No. 20-5570

IN THE

Supreme Court of the United States

RICHARD BERNARD MOORE,

Petitioner,

v.

BRYAN P. STIRLING, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

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

BRIEF OF FEDERAL COURTS AND HABEAS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CAITLIN J. HALLIGAN
Counsel of Record
RYAN W. ALLISON
JORDAN L. WEATHERWAX
SELENDY & GAY PLLC
1290 Avenue of the Americas
New York, New York 10104
(212) 390-9000
challigan@selendygay.com

Counsel for Amici Curiae

298530

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of law with academic and practical expertise in post-conviction law generally, and federal habeas corpus in particular. *Amici* have published extensively in these areas, and several signatories have authored leading habeas corpus books that are regularly cited by the federal courts and used by practicing lawyers. *Amici* respectfully submit this brief to provide information on the history of the fair presentation doctrine at the heart of the circuit split in this case. *Amici* developed this brief solely as individuals and not as representatives of the law schools with which they are affiliated.

A full list of *amici* appears in Appendix A.

SUMMARY OF ARGUMENT

The Antiterrorism and Death Penalty Act of 1996 ("AEDPA") includes a provision that imposes a relitigation bar applicable to claims adjudicated on the merits in state court. 28 U.S.C. § 2254(d). The Court of Appeals for the Fourth Circuit held that § 2254(d) barred relitigation of Petitioner Richard Moore's ineffective-assistance-of-trial-counsel ("IATC") claim because, it reasoned, the same claim had been "adjudicated on the merits" in state court. The Fourth Circuit applied § 2254(d) even though the IATC claim Moore presented in federal court included

1. The parties were provided proper notice and have consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission.

crucial new evidence, and even though the state court claim was factually unsubstantiated. Articulating a new test for "fair presentation" and eschewing any comparison of factual support presented to the state and federal courts, the Fourth Circuit held that that a federal court claim is adjudicated on the merits whenever the "heart of the federal claim" was alleged in state court. The heart-of-the-claim test, which is unsupported by ordinary tools of statutory interpretation, is now at the root of a circuit split.

The rules of fair presentation incorporated into § 2254(d) are well established. Under federal habeas law, a claim that was not "fairly presented" to a state court has not been "adjudicated on the merits" there. *See Picard v. Connor*, 404 U.S. 270, 275 (1971). Instead, this Court has long held that when a claim is not "fairly presented" it is either unexhausted, if further state remedies remain available, or procedurally defaulted, if a return to state court would be futile. *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991). The leading case on the doctrine of fair presentation is *Vasquez v. Hillery*, 474 U.S. 254 (1986), which held that a federal court claim was not fairly presented to a state court when evidence "fundamentally alter[s]" it. *See id.* at 260–61.

Arguing that "adjudicated on the merits" under § 2254(d) requires only identity of legal principles in state and federal court without regard to the facts, the State points to *Cullen v. Pinholster*, 563 U.S. 170 (2011). According to the State, *Pinholster* is a free-floating mandate for lower courts to limit evidence taken in federal habeas proceedings. But *Pinholster* interprets an exception to the relitigation bar, § 2254(d)(1), that applies *only after a federal court determines that a*

state merits adjudication took place. Pinholster says nothing at all about how to determine the logically antecedent question—whether the federal court claim was adjudicated on the merits by a state court in the first place. Indeed, the Court in *Pinholster* explicitly disclaimed any attempt to address this question by refusing to "draw [a] line between new claims and claims adjudicated on the merits," while acknowledging that the addition of new evidence in federal court "may well present a new claim." *Id.* at 186 n.10.

Yet relying on *Pinholster* to support its novel heart-of-the-claim test, the Fourth Circuit held that § 2254(d) barred relitigation of Moore's IATC claim. Its heart-of-the-claim standard means that a federal court challenge is adjudicated on the merits whenever the *legal* allegations on which it rests were presented to the state court, regardless of whether the prisoner also presented *facts and evidence* crucial to the claim to the state court.

