No. 04-721

In the
Supreme Court of the United States

MIKE EVANS, Warden

Petitioner,

v.

REGINALD CHAVIS,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Ninth Circuit

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

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QUESTION PRESENTED

Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition – and therefore was entitled to tolling during that entire period – because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

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

INTEREST OF *AMICUS CURIAE*

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. NACDL filed an *amicus* brief in *Carey v. Saffold*, a case central to the issues raised here.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

This case presents another opportunity to clarify the application of the tolling provision of 28 U.S.C. § 2244(d)(2), which stipulates that the one-year statute of limitations established in 28 U.S.C. § 2244(d)(1) shall be tolled while a "properly filed" application for post-conviction or other collateral review is "pending." The issue at the heart of this case is not, as it was in several recent cases before this Court, *what* constitutes a "properly filed" application. Rather, the issue is *who* decides whether an application, as a factual matter, was filed in compliance with state rules. The correct answer, *amicus* respectfully submits, is the state courts who are best positioned to interpret and enforce their own procedural filing requirements. Deference to express and implied state adjudications of issues regarding proper filing is consistent with this Court's interpretation of § 2244(d)(2), and as numerous federal circuit courts have recognized, with the fundamental principles that guide this Court's federal habeas jurisprudence.

To determine whether Mr. Chavis's state habeas petition in the California Supreme Court was properly filed so as to toll AEDPA's statute of limitations, a federal court should look to the actual basis of the California Supreme Court's denial of Mr. Chavis's petition. Applying principles borrowed from the related independent and adequate state ground doctrine, as articulated in *Harris v. Reed* and its progeny, the proper question is not whether there was some state procedural rule by which a federal claimant arguably failed to abide, as the State here contends, but rather whether the state courts actually determined that the claimant's application

was not properly filed and denied relief, in whole or in the alternative, on that basis.

Applying this approach, the Ninth Circuit properly concluded that no California Court ever determined, expressly or implicitly, that Mr. Chavis's petition was untimely under California's indeterminate requirement that filing of habeas petitions not be "unreasonably delayed." Contrary to Petitioner's argument, this Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), is consistent with these broader procedural bar principles, and supports the Ninth Circuit's decision below. The Court's remand in *Saffold* underscores the important duty of federal courts to carefully evaluate, and defer to, the actual bases of state court rulings in applying AEDPA's tolling provision. Application of these principles here requires finding that Mr. Chavis's petition was not untimely as a matter of California law. Accordingly, the Ninth Circuit correctly ruled that Mr. Chavis's "properly filed" application tolled the statute of limitations.

ARGUMENT

I.

THE SAME CONSIDERATIONS OF COMITY AND FEDERALISM THAT UNDERLIE THE INDEPENDENT AND ADEQUATE STATE GROUND DOCTRINE REQUIRE FEDERAL COURTS APPLYING AEDPA'S TOLLING PROVISION TO DEFER TO STATE COURT DETERMINATIONS REGARDING WHETHER AN APPLICATION FOR COLLATERAL REVIEW COMPLIES WITH STATE FILING RULES.

This case falls at the confluence of two separate lines of this Court's jurisprudence. The first line of cases sheds light on the meaning of a "properly filed application" that is "pending" as those terms are used in the

Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(2). *See Artuz v. Bennett*, 531 U.S. 4 (2000), *Carey v. Saffold*, 536 U.S. 214 (2002), *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005). The second line of cases establishes the parameters of the relationship between state and federal courts in the context of habeas review, and deals more broadly with the degree of deference demanded of federal habeas courts reviewing state court decisions. *See Harris v. Reed*, 489 U.S. 255 (1989); *Coleman v. Thompson*, 501 U.S. 722 (1991), *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). Although the questions raised in these separate lines of cases are distinct, *Bennett*, 531 U.S. at 9, they are nonetheless interrelated. An application may be properly filed, as this Court explained in *Bennett*, even if all of the claims presented in the application are procedurally barred. *Id.* at 10. The converse, however, is not true. An improperly filed application constitutes a procedural default and bars further collateral review of all the claims therein unless and until the defect in the filing is cured or waived. *See Daniels v. United States*, 532 U.S. 374, 381 (2001) (noting that "[p]rocedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim"); *Coleman*, 501 U.S. at 744 (late filing of notice of appeal is independent and adequate state ground precluding federal review of constitutional claims).

