No. 17-1274

In the Supreme Court of the United States

CHARLES L. RYAN,
Director, Arizona Department of Corrections,
Petitioner,

v.

ROBERT ALLEN POYSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF NEVADA, COLORADO, GEORGIA, IDAHO, KANSAS, NEBRASKA, SOUTH CAROLINA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CAPITAL CASE
QUESTIONS PRESENTED

1. Did the Ninth Circuit err in interpreting Federal Rule of Appellate Procedure 41(d)(1) to permit an appellate court to withhold its mandate indefinitely and thereby retain jurisdiction long after this Court denied a petition for certiorari?

2. Did the Ninth Circuit err in holding that the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, permits a federal court to disregard a state court's language and instead presume constitutional error based on the federal court's perception of state-court error in other cases?

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INTEREST OF *AMICI CURIAE*

States have strong interests in the finality of their criminal convictions. Federal habeas corpus jurisprudence recognizes state interests in comity, respecting the States' good faith efforts to honor constitutional rights. This Court has repeatedly emphasized that Congress adopted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to protect those interests and limit the extensive intrusion on state sovereignty that can be occasioned by federal habeas review.

State courts are entrusted to enforce the federal constitution, and state court judges are presumed to know and correctly apply the law. Those core principles serve as a foundation to the principle of comity that also underscores this Court's habeas jurisprudence. And because reasonable minds can differ about the meaning of this Court's opinions applying the Constitution, AEDPA limits the availability of habeas relief to those extreme cases where there is no room for reasonable debate that this Court's clear holdings required the state court to reach a different outcome.

Here, in a line of cases challenging decisions of the Arizona Supreme Court, the Ninth Circuit has reversed those principles. But the Ninth Circuit did so by presuming that the Arizona Supreme Court applied a rule "contrary to" clearly established federal law, not because of what the state court said in this case, but because the Ninth Circuit believes the Arizona Supreme Court committed such an error in other cases. This approach is antithetical to the foundational principles of AEDPA and harms state interests in comity and finality.

SUMMARY OF THE ARGUMENT

When a state court decision challenged under 28 U.S.C. § 2254(d) is susceptible to more than one reasonable interpretation—one that would result in constitutional error, and one that would not—a federal court must give the state court the benefit of the doubt. This core value of federal habeas jurisprudence—comity—finds its roots in the long-standing presumption that judges know, and faithfully adhere to their duty to apply, the law—frequently referred to as the presumption of regularity. And because reasonable minds can differ about the precise contours of this Court's decisions applying the Constitution, it is not the province of lower federal courts to merely second-guess a state court's reasonable application of this Court's decisions on questions of federal constitutional law. Federal habeas review is not a second opportunity for error correction. It is reserved to remedy only extreme malfunctions in state criminal justice systems; when there is no room for fair-minded debate that this Court's precedents compelled the state court to reach a different outcome in a particular case.

In this case, the Ninth Circuit found itself bound by its prior decision in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (*en banc*). But *McKinney* was a deeply divided decision, with five dissenting judges succinctly and simply stating what should have controlled the outcome there: "This case should come down to a review of only a few pages of the transcript from McKinney's sentencing, and a few pages from the Arizona Supreme Court's decision affirming his sentence." 813 F.3d at 830 (Bea, J. dissenting). The reason for such a simple resolution of the case is

simple: nothing within the actual language of the Arizona Supreme Court's decision demonstrated that the decision was inconsistent with what this Court's holdings should have required of the state court. *Id*. at 836-41. Such deferential consideration of state court rulings on habeas review is what the law requires. *See Early v. Packer*, 537 U.S. 3, 8 (2002); *see also Parker v. Dugger*, 498 U.S. 308, 314-15 (1991) (presuming state court judge considered relevant mitigating evidence because "he said he did").

Notwithstanding the dissent's clear articulation of the proper analysis, the *McKinney* majority glossed over the Arizona Supreme Court's actual opinion adjudicating McKinney's claim, turning AEDPA (and the presumption of regularity) on its head. The majority determined that habeas relief was warranted under 28 U.S.C. § 2254(d) after presuming that the Arizona court must have committed a federal constitutional error in reviewing McKinney's case because the majority believed that the Arizona court had committed constitutional error when reviewing the same issue in *other cases*.