There is no indication that, when it enacted AEDPA, Congress intended "adjudicated on the merits" to mean something other than what it always meant—an adjudication by a state court of a claim that was fairly presented to it. And it was settled long before 1996 that, if the factual "substance" of a claim was omitted from the state proceeding, it was neither fairly presented nor adjudicated on the merits there. *See Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam). The evidentiary dimension of the fair presentation rule, like the legal principles dimension, reflects a profound comity interest in having habeas petitioners give state courts a fair chance to superintend the integrity of their own judgments. *Coleman*, 501 U.S. at 731.

Of course, the text and meaning of § 2254(d) have remained the same; the only changes are the incentives for state respondents. There was nothing remotely controversial about the meaning of "fair presentation" and "merits adjudication" until *Pinholster* and *Martinez v. Ryan*, 566 U.S. 1 (2012). After *Martinez*, the absence of fair presentation no longer served as a categorical bar to merits review in federal court. *See id.* at 9. State respondents thereafter sought to expand the definition of fair presentation to include claims that were factually developed in federal court, but presented only through skeletal, unsubstantiated allegations in state court. If such claims are reclassified as having been fairly presented, the states' thinking goes, then they are adjudicated on the merits, subject to the relitigation bar, and the *Martinez* excuse is irrelevant. The meaning of the § 2254(d), however, did not change when the Court decided *Martinez.* If states want to redefine the scope of the relitigation bar because *Martinez* changed their incentives, their recourse is to seek a revision of § 2254(d) from Congress, not from a federal court.

ARGUMENT

Applying its "heart of the claim" test, the Fourth Circuit held that § 2254(d) precluded relitigation of Moore's IATC claim because it was adjudicated on the merits and not new. *Moore v. Stirling*, 952 F.3d 174, 183–84 (4th Cir. 2020). That test, which treats a claim as fairly presented without respect to factual substantiation in state court, is based on an incorrect interpretation of § 2254(d) and creates a circuit split. When Congress enacted AEDPA, a federal court claim was not "adjudicated on the merits" simply because similar allegations were made to a state court. Fair presentation required factual substance.

Nothing has changed since about the statute. That *Martinez* changed the incentives for state respondents is not a sufficient reason for judges to assign a different meaning to statutory text that remains unchanged.

I. THE FOURTH CIRCUIT'S "HEART OF THE CLAIM" TEST CREATED A DEEPENING SPLIT IN THE COURTS OF APPEALS

Understanding the circuit split requires an understanding of the fair presentation doctrine, and its relationship to the merits adjudication requirement appearing in § 2254(d). Federal law has long required that, for a federal court claim to have been fairly presented to and adjudicated on the merits by a state court, the claimant must have presented the state court with both the legal principles *and* the evidence in support of that claim. *See Picard*, 404 U.S. at 276. When a federal court is presented with new evidence that fundamentally alters a similar claim that was presented to the state court, a federal court does not treat that claim as having been fairly presented or adjudicated on the merits in state court. *See Vasquez*, 474 U.S. at 260–61.

A. Before *Martinez*, Every Court Agreed That A Federal Court Claim Had Not Been Fairly Presented In Or Adjudicated On The Merits By A State Court If New Evidence Fundamentally Altered It

Several important federal habeas rules are keyed to a determination about whether a particular claim presented to a federal court was fairly presented to and adjudicated on the merits by a state court. One of the most important such rules, specified in 28 U.S.C. § 2254(d), generally bars

relitigation of claims that were adjudicated on the merits in state court. *Harrington v. Richter*, 562 U.S. 86, 98 (2011). If a claim is adjudicated on the merits, then federal relief is not permitted unless the state court decision is legally unreasonable under § 2254(d)(1) or factually unreasonable under § 2254(d)(2). *Id.* Both the legal and factual inquiries entail scrutiny of the state record only. *See* § 2254(d)(2) (factual unreasonableness); *Pinholster*, 563 U.S. at 180–81 (legal unreasonableness). Additional evidence can be used to prove a constitutional violation only if a claim was not decided on the merits or after a federal court concludes, on the state record alone, that a state merits decision was legally or factually unreasonable.

