No. 19-1023

IN THE
Supreme Court of the United States

DONNIE MORGAN, WARDEN,
Petitioner,
v.

VINCENT D. WHITE, JR.,
Respondent.

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

BRIEF OF INDIANA, ARIZONA, ARKANSAS, KANSAS, KENTUCKY, MISSOURI, NEBRASKA, SOUTH CAROLINA, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

STATUTES

OTHER AUTHORITIES

OTHER AUTHORITIES [CONT'D]

INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Arizona, Arkansas, Kansas, Kentucky, Missouri, Nebraska, South Carolina, Texas, and Utah respectfully submit this brief as *amici curiae* in support of Petitioner. *Amici* are responsible for enforcing state criminal laws and thus have interests in protecting the finality of state court criminal judgments and, relatedly, uniform application of the bar against bringing procedurally defaulted habeas claims in federal court. *Amici* States also have a strong interest in ensuring that the single, equitable exception to the procedural-default rule—where "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law," *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)—remains narrow. *Amici* States file this brief to explain why the Court should grant Ohio's petition for a writ of certiorari and reaffirm that every habeas petitioner seeking to avoid the procedural-default rule must show actual prejudice.

REASONS FOR GRANTING THE PETITION

The Court has long "been careful to limit the scope of federal intrusion into state criminal adjudications" in light of "the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). In particular, "federal habeas challenges to state convictions . . . entail greater finality problems and special comity concerns." *Engle v. Isaac*, 456 U.S. 107,

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the Amici States' intention to file this brief at least 10 days prior to the due date of this brief.

134 (1982); *see also Harris v. Reed*, 489 U.S. 255, 282 (1989) ("[F]ederal habeas review itself entails significant costs. It disturbs the State's significant interest in repose for concluded litigation . . . and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority").

Applying these principles in federal habeas, the Court has declared that "a state decision resting on an adequate foundation of state substantive law"—including dismissal of federal claims for failure to follow state rules—"is immune from review in federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977). Yet the Court also developed an exception to the procedural-default rule for habeas petitioners who show both cause for the default and actual prejudice resulting from a claimed violation of federal law. *Id.* at 90–91. The cause-and-prejudice exception is justified on equitable (not constitutional) grounds and originated with the Federal Rules of Criminal Procedure. *See id.*; *id.* at 96 n.4 (Stevens, J., concurring).

In *Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991), the Court held that counsel's failure to raise federal claims during state post-conviction proceedings does not constitute "cause" to excuse procedural default because no constitutional right to post-conviction counsel exists. That same year, the Court also recognized that, to excuse procedural default, a petitioner must also show "actual prejudice resulting from the errors of which he complains." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

Congress's passage of AEDPA in 1996 neither codified nor modified these precedents. *See*, *e.g.*, *Moleterno v. Nelson*, 114 F.3d 629, 633–34 (7th Cir. 1997) (noting that the substantive changes to 28 U.S.C. section 2254 made by AEDPA did not change the procedural default rules).

The Court, however, modified *Coleman* on its own. In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court narrowly qualified *Coleman* and held that counsel's failure to raise an ineffective-assistance-of-trial-counsel claim in a state post-conviction proceeding *can* constitute "cause" if (1) the State required the prisoner to raise such a claim in the collateral proceeding (rather than on direct appeal); (2) the failure to raise the claim in the state post-conviction proceeding was ineffective under the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984); and (3) the underlying ineffective-assistance claim had "some merit." *Id.* at 14. And in *Trevino v. Thaler*, 569 U.S. 413 (2013), the Court extended *Martinez* to apply not only when a State categorically requires a prisoner to raise an ineffective-assistance-of-trial claim in a collateral proceeding, but also when a State *effectively* does so, such as where the time for filing the claim prior to direct review is insufficient to permit reasonable investigation.

Crucially, both *Martinez* and *Trevino* addressed only the "cause" portion of the cause-and-prejudice exception. Neither decision addressed—much less removed—the requirement that a habeas petitioner show "actual prejudice" from the default before presenting a procedurally defaulted claim.