As if that error were not enough, the Ninth Circuit's treatment of *McKinney* as binding precedent perpetuates the error the court committed in that case and brings truth to the dissenting judges' concerns about the problems created by the *McKinney* decision. *See McKinney*, 813 F.3d at 849-50 (Bea, J. dissenting) (raising concerns about the broader impact of the *McKinney* decision). The panel majority in this case expressly acknowledged it was disregarding a reasonable interpretation of the state court decision

from Poyson's case in order to create a conflict with *Eddings*. Pet. App. 30.

This Court's intervention is necessary to maintain proper balance between the state and federal interests at play when federal courts review state criminal judgments.

ARGUMENT

Sitting *en banc* in *McKinney*, the Ninth Circuit narrowly concluded that the Arizona courts had applied a rule that conflicted with this Court's decision from *Eddings v. Oklahoma*, 455 U.S. 104 (1982). But the "conflict" that the Ninth Circuit found did not turn on anything the Arizona Supreme Court actually said when reviewing McKinney's case. Instead, the supposed conflict arose based on the *en banc* majority's reading of *past* Arizona Supreme Court decisions, together with an assumption that, notwithstanding what the Arizona Supreme Court actually said when reviewing McKinney's case, the state court must have implicitly incorporated the rationale from those past decisions into McKinney's case.

The Ninth Circuit's decision in *McKinney* was irreconcilable with the Arizona Supreme Court's actual decision adjudicating McKinney's *Eddings* claim, especially when viewed under AEDPA's deferential lens. In *Poyson*, the court has perpetuated its error from *McKinney* by reading the *en banc* majority's opinion to require the court to conclude that the Arizona Supreme Court applied a rule that is contrary to this Court's precedents, despite its acknowledgment that the wording of the Arizona Supreme Court's

decision in Poyson's case can be read consistently with this Court's holdings.

Eddings clearly established that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S. at 113-14 (emphasis in original). In subsequent cases applying *Eddings*, this Court held that a state cannot establish a rule making mitigating evidence *irrelevant* in the absence of a causal connection between the mitigating evidence and the defendant's crime. *Penry v. Lynaugh*, 492 U.S. 302 (1987), *overruled on other grounds by Atkins v. Virginia*, 563 U.S. 304 (2002). The sentencer must be allowed to *consider* all mitigating evidence, even if there is no causal connection between that evidence and crime.

But nothing in *Eddings* and its progeny has ever precluded states from establishing rules that guide sentencing discretion in how to assign *weight* to mitigating evidence. Indeed, this Court has acknowledged that a "state may shape and structure the jury's consideration of mitigation." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *see also Saffle v. Parks*, 494 U.S. 484, 492-93 (1990) (acknowledging "the distinction between allowing the jury to *consider* mitigating evidence and *guiding their consideration*") (emphasis added). *Eddings* also acknowledged that a causal connection between mitigating evidence and the crime makes that evidence worthy of greater weight when considering an appropriate sentence. *See* 455 U.S. at 115-16; *see also Penry*, 492 U.S. at 319.

The Arizona courts did not refuse to consider Poyson's mitigating evidence; they expressly considered the existence of the mitigating evidence and only determined that the absence of a causal connection between mitigating evidence and the offense demonstrated that the mitigating evidence did not carry any weight. Pet. App. 284-85. *Eddings*, and its progeny, do not preclude such an outcome. This Court's decisions require only that the sentencer be permitted to *consider* and give *effect* to the evidence, but the Constitution does not compel the sentencer to give *weight* to any particular evidence.

I. This Court's Decisions Require Federal Courts to Give State Court Decisions Reviewed Under AEDPA the Benefit of the Doubt.

Congress, through the adoption of AEDPA, imposed strict limitations on the availability of federal habeas relief, reinforcing the presumption of regularity, by expressly requiring federal courts to give state court decisions resolving challenges to state criminal judgments the benefit of the doubt. *See Burt v. Titlow,* 134 S. Ct. 10, 15-16 (2013); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*); *cf. Brown v. Payton*, 544 U.S. 133, 148-49 (2005) (Breyer, J. concurring) (recognizing that AEDPA significantly constrains federal review of a claim asserting that an ambiguous jury instruction resulted in *Eddings* error). The plain language of 28 U.S.C. § 2254(a) and (d) does not provide for federal habeas review that looks at what a state court did *in other cases* to create a presumption that the state court did the same *in this case*. Those provisions require that a petitioner show that *his*

judgment of conviction is invalid by identifying a constitutional error that occurred in *his* state proceeding. 28 U.S.C. § 2254; *Cullen v. Pinholster*, 563 U.S. 170 (2011) (recognizing AEDPA's "backward-looking language requires an examination of the state-court decision at the time it was made").