Federal habeas relief is ordinarily unavailable to a state prisoner who fails to present fairly a claim because he has either failed to exhaust it (if a state remedy remains) or has procedurally defaulted it (if one does not). *See Coleman*, 501 U.S. at 729–30 (1991) (procedural default); *Picard*, 404 U.S. at 275 (exhaustion). Crucially, a claim that is not fairly presented cannot be "adjudicated on the merits" because the state court cannot decide the substance of factually supported allegations. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (procedurally defaulted claims are not "resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure").

Vasquez, 474 U.S. at 257, reaffirmed the rule that a federal court claim is not fairly presented when new, crucial evidence "fundamentally alters" an otherwise similar claim litigated in state courts, *id.* at 260. The evidentiary dimension of the fair-presentation rule serves an important federalism interest: A claim is presented

when the state court has had a fair opportunity to apply the legal principles to the facts. *Picard*, 404 U.S. at 277.

The basic planks of the fair-presentation rule were settled long ago. Before 2012, the courts of appeals recognized the same rule: When a petitioner presents a federal court with evidence that fundamentally alters a claim presented to a state court, the federal court claim was neither presented fairly to nor adjudicated on the merits by the state court. *See, e.g., Winston v. Kelly*, 592 F.3d 535, 550 (4th Cir. 2010) (applying *Vasquez* and holding "if the petitioner presented *no evidence* to the state courts … the claim will be fundamentally altered by the new evidence presented to the district court"); *Satterlee v. Wolfenbarger*, 453 F.3d 362, 366 n.2 (6th Cir. 2006) (citing *Vasquez* and holding a claim is not fundamentally altered by "introduction of new factual materials supportive of those already in the record" (quoting 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Prac. & Proc. § 23.3c, at 1088–89 (5th ed. 2005))); *Anderson v. Johnson*, 338 F.3d 382, 388 (5th Cir. 2003) (citing *Vasquez* and finding that affidavit did not fundamentally alter claim where it supported an allegation he asserted in state court); *Hawkins v. Mullin*, 291 F.3d 658, 670 (10th Cir. 2002) (citing *Vasquez* and holding that petitioner defaulted on claim for which he presented no evidence to state court); *Stevens v. Del. Corr. Ctr.*, 295 F.3d 361, 370 (3d Cir. 2002) (citing *Vasquez* and holding new affidavits presented to federal court did not fundamentally alter claim because they presented same facts as evidence petitioner presented to state court); *Boyko v. Parke*, 259 F.3d 781, 789 (7th Cir. 2001) (citing *Vasquez* and holding that petitioner's claim was not fundamentally altered by new evidence);

Caballero v. Keane, 42 F.3d 738, 741 (2d Cir. 1994) (citing *Vasquez* and remanding with instruction to dismiss because petitioner failed to exhaust state remedies as to claim fundamentally altered by evidence of trial attorney's drug use); *Cox v. Lockhart*, 970 F.2d 448, 454 (8th Cir. 1992) (claim not fairly presented where no evidence presented to state court to support one element of claim); *Aldridge v. Dugger*, 925 F.2d 1320, 1330 (11th Cir. 1991) (citing *Vasquez* and holding that new evidence did not fundamentally alter petitioner's claim); *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988) (citing *Vasquez* and dismissing petition based on evidence that was never presented to state court); *Turner v. Fair*, 617 F.2d 7, 11 (1st Cir. 1980) (no fair presentation when theory undergoes "material alteration").[2]