Both lines of cases thus address a similar problem: determining when "a procedural default under state law forecloses federal relief on collateral attack." *Fernandez v. Sternes*, 227 F.3d 977, 978 (7th Cir. 2000). To solve that problem, they rely on a common methodology: they direct federal courts to look to state interpretations of

state law, and to defer to the decisions of the state courts with respect to those matters. Applying this methodology to the case at bar, this Court should conclude that the statute of limitations was tolled while Mr. Chavis exhausted his state remedies, because unlike in *Carey v. Saffold*, no California court has ever held, or even intimated, that Mr. Chavis's petition before the California Supreme Court was not timely under California law, nor do the circumstances surrounding the California Supreme Court's summary denial of that petition indicate that the denial was in fact based on untimeliness. Nothing in AEDPA, or in *Saffold*, indicates that Congress intended federal courts to scrutinize filings in state courts to determine, in the first instance, whether they complied with every conceivably applicable filing rule. The decision below should be affirmed.

A.

AEDPA Should Be Interpreted In Light of Well-Established Principles of Federal Habeas Law.

Whether a petition for post-conviction collateral relief is "properly filed" under 28 U.S.C. § 2244(d)(2) so as to trigger that section's tolling provisions must be considered "against the backdrop of federal habeas law dealing with procedurally barred claims" against which the AEDPA was enacted. *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999). The independent and adequate state ground doctrine is a prominent feature of that backdrop. The doctrine is "grounded in concerns of comity and federalism," *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), and is intended to give States the "first opportunity to address and correct alleged violations of state prisoner's federal rights." *Id.* at 731.

The independent and adequate state ground doctrine works hand-in-glove with the exhaustion doctrine to ensure that the States "have the first opportunity to address and correct alleged violations of state prisoners' federal rights." 501 U.S. at 731 ("independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases"); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts").

AEDPA serves similar purposes. With its enactment, Congress sought to "reduce federal intrusion into state criminal proceedings," *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) (citation omitted), and "accord greater deference to state court adjudications." *Id.* The tolling provisions of § 2244(d)(2) should be interpreted in light of these purposes. Like the independent and adequate state ground doctrine, AEDPA's tolling provision is intended to encourage claim exhaustion. *See Duncan v. Walker*, 533 U.S. 167, 180 (2001); *Villegas*, 184 F.3d at 471 (citing 28 U.S.C. § 2254(b)(1)). Although § 2244(d)(1) imposes a one-year statute of limitations for a state prisoner to seek federal habeas review, the tolling provision in § 2244(d)(2) permits the state courts to fully consider the prisoner's federal claims; without the tolling provision, the requirement that state prisoners exhaust state remedies before seeking federal review would be rendered meaningless, and state prisoners would be forced to choose between pursuing available state remedies or filing premature claims in federal court within the limitations period. *See Duncan*, 533 U.S. at 180 ("The tolling provision of § 2244(d)(2) balances the

interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued.").

AEDPA does not, however, purport to impose upon the states any mandatory procedural rules that all states must obey, or that somehow "trump" the state procedures established regarding the availability of post-conviction or other collateral review. As the Ninth Circuit decision below reflects, states are free to determine timeliness rules for obtaining relief in their courts. As the Court stated in *Carey v. Saffold*, 536 U.S. at 223, "it is the State's interests that the tolling provision seeks to protect, and the State, through its supreme court decisions or legislation, can explicate timing requirements more precisely should that prove necessary."

B.

THE INDEPENDENT AND ADEQUATE STATE GROUND DOCTRINE BARS FEDERAL REVIEW ONLY WHERE THE STATE COURT ACTUALLY RELIED ON THE PROCEDURAL BAR.