This Court's decisions applying AEDPA establish that habeas relief is unavailable if reasonable jurists can interpret a state court's application of the law to avoid a conflict with the holdings of this Court. *Harrington v. Richter*, 562 U.S. 86, 86, 102 (2011)) (noting habeas relief is conditioned on petitioner's ability to show "there is *no possibility* fairminded jurists could disagree that *the state court's decision conflicts* with this Court's precedents") (emphasis added). Where the state decision, within its four corners, articulates a rule that is consistent with this Court's holdings, a federal court need look no further than the face of the state court decision to be convinced that it should deny a petitioner's claim. Such an idea is hardly controversial; constitutional avoidance is one of the most fundamental doctrines of this Court's jurisprudence. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

II. The Ninth Circuit Misapplied AEDPA When It Relied on *McKinney* to Presume Error.

Compounding its error from *McKinney*, the Ninth Circuit has again deprived the Arizona Supreme Court of the benefit of the doubt by finding that *McKinney*, instead of what the Arizona Supreme Court said in adjudicating Poyson's claims for relief, controls the outcome of this case. *McKinney* was itself an unusual decision in that it presumed that the Arizona Supreme

Court applied a rule that violated *Eddings*, despite express language in the Arizona Supreme Court's decision to the contrary, because the Ninth Circuit believed (1) that the Arizona Supreme Court had committed *Eddings* error in other cases, and (2) the Arizona Supreme Court has a strong view of *stare decisis*. And now the Ninth Circuit believes that it must carry forward *McKinney*'s strained logic, while again disregarding the actual decision before it—here, the Arizona Supreme Court's decision adjudicating Poyson's claims.

But the plain language of 28 U.S.C. § 2254(d) required the federal court to review the "adjudication of [*Poyson's*] claim," not what happened in *McKinney* or any other case decided by the Arizona Supreme Court. Thus, it was improper for the Ninth Circuit to presume error, while disregarding what the Arizona Supreme Court actually said in this case. Poyson has the burden to prove that the Arizona courts decided *his case* in a way that is contrary to clearly established federal law.

A. Neither *Eddings* nor any other case precludes a state from looking for a causal connection when assigning weight to the mitigating evidence.

Capital sentencing frameworks like Arizona's are an outgrowth of this Court's decisions in *Furman v. Georgia*, 408 U.S. 238 (1972). *See Walton v. Arizona*, 497 U.S. 639, 657-61 (1990) (Scalia, J., concurring) (summarizing *Furman* and its progeny), *overruled on unrelated grounds by Ring v. Arizona*, 536 U.S. 584 (2002). The fundamental principle to be derived from *Furman* is "that 'where discretion is afforded a sentencing body on a matter so grave as the

determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)). As a result, "while some jury discretion still exists, the discretion to be exercised is controlled by clear and objective standards so as to produce non-arbitrary application," and states are required to "narrow the class of murders subject to capital punishment by providing specific and detailed guidance to the sentencer." *Id*. at 302-03 (internal quotation marks omitted).

In *Eddings*, this Court clearly established that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S. at 113-14 (emphasis in original). But, consistent with *Furman*, *Eddings* does not preclude states from establishing objective rules to guide sentencing decisions on how to assign weight to mitigating evidence, as long as those rules don't preclude the sentencer from giving effect to the mitigating evidence. *Buchanan*, 522 U.S. at 276.

Instead, *Eddings* acknowledges that the weight to be given to mitigating evidence will reasonably differ from case to case. 455 U.S. at 115. And, when evaluating Eddings's mitigating evidence, this Court expressly acknowledged that Eddings's mitigating evidence—his "difficult family history" and "emotional disturbance"—was "particularly relevant" and worthy of "great weight" because it shared a causal connection

with his crime: Eddings was only 16 at the time of his offense. *Id.* at 107-08, 115-16; *see also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) ("If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that *defendants who commit criminal acts that are attributable* to a disadvantaged background, or to emotional and mental problems, *may be less culpable* than defendants who have no such excuse.'") (emphasis added).

