretation of the unreasonable-application clause were correct, then in order to reach the conclusion that Virginia had unreasonably applied ineffective-assistance-of-counsel principles, *Williams* would have had to discuss *all hypothetical* reasoning that might have supported the state judgment. In fact, if Texas is correct, then every other section 2254(d)(1) case that fails to analyze the multiplicity of potential, unexplicated support for an outcome has been decided incorrectly.

Of course, every opinion applying § 2254(d)(1) is not wrong rather Texas is wrong—when a state decision takes the form of a reasoned opinion, a federal court looks at legal analysis that a reasoned state decision actually involves. *Porter v. McCollum*, 558 U.S. 30, 39 (2009); *Rompilla v. Beard*, 545 U.S. 374,

390-93 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) In the face of a state court decision that articulates the basis for denying relief, it is the explicated rationales for denying relief that "would be relevant" to the application of Section 2254(d). *Parker v. Matthews*, 132 S.Ct. 2148, 2151-52 (2012). When a state court provides one or more grounds for denying relief, the federal court could not reach the claim unless both rationales were unreasonable. A federal court is not foreclosed from reviewing the merits of an unreasonably decided claim simply because the court could hypothesize some reasonable but-fictitious rationale in support of the outcome. *Id.*; *see also Wetzel v. Lambert*, 132 S.Ct. 1195, 1198-1199 (2012)(emphasizing the reach of Section 2254(d) across alternative, stated rationales for denying habeas relief).

The Texas brief selectively quotes the *Richter* passage, which, properly contextualized, does not undermine the unbroken string of authority looking to legal analysis state courts *actually use* in reasoned state decisions. The Texas brief's selective *Richter* excerpt provides that the federal court should have "determine[d] what arguments or theories supported or * * * could have supported[] the state court's decision[.]" *See* TX Br. at 5 (quoting *Richter*) (all alterations in original except closing period). The ellipses, however, change the meaning of the excerpted text. The original text reads: "Under § 2254(d), a habeas court must determine what arguments or theories supported or, *as here*, could have supported, the state court's decision." *Richter*,

131 S. Ct. at 786 (emphasis added). "As here" is the language that limits the holding to cases where the state decision is without explanatory reasoning.

The limited application of *Richter's* "could have supported" language makes sense. Under *Richter*, a federal court does not speculate about theoretically supportive reasoning because it must go beyond the *actual basis* for the state decision; it speculates about theoretically supportive reasoning because, in summary-denial cases, it does not know what the actual basis for decision is.

Insofar as it applies to silent, summary state court decisions, *Richter* is consonant with the comity principles underlying AEDPA. In a system of co-equal sovereigns, it makes sense to presume the best intentions and proper reasoning of state court judges when there is no direct evidence to the contrary. *See Richter*, 131 S. Ct. at 784 (calling for deference to decisions "unaccompanied by an explanation"). But when the state court decision "involved" an objectively and explicitly unreasonable application of federal law, then comity is not served by deference to a hypothetical – indeed fictitious – rationale. *Cf. Early v. Packer*, 537 U.S. 3, 8 (2003) ("Avoiding these pitfalls does not require citation of our cases-indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."); *SEC v. Chenery Corp.,* 318 U.S. 80, 94 (1943) (recognizing that agency actions can be upheld only

on the basis of a rationale articulated by the agency, not on the basis of "post hoc rationalizations").

To approve deference to a hypothetical *post-hoc* rationale that the state court did not rely on is to turn comity on its head. *Cf. Richter,* 131 S.Ct. at 784 (concluding that there is "no merit" to defining the scope of AEDPA's application based on speculation about the potential impact of a rule on state court "[o]pinion writing practices."). The federal habeas court in these circumstances is not respecting the actions of a separate, state sovereign; instead, it is respecting a fiction generated by the federal court itself.

B. *Harrington's "Fairminded* Disagreement" Language Does Not Resuscitate The "No Reasonable Jurist" Standard Rejected in *Williams*.

This Court has repeatedly emphasized that Section 2254(d) "is difficult to meet * * * because it was meant to be," *Richter*, 131 S. Ct. at 786, and that a federal court may not declare an application to be unreasonable merely because the court believes it incorrect, *id.* at 785 (quoting *Williams*, 529 U.S. at 410). It has also held, however, that a claimant need not show that "all reasonable jurists" would disagree with an application of law to render it unreasonable. *See Williams*, 529 U.S. at 409-10. In *Williams*, the Court rejected the all-reasonable-jurists standard because, the Court explained, state respondents should not be able to defeat relief simply by pointing to a

dissent on the merits or to a single piece of authority inconsistent with the petitioner's position. See *id.* at 410 (holding that a state decision might be unreasonable even if judges dissented on the "underlying mixed constitutional question); *ibid.* (rejecting test for reasonableness based on the existence of conflicting authority). The Warden and aligned *Amici* urge that rejected position here. *See* TX Br. at 3, 8-9 (suggesting that state decision cannot be unreasonable if any question on the underlying constitutional issue exists); *id.* at 8 (focusing on Judge Cook's dissent as proof that the underlying state decision was reasonable).

Richter repeatedly explained that an application of law was not unreasonable if it could be the subject of "fair-minded" disagreement. *See Richter,* 131 S. Ct. at 786-87. The Warden reasons that "[f]airminded jurists could readily disagree" over application of the principle, Pet. Br. at 43, and the Texas Brief likewise cites the disagreement of fair-minded jurists as the touchstone of objective unreasonableness. Whatever "fair-minded disagreement" means, it cannot mean a return of the "all-reasonable-jurists" scenario unless this Court meant to overrule, *sub silencio*, the statutory interpretation in *Williams*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JUSTIN F. MARCEAU
Counsel of Record
University of Denver
Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80210
(303) 871-6449
jmarceau@law.du.edu

LEE KOVARSKY
University of Maryland
Francis King Carey
School of Law
500 W. Baltimore St.
Baltimore, MD 21201
(434) 466-8257
lkovarsky@
law.umaryland.edu

BARBARA BERGMAN
Co-Chair, NACDL
Amicus Committee
University of New Mexico
School of Law
1117 Stanford, N.E.
Albuquerque, NM 87131
(502) 277-3304
BERGMAN@law.unm.edu

Dated: November 19, 2013