---

2. Indeed, since *Vasquez*, procedural default resulting from the fundamental alteration of a claim has resulted in multiple capital defendants being executed without ever having had the claims they presented in federal court adjudicated on the merits. *See, e.g.*, *Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003) (claim presented by capital defendant on federal habeas was procedurally defaulted because it was altered by substantial mitigating evidence); *Next to Die: Watching Death Row*, The Marshall Project, https://bit.ly/2Sk3i2x (last visited Sept. 30, 2020) (Kunkle executed on January 25, 2005); *Hawkins*, 291 F.3d at 670 (capital prisoner's claim procedurally defaulted when he attempted to "present evidence in a federal habeas proceeding that place[d] the claim[] in a significantly different legal posture" (internal quotation marks omitted)); *Next to Die: Watching Death Row*, The Marshall Project, https://bit.ly/33gULE0 (last visited Sept. 30, 2020) (Hawkins executed on April 8, 2003); *Matthews v. Evatt*, 105 F.3d 907, 914-15 (4th Cir. 1997) (capital prisoner's claim procedurally defaulted because he failed to present factual support to the state court); *S. Carolina Carries Out Execution*, Associated Press (Nov. 8, 1997), https://bit.ly/36siz9M (Matthews executed in November 1997).

B. Following *Martinez*, Courts Of Appeals Have Split On The Test For Determining Whether A Claim Is New Or Adjudicated On The Merits

In 2012 and 2013, this Court decided *Martinez*, and *Trevino v. Thaler*, 569 U.S. 413 (2013), which together hold that deficient state post-conviction representation can excuse the procedural default of an IATC claim. *Martinez* recognized that when state procedural rules require petitioners to raise IATC claims first on collateral review, "[i]nadequate assistance of counsel at initial review collateral proceedings may establish cause for a prisoner's procedural default of a [substantial] claim of ineffective assistance at trial." 566 U.S. at 9. *Trevino* extended *Martinez* relief to circumstances where a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." 569 U.S. at 429.

After *Martinez* and *Trevino*, the courts of appeals abandoned their prior uniformity and began to split on how they analyze whether a claim is new or "adjudicated on the merits." The Fifth and Ninth Circuits continue to apply the longstanding rule—that is, they require federal courts to consider whether both the facts and the legal principles presented to the federal court are the same as those presented to the state court. The test in those circuits for whether a claim was adjudicated on the merits includes an analysis of whether new evidence either fundamentally alters the claim presented to the state court or places the claim in a significantly different and stronger evidentiary posture than it was in when presented to the state court. *Nelson v. Davis*, 952 F.3d

651, 671 (5th Cir. 2020); *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014).

The Ninth Circuit was the first to confront arguments from state respondents that the meaning of "fair presentation" and "adjudicated on the merits" had changed after *Martinez* and *Trevino*. In *Dickens*, that court reaffirmed the longstanding rule that new evidence presented in federal court could "fundamentally alter" a state court IATC claim with similar allegations, and that such a claim was not adjudicated on the merits within the meaning of § 2254(d). *See* 740 F.3d at 1319. And in *Nelson*, the Fifth Circuit did the same. *See* 952 F.3d at 671–72 (recognizing that new evidence could "fundamentally alter[]" a claim, "render[ing] it a new claim that was not adjudicated on the merits by the state court").

The Fourth and the Eighth Circuits, by contrast, have changed course, eschewing any inquiry into the effect of new facts adduced in federal court. In these jurisdictions, the presence of similar legal allegations suffices to show that a federal court claim was adjudicated on the merits in state court. In this case, the Fourth Circuit adopted a novel "heart of the claim" test, centering the inquiry on the relationship between pleadings and abandoning the longstanding emphasis on the material factual differences that were so central to *Vasquez*. The Fourth Circuit held that Moore's claim was adjudicated on the merits and not new, even though the state court record contained none of the new, crucial evidence presented to the federal court. *Moore*, 952 F.3d at 182–83. Because the "heart" (*i.e.*, the supporting legal principles) of Moore's IATC claim was raised in both state and federal habeas, the Fourth Circuit reasoned, the claim in federal court was adjudicated on

the merits and § 2254(d) barred consideration of any new evidence. *See id.*

Just months after the Fourth Circuit decided *Moore*, the Eighth Circuit took the same approach to fair presentation, and positioned itself to incorporate that test into § 2254(d) analyses. *See Thomas v. Payne*, 960 F.3d 465, 473 (8th Cir. 2020). That court determined that a claim was fairly presented and not fundamentally altered by new evidence presented in federal habeas, reasoning that "[t]he weakness of support for the claims in the [post-conviction] petition and hearing *has no bearing on whether the claims were actually presented*." *Id.* (emphasis added). Although the Eighth Circuit declined to analyze application of § 2254(d), it noted that "[i]t appear[ed] § 2254(d) would, in fact, apply" based on its finding that the claim was fairly presented. *See id.* at 472 n.5. The Eighth Circuit is well-positioned to solidify its alignment with the Fourth Circuit, needing only to confirm that its new fair presentation test applies to § 2254(d).