Generally, federal courts will not consider an issue of federal law, either on direct or habeas review, if "the judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision," *Harris v. Reed*, 489 U.S. at 260-261. Procedural bar – failure to comply with state procedural rules – can serve as such an independent and adequate state ground.

This Court explained in *Harris*, however, that "the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: '[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'" 489 U.S. at 261-262 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). *See also Michigan v. Long* 463 U.S. 1032, 1039 n.4 (1983) ("We may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied.") (citing *Beecher v. Alabama*, 389 U.S. 35, 37, n. 3 (1967)).

Accordingly, the central task before a federal court is to determine the actual basis of the controlling state court decision. This task is more difficult when, as here, the relevant decision does not clearly state the grounds of decision. To assist the federal courts, this Court has devised several interpretive principles. First, "when the decision 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law," a federal court will address the petition "unless the state court's opinion contains a plain statement that [its] decision rests upon adequate and independent state grounds." *Harris*, 489 U.S. at 261 (quoting *Long*, 463 U.S. at 1042) (internal quotations omitted). The Court favored this approach in part because it relieved federal judges of the burden of independently "examining state law," a contrary approach was "unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties." *Long*, 463 U.S. at 1039.

The mere fact that a state court chooses to discuss the merits of a claim does not by itself preclude a finding that the state court decision was also based on an independent and adequate state ground. When a state decision indicates alternative grounds, federal review is generally barred under principles of procedural default as long as one of the alternative grounds was sufficient under state law to foreclose relief. *See Sochor v. Florida*, 504 U.S. 527, 533 (1992).

Where there is no indication that the state decision is invoking federal law, the *Harris* "plain statement" rule does not apply. *Coleman*, 501 U.S. 738. Even where the state decision is a mere summary dismissal, however, the court still must attempt to determine the basis of the state decision. In *Coleman*, this Court indicated that it was appropriate for a federal court to consider the context in which the summary denial was issued, such as whether the summary denial was issued in response to a motion predicated on an alleged procedural default. By looking beneath the face of the decision, the Court had no difficulty finding the basis of the Virginia Supreme Court's decision. *See* 501 U.S. at 740 ("The Virginia Supreme Court stated plainly that it was granting the Commonwealth's motion to dismiss the petition for appeal," which in turn "was based solely on Coleman's failure to meet the Supreme Court's time requirements.").

Ylst v. Nunnemaker, 501 U.S. 797 (1991), established an additional interpretive rule: "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." 501 U.S. at 803. The rule articulated in *Ylst* was based on the empirical presumption that "silence implies consent, not

the opposite." *Id.* at 804. The presumption is rebuttable, however, where "strong evidence" exists "that the presumption, as applied, is wrong." *Id.*

Harris, Coleman and *Ylst* all stand for the proposition that a federal court must look to the basis of the state court ruling to determine whether a petitioner's alleged noncompliance with a rule of state procedure establishes an adequate and independent ground to deny the requested relief. Where the state decision is ambiguous, these cases direct the federal court to take other evidence into account, including any "plain statement" of intent included in the state opinion, the language used by the state court, the context in which the decision was rendered, and the content of the lower court decisions to determine if the state court actually relied on the procedural bar as an independent basis for its disposition of the case. However, once the basis of the state ruling is established, the inquiry is at an end: "if the state enforces its procedural rules and deems the claim forfeited, then federal review is barred; if the state excuses a default, then federal review is proper." *Fernandez*, 227 F.3d at 978.

C.

WHETHER AN APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW COMPLIES WITH STATE FILING RULES IS A QUESTION OF STATE LAW THAT SHOULD BE DECIDED BY REFERENCE TO THE DECISIONS OF STATE COURTS.

AEDPA only permits tolling of applications that are "properly filed." As this Court has explained, "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings," including "the form of the document, the time limits upon its delivery, the court and

office in which it must be lodged, and the requisite filing fee." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Obviously, these applicable rules are fixed by state, not federal, law, and like other kinds of procedural bars triggered by failure to comply with state procedural rules, protect the state interest in enforcement of state procedures. When an application fails to comply with these state procedural rules, including time limits, it is not "properly filed." *Pace*, 125 S.Ct. at 1812 ("When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2).") (quoting *Saffold*, 536 U.S. at 226).