Thus, not only did *Eddings* expressly *not* place limitations on a state's ability to provide guidance about how to weigh relevant mitigating evidence, but the reasoning in *Eddings*, and its progeny, expressly recognizes that the presence or absence of a causal connection to the crime is a significant factor in determining how much weight to give mitigating evidence at sentencing, as it bears on the defendant's culpability for his offense(s).

B. The Ninth Circuit acknowledges that the Arizona Supreme Court applied the causal nexus test to determine the *weight*, not the *relevance*, of the mitigating evidence.

The Arizona Supreme Court stated that it was applying the causal nexus test for purposes of determining the *weight* of the mitigating evidence at issue in this case. Pet. App. 284-85. The Ninth Circuit panel majority admitted as much when it noted that the Arizona Supreme Court's order suggested it used

the "causal nexus test as a permissible weighing mechanism," but the Court ultimately disregarded the language of the state court decision in order to create a conflict with *Eddings*. Pet. App. 27-31. The court's reliance on *McKinney* to trump what the Arizona Supreme Court actually said in this case cannot be reconciled with AEDPA or the presumption of regularity.

AEDPA's deferential standard requires the federal court on collateral review to take the Arizona Supreme Court at its word—indeed, to give the state-court decision the benefit of the doubt. *Woodford*, 537 U.S. at 24. Instead of deferring to how the Arizona Supreme Court articulated that state's causal nexus test *in this case*, the Ninth Circuit sought out a conflict through its reliance on *McKinney*.

The Ninth Circuit's tortured path to a conflict, which is tainted by the strained logic of *McKinney*, does not just turn AEDPA on its head; it also runs directly against the presumption of regularity. The presumption of regularity frequently comes into play in a habeas proceeding when a reviewing state court simply affirms without explanation of a lower state court's judgment. *See, e.g., Harrington*, 562 U.S. at 98. Federal courts on collateral review must presume that the reviewing state court's basis for affirming the lower court's judgment, while unstated, was valid. *Id.*; *see also Burt*, 134 S. Ct. at 15; *Parke v. Raley*, 506 U.S. 20, 29-30 (1992). Where, as here, the reviewing state court *has* provided a valid reason for affirming the decision below, a federal court on collateral review should *a fortiori* presume that the judgment was affirmed for a valid, not invalid, reason. *See*, *e.g.*, *Voorhees v.*

Jackson, 35 U.S. 449, 469 (1836) ("There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears.")

The Arizona Supreme Court clearly provided a valid rationale for affirming Poyson's sentence. Pet. App. 30 (acknowledging the state court decision can be read as applying the "causal nexus test as a permissible weighing mechanism"). But instead of presuming that the Arizona Supreme Court meant what it said in this case, the Ninth Circuit presumed the opposite: that an unstated *Eddings* error occurred in this case simply because the Arizona Supreme Court had purportedly committed *Eddings* error in other cases. That sort of logic turns the presumption of regularity into a presumption of *ir*regularity.

III. The Ninth Circuit's Application of AEDPA in *McKinney* and *Poyson* Threatens State Interests in Other Contexts.

The dissenting judges in *McKinney* predicted that this case would come. 813 F.3d at 849-50 (Bea, J. dissenting) (predicting the impact of *McKinney* on related Arizona cases). And the State of Arizona remains rightfully concerned that this case will impact additional cases out of Arizona raising a causal nexus/*Eddings* issue.

But the dissenting judges' concerns did not just end with the impact that the rationale from *McKinney* would have on the causal nexus/*Eddings* issue. *Id*. at 850 (noting that *McKinney* is likely to spread to other contexts). Rather than wait to see if the dissent's second prediction comes true, this Court should

intervene now and reverse the Ninth Circuit in this case, while also abrogating *McKinney* and its improper application of the AEDPA standard.

CONCLUSION

Habeas relief should have been unavailable under AEDPA, and this Court should grant the petition and summarily reverse the Ninth Circuit's decision.

Respectfully submitted,

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