* * *

In short, there was no confusion of the meaning of "fair presentation" and "adjudicated on the merits" before *Martinez*. In every federal jurisdiction, federal courts observed the rule set forth in *Picard* and *Vasquez*: A federal court claim was not adjudicated on the merits in state court when it is not fairly presented there, and a federal court claim is not fairly presented if the comparable state court claim omitted substantial evidence. The Fifth and Ninth Circuits held that *Martinez* changed nothing about the meaning of fair presentation, but the Fourth Circuit now disagrees. In the Fourth Circuit, a federal

court claim is adjudicated on the merits in federal court if it shares legal allegations with a claim in state court, regardless of evidentiary support.

II. THE DEFINITION OF "ADJUDICATED ON THE MERITS" DID NOT CHANGE WHEN THE COURT DECIDED *MARTINEZ*; THE STATES' INCENTIVES DID

The rule adopted in *Moore* is the culmination of a post-*Martinez* effort by state respondents to revise, for the purposes of § 2254(d), the meaning of "adjudication on the merits." But *Martinez* changed only the judge-made consequences for a claim that has been classified as *not* having been "adjudicated on the merits"—that is, for procedurally defaulted claims. *Martinez* did nothing, and could do nothing, to alter the meaning of "adjudicated on the merits" in the statute. If states want to change the meaning of that term in § 2254(d), the appropriate appeal is to Congress, not the courts.

Before *Martinez*, federal relief was functionally unavailable for claims not fairly presented to state courts. If no federal remedy remained, such claims were procedurally defaulted, and a federal court could not grant relief unless the claimant could satisfy a narrow excuse doctrine. *See Coleman*, 501 U.S. at 750 (explaining that excuse had been narrowed so as to require a showing of cause and prejudice or, in the absence of cause, a miscarriage of justice). Thus, when a petitioner presented to the federal court new evidence that fundamentally altered the substance of a state court claim, that claim could not be considered unless the petitioner could satisfy a very narrow exception. *Martinez* expanded the excuse for procedural default such that failure to fairly present

an IATC claim could be excused by deficient state post-conviction lawyering. *See* 566 U.S. at 9. More precisely, if an IATC claim is not fairly presented and therefore subject to procedural default, and if the default is attributable to inadequate state post-conviction counsel, then the IATC claimant may still obtain federal habeas review on the merits. *See id.* This change reduced the desirability, for state respondents, of a finding that a claim had not been fairly presented in state court.

Around the time that the Supreme Court decided *Martinez*, the incentives were shifting on the other side of the equation, too. As the absence of fair presentation was becoming less of an advantage for state respondents, an adverse merits adjudication was becoming a windfall. In *Pinholster*, this Court held that, for claims denied on the merits in state court, a prisoner could satisfy the relitigation bar using only factual material from the state record. *See* 563 U.S. at 186–87. And in *Harrington v. Richter*, 562 U.S. 86 (2011), the Court held that, for claims adjudicated on the merits, a state prisoner cannot overcome the federal relitigation bar without a stringent showing on the law that every "fairminded jurist[]" would find the state decision unreasonable. *Id.* at 786.