The framework established in *Harris* and its progeny to determine generally when a federal court must decline review of a decision supported by an independent and adequate state ground applies with equal force to the question whether an application for state post-conviction relief is "properly filed." *See Pratt v. Greiner*, 306 F.3d 1190, 1196 (2d Cir. 2002) (deferential approach to whether state-court filing is "properly filed" echoes "the notions of federalism and comity that pervade our federal habeas jurisprudence"). After all, compliance with state procedural filing requirements, no less than compliance with other state procedural rules such as contemporaneous objection requirements or rules stipulating that to preserve a claim for collateral review, the claim must be raised on appeal, is mandatory to avoid procedural default. *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (finding "no principled reason to apply a lesser measure of deference to the state court in the context of § 2244(d)(2) than we apply in the context of procedural default questions"). As Judge Easterbrook explained, "a decision with respect to proper filing, as a state-law procedural ground, should be treated the way

Harris specifies for other state grounds." *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002).

A rule requiring courts to defer to actual state court adjudications of compliance with filing requirements, like the *Harris* doctrine in the context of procedural default, strikes the appropriate balance. *Harris* balances the federal interest in safeguarding federal rights and encouraging uniformity in federal law, *Long*, 463 U.S. at 1040, against the state interest in safeguarding state law and procedural rules. It does this by directing federal courts to carefully examine the basis of state decisions and to decline jurisdiction if, but only if, the state court's decision plainly rested on an independent and adequate state ground. Applied to the question at issue here – whether an application is "properly filed" – the object of the federal court's inquiry should be simply to determine whether the state court actually based its ruling on a finding that the application was out of compliance with the rules governing proper filing.

Because state courts are the final authority on state law, federal courts must look to, and accept, a state court's interpretation of its statutes and its rules of practice. State court rulings regarding whether an application is properly filed should be, as this Court has treated them, dispositive with respect to whether an application is "properly filed." *See, e.g.*, *Pace*, 125 S. Ct. at 1814 ("Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,'); *Saffold*, 536 U.S. at 226 ("If the California Supreme Court had clearly ruled that Saffold's 4 ½–month delay was 'unreasonable,' that would be the end of the matter").

The federal circuit courts overwhelmingly have recognized that state rulings on such questions as the timeliness of an application are binding on federal courts. *See, e.g., Pratt v. Greiner*, 306 F.3d 1190, 1195 (2d Cir. 2002) (finding it well-settled "that courts, on habeas review, should not scrutinize the legitimacy of state court filings to determine whether they were 'properly filed' within the meaning of § 2244(d)(2)"); *Emerson v. Johnson*, 243 F.3d 931 (5th Cir. 2001) (federal courts defer to state courts' application of state law when determining whether something is 'properly filed'); *Israfil v. Russell*, 276 F.3d 768, 771-72 (6th Cir. 2001) ("Principles of comity require federal courts to defer to a state's judgment on issues of state law and, more particularly, on issues of state procedural law"); *Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir.2003) (holding that federal courts are obliged to accept state interpretation of law in response to claim that state court was incorrect); *Powell v. Davis*, 415 F.3d 722, 726 (7th Cir. 2005) ("we have no authority to second-guess a ruling based on state law"); *Habteselassie v. Novak*, 209 F.3d 1208, 1213 (10th Cir. 2000) (holding that because "the state court treated Habteselassie's motion as a motion for post-conviction relief" it would "find that his state motion was an 'application for State post-conviction or other collateral review' within the meaning of § 2244(d)(2)"); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (holding that "a federal court should defer to a state court's application of state filing deadlines").