In short, the meaning of "adjudicated on the merits" in § 2254(d) did not change; the implications for state respondents did. State respondents that had formerly pushed for strict fair presentation rules that triggered procedural defaults suddenly preferred claims to be classified as having been "adjudicated on the merits" in state court. What followed was a rash of requests from state respondents for courts to hold that *Pinholster* in some sense superseded *Martinez* and controlled the scope of the "fair presentation" requirement. *See*, *e.g.*, *Dickens*,

740 F.3d at 1320 ("The state presents various arguments to convince us that Dickens is not entitled to remand under *Martinez* and that our conclusion would contravene [*Pinholster*]"); Brief for Appellee at 16, *Nelson v. Davis*, No. 17-70012 (5th Cir. Jul. 22, 2020) (state respondent arguing that claimant may not, under *Martinez*, use "new facts or legal arguments" to "defeat the[] limits" set forth in *Pinholster*). The State's argument in *Moore*, which the Fourth Circuit adopted, is part of this effort to treat *Pinholster* as a free-floating mandate for courts to prohibit federal review of new evidence in every case.

But *Pinholster* interprets statutory language that does not apply in every case, and does not apply in *any case* where a claim is not "adjudicated on the merits."[3] Specifically, *Pinholster* is about how to apply § 2254(d)(1), the exception to a relitigation bar that applies only when there *is* a state merits adjudication. The State's framing—that courts must choose between the policies embedded in *Martinez* and those reflected in *Pinholster*—elides the fact that *Pinholster* interprets a statutory provision not at issue in cases like Moore's. Indeed, *Pinholster* itself makes this observation explicit, as the Court itself noted it was not "draw[ing] the line between new claims and claims adjudicated on the merits." 563 U.S. at 186 n.10. "Adjudication on the merits" meant the same thing the day after *Pinholster* as it did in 1996.

The question presented in this case is therefore a straightforward issue of statutory interpretation about

3. As explained above, *supra* Part I, 28 U.S.C. § 2254(d) contains broadly applicable language that categorically bars relitigation of claims "adjudicated on the merits" in state court, subject to two exceptions within the statute. *Pinholster* interprets only one of those subsections, § 2254(d)(1). 563 U.S. at 181.

what "adjudicated on the merits" means. Judge-made law about the *consequences* of a failure to "fairly present" has changed, but the statutory meaning of adjudicated on the merits—keyed to fair presentation—has not. This Court should therefore confirm that fair presentation still means what it meant when Congress enacted § 2254(d). The meaning of a statute does not change because a Supreme Court decision about a separate doctrine opens the door to habeas relief in a limited number of cases.

III. THE FOURTH CIRCUIT'S RULE IS IRRECONCILABLE WITH THIS COURT'S PRECEDENT AND UNDERLYING COMITY PRINCIPLES

The rule from *Vasquez* and *Picard* is the best interpretation of "adjudicated on the merits" because it was in place when Congress passed § 2254(d). The Fourth Circuit's heart-of-the-claim test, by contrast, is inconsistent with the statute's settled meaning. In passing AEDPA, Congress used a term familiar to prior habeas law—"adjudicated on the merits." And "where [C]ongress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see also Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016) ("[I]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses."). This rule of statutory interpretation applies with special force when AEDPA incorporates terms from antecedent decisional law. *See Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007) (requiring courts interpreting

AEDPA to look to prior "case law" when statutory term is "not self-defining").

When Congress passed AEDPA, it well-understood that a claim could not be "adjudicated on the merits" unless it was fairly presented to state courts. In landmark cases like *Wainwright v. Sykes*, this Court explained that a procedurally defaulted claim—a claim not fairly presented to the state court and for which state remedies are unavailable—is one that was not "*resolved on the merits* in the state proceeding due to respondent's failure to raise them there as required by state procedure." 433 U.S. 72, 87 (1977) (emphasis added). And in *Vasquez*, this Court indicated that if evidence fundamentally alters a claim such that it is new, it must be sent to the state court for adjudication on the merits. 474 U.S. at 622. Post-AEDPA cases confirm that the statute preserved the longstanding alignment between fair presentation and merits adjudication. *See, e.g., Johnson v. Williams*, 568 U.S. 289, 302 (2013) ("A judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court … heard and *evaluated* the evidence and the parties' substantive arguments." (emphasis in original)); *see also Richter*, 562 U.S. at 99 (conditioning the presumption "that the state court adjudicated the claim on the merits" on the claim having been "presented" to the state court). Indeed, in this very case, Fourth Circuit acknowledged that a claim not fairly presented to a state court cannot be adjudicated there: "We generally may entertain a prisoner's habeas petition raising federal claims only if he has exhausted the remedies available in the courts of the state [*i.e.*, fairly presented] …. And where the state court has denied those claims on the merits, we must review that decision with great deference." 952 F.3d at 181.