Moreover, since questions regarding whether an application is "properly filed" are not limited to issues of timeliness, the approach proposed by the State – that federal courts should independently assess whether state filings comply with state procedural requirements – would embroil federal district courts in litigation

regarding a vast range of minutiae. *See, e.g., Hurley v. Moore,* 233 F.3d 1295 (11th Cir. 2000) (application not "properly filed" where state court ruled petitioner failed to comply with procedural requirement of written oath); *Sibley v. Culliver,* 377 F.3d 1196 (11th Cir. 2004) (application not properly filed where state court ruled, *inter alia,* petition was filed in wrong court and violated state law form requirements); *Christian v. Baskerville,* 232 F.Supp. 2d (E.D.N.Y. 2001) (petition not properly filed where state court determined petition failed to list specific errors alleged, as required under state rule). Under Petitioner's view, federal district courts would regularly be required to resolve issues not expressly resolved by state courts regarding whether the state prisoner paid the proper filing fee, conformed to applicable page or word limits, or typeset his papers within the correct margins. *Cf. Bennett,* 531 U.S. at 8 (noting that timeliness is only one of many standard attributes of a "properly filed" application). To resolve such issues, federal district courts will presumably be required to conduct evidentiary hearings, which in a case like this one, as Petitioner concedes, may involve fairly complex facts, in order to resolve the merits of a challenge to the propriety of state court filings. *See* Pet. Br. at 22 (determining whether a petition is untimely under California law is "a fact-intensive inquiry"). State rather than federal courts are much better positioned to make such factual determinations.

II.

APPLYING THESE PRINCIPLES, THE NINTH CIRCUIT PROPERLY DEEMED MR. CHAVIS'S APPLICATION "PROPERLY FILED" AND SUFFICIENT, UNDER *SAFFOLD*, TO TOLL THE STATUTE OF LIMITATIONS.

The State of California misreads this Court's decision in *Saffold*, and is mistaken regarding the proper role of federal courts in determining whether an application for state post-conviction relief has been "properly filed." A careful consideration of *Saffold*, viewed in light of the larger backdrop of procedural default jurisprudence, makes clear that the appropriate inquiry to be undertaken by a federal habeas court is not whether the federal court believes that Mr. Chavis's petition was untimely, but whether Mr. Chavis's application was ruled untimely by the California Supreme Court. *Cf. Harris*, 489 U.S. at 261 ("the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim;" state court "must actually have relied on the procedural bar" in its disposition of the case).

A.

SAFFOLD DOES NOT SUPPORT THE STATE'S POSITION IN THIS CASE.

The *Saffold* case required this Court to determine whether, under California's unusual "original writ" system, an application for habeas review remains "pending" for purposes of § 2244(d)(2) during the period after a lower California court denied the petition, but before a new "original petition" was filed in a higher appellate court. Based on its conclusion that California's original writ system functions, in effect, like the "appeal" systems of other states, this Court held that an

application for collateral review remains pending under California's system through termination of the review process as long as the petitioner complies with applicable filing requirements, including the "due diligence" standard set forth under California law. 536 U.S. at 221-224.

Saffold filed his petition in the Calfornia Supreme Court 4 ½ months after the lower appeals court issued its decision. In denying the petition, the California Supreme Court explained that the denial was "'on the merits and for lack of diligence.'" 536 U.S. at 225. Foreshadowing its decision in *Pace*, this Court noted that if Saffold had not timely filed his petition in the California Supreme Court, then the period preceding filing of that petition would not be tolled. *Id.* at 226. In vacating the decision below, this Court rejected the Ninth Circuit's contention that the California Supreme Court's statement that it had denied Saffold's petition "on the merits" proved that it did not also find the petition untimely. Rather, this Court concluded that the state court decision may merely have reflected "alternative grounds for decision." *Id.* at 225. This Court then remanded back to the Court of Appeals.

Petitioner now contends that the purpose of this remand was to determine, in the first instance, whether Saffold's 4 ½ month delay was "unreasonable" under California state law. *See* Pet. Br. at 16. That is incorrect. This Court remanded to the Ninth Circuit to determine whether the California Supreme Court's denial of Saffold's petition "for lack of diligence" meant that the California Supreme Court had ruled specifically this his petition was untimely, or that he had overly delayed in initiating collateral review (which would not be relevant to whether the instant petition was timely). Because of

the ambiguity of the phrase "lack of diligence," *see id.* at 226 ("We cannot say in this case ... that the Ninth Circuit was wrong in its ultimate conclusion" that Saffold's petition was not dismissed as untimely); *id.* at 236 (Kennedy, J., dissenting) (noting that majority concluded "that the lack of diligence finding is ambiguous"), remand was necessary to determine the basis of the California Supreme Court's ruling. After all, "[i]f the California Supreme Court had clearly ruled that Saffold's 4 ½ month delay was 'unreasonable,' that would be the end of the matter." *Id.* at 226; *see also id.* at 236 (Kennedy, J., dissenting) ("If the California court held that all of respondent's state habeas petitions were years overdue, then they were not 'properly filed' at all, and there would be no tolling of the federal limitations period."); *Brooks v. Walls*, 301 F.3d at 842-843 (Easterbrook, J.) (explaining that purpose of remand in *Saffold* was to permit federal court to determine if phrase "'lack of diligence' differs linguistically from 'unreasonable delay,'" the California Supreme Court's "canonical phrase" for "untimely"). This is precisely what the Ninth Circuit understood its task to be on remand. *See Saffold v. Carey*, 312 F.3d 1031, 1034 (9th Cir. 2002) (O'Scannlain, J.).

Saffold is thus best understood as a variation of the basic "actual basis" approach routinely employed in federal habeas law. If the California Supreme Court actually dismissed Saffold's petition as untimely, then its determination establishes for purposes of § 2244(d)(2) that it was not "properly filed" – an independent and adequate state ground of decision. If it did not make that determination, however, then the federal court would have been wrong to so treat it. Petitioner's alternative reading of *Saffold*, which suggests the federal court should make its own determination of whether an

application complies with state timeliness requirements, would "create substantial uncertainty, and resulting federal litigation, over whether a prisoner had filed his habeas petition within a reasonable time." *Saffold*, 536 U.S. at 235 (Kennedy, J., dissenting) (noting difficulty of interpreting questions of timeliness where California law looks to whether prisoner exercised "due diligence" in filing petition).

Indeed, relying on *Harris's* "actual basis" principle to decide whether an application is "properly filed" helps resolve many of the conundrums encountered interpreting § 2244(d)(2). If an application has been conceded to be untimely by a petitioner, or adjudicated by a state court as untimely, or otherwise improperly filed, that application has not been "properly filed." *See Pace*, 125 S.Ct. at 1814. If a state court subsequently grants leave to file the untimely application, the petition is "properly filed" as of the date leave is granted. *See Fernandez*, 227 F.3d at 979 (state court's grant of motion for leave to file late petition renders petition "properly filed" for purposes of § 2244(d)(2)), *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). The time period during which the application was adjudicated "out of time" by the state court, however, may not toll AEDPA's limitations period if no properly filed application was in fact pending. *See Fernandez*, 227 F.3d at 980; *Melancon*, 259 F.3d at 407.[2] Whether an untimely petition denied on

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2. The subsequent acceptance of an application by a court for consideration of the merits, or to consider whether an exception to the general time limit applies, establishes only that an application might be deemed "properly filed" as of its date a state court accepts it as filed, but does not retroactively moot the fact of its

the merits notwithstanding its untimeliness was properly filed turns on the basis of the state court's denial. If the petition ultimately is denied, solely or alternatively for noncompliance with filing requirements, it was never "properly filed." *See Saffold*, 536 U.S. at 226. At the same time, if the state court grounds its denial of an adjudicated untimely application solely on the merits, or otherwise does not indicate the denial was based on the acknowledged filing defect, the application was properly filed and tolls AEDPA's statute of limitations at least from the date of its belated acceptance to the date of denial. The actual basis rule also suggests that if a state court decides an arguably untimely application on the merits without ever indicating that the application was untimely or otherwise improper, such an application must be treated as "properly filed" and the full period tolled. *Id.* at 226 (implying that if California Supreme Court did not rule Saffold's petition untimely, then it was pending throughout 4 ½ month interval).