The meaning of fair presentation embedded in § 2254(d)'s merits adjudication requirement was likewise well established in 1996. The "fair presentation" requirement is over a century old and has long required the presentation of both the facts and the legal principles supporting the claim in order to give "full operation" to comity, which "is a principle of right and of law, and therefore of necessity." *Ex parte Royall*, 117 U.S. 241, 252 (1886); *see also Picard*, 404 U.S. at 277 (requiring presentation of facts and legal principles).

The rule that fair presentation required evidentiary substance is rooted in federalism, and the principle that state courts should have the first opportunity to enforce federal rights. It is "an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)). A state court did not have a "'fair opportunity' to apply controlling legal principles to the facts bearing upon [a prisoner's] constitutional claim" if the facts were not presented. *Harless*, 459 U.S. at 6. The emphasis on providing state courts with the fair opportunity to adjudicate law and fact animates *Vasquez,* which emphasized that a federal court claim is not fairly presented to a state court when new, material evidence "fundamentally alters" it. 474 U.S. at 260.

When it passed AEDPA, Congress was well aware of the longstanding rule. At that time, a federal court claim supported with evidence that was new and material was a claim that was new, not fairly presented to the state court and not "adjudicated on the merits" there. Nothing

in the text or legislative history of the statute suggests that Congress altered that well-established meaning when it used the words "adjudicated on the merits" in § 2254(d). But the Fourth Circuit's heart-of-the-claim standard effectively usurps Congress by cutting loose the emphasis on factual substance that had been a touchstone of fair presentation doctrine. This Court should grant certiorari to resolve the deepening circuit split, clarify the meaning of "adjudicated on the merits," and reject the Fourth Circuit's test.

CONCLUSION

For the foregoing reasons, Richard Moore's petition for certiorari should be granted.

Dated: New York, NY
October 2, 2020

Respectfully submitted,

Caitlin J. Halligan
Counsel of Record
Ryan W. Allison
Jordan L. Weatherwax
Selendy & Gay PLLC
1290 Avenue of the Americas
New York, New York 10104
(212) 390-9000
challigan@selendygay.com

Counsel for Amici Curiae

APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

Michael C. Dorf
Robert S. Stevens Professor of Law
Cornell Law School*
Ithaca, New York

Eric M. Freedman
Siggi B. Wilzig Distinguished Professor of Constitutional Rights
Hofstra University School of Law*
Hempstead, New York

Brandon L. Garrett
L. Neil Williams, Jr. Professor of Law
Duke University School of Law*
Durham, North Carolina

Randy A. Hertz
Vice Dean and Professor of Clinical Law
New York University Law School*
New York, New York

Lee Kovarsky
Bryant Smith Chair in Law
University of Texas School of Law*
Austin, Texas

James S. Liebman
Simon H. Rifkind Professor of Law
Columbia Law School*
New York, New York

Appendix

Leah M. Litman
Assistant Professor of Law
University of Michigan Law School*
Ann Arbor, Michigan

Justin F. Marceau
Professor of Law
University of Denver, Sturm College of Law*
Denver, Colorado

Eve Brensike Primus
Yale Kamisar Collegiate Professor of Law
University of Michigan Law School*
Ann Arbor, Michigan

Jordan M. Steiker
Judge Robert M. Parker Endowed Chair in Law
University of Texas School of Law*
Austin, Texas

Stephen I. Vladeck
A. Dalton Cross Professor in Law
University of Texas School of Law*
Austin, Texas

Samuel Wiseman
Professor of Law
Penn State Law*
University Park, Pennsylvania

Appendix

Larry Yackle
Professor of Law Emeritus
Boston University School of Law
Boston, Massachusetts

**Affiliations listed for identification purposes only.*