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impropriety prior to correction or waiver of the defect. A state court ruling that the application was not untimely due to the applicability of an exception, however, should mean that such application was both properly filed and pending throughout the relevant time period.

B.

BECAUSE *SAFFOLD* DIRECTS THE FEDERAL COURT TO DETERMINE WHETHER AN APPLICATION IS "PROPERLY FILED" BY LOOKING AT WHETHER IT WAS DEEMED OUT OF COMPLIANCE WITH STATE FILING RULES, MR. CHAVIS'S APPLICATION FOR COLLATERAL REVIEW MUST BE TREATED AS PROPERLY FILED.

Unlike in Saffold's case, the California Supreme Court gave no indication that Mr. Chavis's petition was untimely when it issued its summary denial. Since the California Supreme Court's summary denial was not issued in response to a motion to dismiss based on its lack of timeliness, and no lower court had ever deemed Mr. Chavis's application untimely, neither *Coleman*'s direction to examine the surrounding context of an ambiguous order, nor *Ylst*'s "look-through" principle supports the State's contention that the federal court can disregard altogether a California Supreme Court order that expressly did not make any finding of untimeliness. This Court's procedural default jurisprudence dictates the opposite. *See Jefferson v. Welborn*, 222 F.3d 286, 288 (7th Cir. 2000) (applying *Harris's* analytical framework to conclude that "if the last word from the state supreme court does not reveal whether a procedural bar or a substantive lack of merit motivated its ruling, we will presume it is the latter for purposes of § 2244(d), unless 'the last reasoned opinion on the claim explicitly impose[d] a procedural default,' which the denial of review by the state supreme court does not disturb") (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). Absent any indication that the California Supreme Court considered Chavis's petition untimely, an independent federal inquiry into whether Chavis's petition *could* have been ruled untimely, and hence improperly filed under California law, would exceed the proper bounds of the

federal court's habeas review powers and embroil federal courts in unwanted and unneeded federal litigation over matters that are more properly and efficiently resolved by state courts.

The State's position here carries with it significant consequences; investing federal courts with responsibility for interpreting and applying state procedural rules will likely only confuse state law. Will state courts be bound to follow federal interpretations of state timeliness requirements? If not, to which set of rulings should state prisoners look to for guidance, the states' own interpretations of state rules, or federal interpretations of state rules? Moreover, if federal courts have the authority to make independent determinations of whether state prisoners complied with state filing rules when the state courts did not make any such determinations, they would necessarily also seem to have the authority to disregard the procedural determinations in fact made by state courts when the federal court concluded that such rulings were incorrect. This latter conclusion, however, has been emphatically rejected by this Court in its recent cases. *See Pace*, 125 S. Ct. at 1812; *Saffold*, 536 U.S. at 226. The State's contention in this case should receive an equally emphatic rejection.

C.

MOST FEDERAL CIRCUIT COURTS REJECT PETITIONER'S ASSERTION THAT FEDERAL COURTS SHOULD INDEPENDENTLY ASSESS WHETHER AN APPLICATION COMPLIED WITH STATE FILING RULES.

The State suggests that the Ninth Circuit's decision below conflicts with decisions in several other circuit courts. *See* Pet.'s Br. at 39-43. That suggestion is incorrect. Most of the decisions cited by the State do not take issue

with the basic proposition at issue in this case, that federal courts should defer to state court determinations regarding the procedural propriety of a state prisoner's filings, including whether an application was timely filed. For example, in *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000), there was no dispute as to the timeliness of Klinger's appeal; Klinger expressly conceded that his petition was out of time, and filed a motion for leave to appeal out of time. The issue in *Klinger* was whether the time period during which Klinger's appeal had concededly lapsed, and the time that the appellate court granted his motion for leave to appeal out of time, was subject to tolling. The Tenth Circuit concluded it was not, because no "properly filed" application was pending during that time period.

Melancon v. Kaylo, 259 F.3d 401 (5th Cir. 2001), is equally inapposite. In that case, Melancon filed an application for supervisory writ "approximately five months" after the application was due, under Louisiana Court of Appeals Rule 4-3. *Id.* at 403. Although the Court of Appeal made an express finding that Melancon's appeal was untimely, it nonetheless considered the application on the merits pursuant to a provision in Rule 4-3 that allows the Court "to consider an application that was not timely filed if there is a 'showing that the delay was not due to the applicant's fault.'" *Id.* at 405. Noting its obligation to defer to state courts' application of state law in determining whether an application is "properly filed," the Fifth Circuit concluded that the untimely filed application was nonetheless "properly filed" for purposes of AEDPA. At the same time, because the Court of Appeal had expressly ruled that the application was untimely, the Fifth Circuit held that the application was not "pending" during the five months in which it

had been adjudicated out of time. Both *Melancon* and *Klinger*, therefore, are consistent with the proposition that the state determination of timeliness – not an independent federal determination – controls.

The State also claims that *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), supports its view that federal courts should make independent assessments of a petitioner's procedural compliance with state law. It does not. As in *Klinger*, the petitioner Fernandez missed a filing deadline and, conceding that his petition was untimely, filed a motion for permission to file a late petition for leave to appeal. The Illinois Supreme Court permitted Fernandez to file his petition for leave to appeal, but did not grant him leave to file the petition itself. In concluding that Fernandez's petition was "properly filed," not only did the Seventh Circuit not condone an independent inquiry into his compliance with state filing rules, it held just the opposite: "if a state court accepts and entertains [a petition] on the merits it has been 'properly filed' but ... if the state court rejects it as procedurally irregular it has not been 'properly filed.' The Court also recognized the corollary proposition, reflecting the application of the general principles of procedural bar set forth in *Harris v. Reed*, "that a petition that fails to comply with state procedural requirements is still 'properly filed' if the state accepts it and issues a decision on the merits." *Id.* at 978.[3]

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3. In light of *Saffold*, this corollary proposition is probably correct only if the state decision could not be interpreted as resting, at least as an alternative ground, on the filing defect.

Only one Circuit Court – the Fourth – appears to have adopted the rule the State urges this Court to adopt here, and a review of that decision illustrates its deficiencies. In *Allen v. Mitchell*, 276 F.3d 183 (4th Cir. 2001), the court was called on to determine whether a petition for certiorari, filed four years after denial of his initial petition for collateral relief, was "properly filed" where the North Carolina Supreme Court denied the petition without explanation. Like California, North Carolina imposes no determinate timing limit to seek review, merely requiring that the petition be filed "without unreasonable delay." 276 F.3d. at 186 (citing N.C. R.App. P. 21(c)).

Under North Carolina law, whether delay is unreasonable turns on whether the petition would be "subject to dismissal under the equitable doctrine of laches." *Id.* at 186. It is not based upon mere passage of time, and to resolve the dispute, a court must take into account whether "the delay is (i) unreasonable and (ii) injurious or prejudicial to the party asserting the defense." *Id.* at 187. In the face of this complex factual question, the Fourth Circuit concluded that it could not determine, one way or the other, if "Allen's petition was necessarily untimely solely because it was filed more than four years after the denial of his" initial motion for relief. *Id.* Accordingly, the Fourth Circuit ruled that "Allen must be afforded an opportunity to explain the lengthy delay," and thus remanded the case to the federal district court for further proceedings, and an evidentiary hearing if necessary, to determine whether the certiorari petition was timely.[4] *Id.*

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4. Even if the Court concluded as a result of that hearing that Allen's petition was untimely, it still was

It is precisely to avoid these types of fact-intensive inquiries into state procedural rules that the well-developed principles of procedural default require federal courts to limit their inquiry to the actual basis of the state court's decision. It is also why most courts faced with the problem of determining whether an application is timely or otherwise "properly filed" have almost uniformly limited their inquiry to the actual grounds of decision relied upon by state courts. The same deference is required here.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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confronted with the additional problem of determining precisely "when the Appeal Period ended and how much time subsequently accrued against the statute of limitations." 276 F.3d. at 187. Given the indeterminate nature of North Carolina's timeliness rules, it is not clear how a federal court should resolve that question.

Respectfully submitted,

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