In its decision below, however, the Sixth Circuit erroneously concluded that because the habeas petitioner had established cause under *Martinez-Trevino*, he was not required to make a showing of actual prejudice. The decision exacerbates a circuit conflict and severely undermines the values of federalism, comity, and finality that justify the procedural-default rule. The Court should grant certiorari to state definitively that all habeas petitioners, including those seeking to present claims under the *Martinez-Trevino* exception, must always show actual prejudice before presenting an otherwise procedurally defaulted claim.

I. The Cause-and-Prejudice Exception to the Procedural Default Bar Is Equitable, Not Constitutional, and Should Remain Narrow

A. The procedural-default rule advances federalism, comity, and finality and preserves state court authority to consider constitutional claims

To safeguard the principles of federalism, comity, and finality of state-court judgments, the Court has long held that where a petitioner seeking a writ of habeas corpus has procedurally defaulted his claim—*i.e.*, where a state procedural rule bars the claim, such as because the petitioner failed timely to raise the claim in state court—a federal habeas court is barred from reviewing the claim. *See Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). The procedural-default doctrine arose, in part, out of concern about sandbagging by defense lawyers, who might otherwise strategically default,

knowing that federal courts would provide an alternative forum if the defendant received a guilty verdict. *Wainwright*, 433 U.S. at 89; *see also Coleman v. Thompson*, 501 U.S. 722, 732, (1991) ("[i]n the absence of the [procedural-default] doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court"). The point is to make "the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright*, 433 U.S. at 90.

Congress further advanced the principles of comity, finality, and federalism by passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which further limited the "scope of federal intrusion into state criminal adjudications." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Congress intended AEDPA "to streamline the criminal justice system" by codifying and further expanding the Court's recent limitations on federal habeas relief. Joseph M. Ditkoff, *The Ever More Complicated "Actual Innocence" Gateway to Habeas Review:* Schlup v. Delo*, 115 S. Ct. 851 (1995)*, 18 Harv. J.L. & Pub. Pol'y 889, 889 (1995). In particular, AEDPA sought to preserve the opportunity for state courts to adjudicate constitutional claims before petitioners could seek federal habeas review and sought "to 'reduce delays in the execution of state and federal criminal sentences, particularly in capital cases.'" *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). AEDPA thus requires habeas petitioners to exhaust all claims in state court before

bringing them before a federal court. *See* 28 U.S.C. § 2254(b), (d); *Rhines*, 544 U.S. at 274–75.

AEDPA's exhaustion requirement goes hand-in-hand with the pre-AEDPA procedural-default doctrine. *See Cone v. Bell*, 556 U.S. 449, 465 (2009) ("[C]onsistent with the longstanding requirement that habeas petitioners must exhaust available state remedies before seeking relief in federal court, we have held that when a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review"); *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) ("We recognized the inseparability of the exhaustion rule and the procedural-default doctrine in *Coleman*"). The Court has thus described the procedural default doctrine as an "important corollary to the exhaustion requirement" of AEDPA—both doctrines advance the principles of comity, finality, and federalism. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (internal quotation marks omitted).

A federal court that considers limiting the scope of the procedural-default rule should be especially sensitive to the weighty concerns—endorsed by this Court and Congress—underlying the rule.

B. Given the important state interests justifying the procedural default rule, the Court has excused compliance only where a petitioner can show both cause and actual prejudice

Of particular importance here, the fundamental interests that justify the procedural-default rule should guide the application of the sole exception to that rule—the equity-based cause-and-prejudice standard. *See Martinez v. Ryan*, 566 U.S. at 13 (noting that the rules for excusing procedural default developed through the "exercise of the Court's discretion" and "reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default"); Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 Minn. L. Rev. 1015, 1036 (May 1993). ("Cause and prejudice is strictly a court-made rule to give sufficient credence to comity and to defer to a state's need to enforce its procedural rules").

The cause-and-prejudice standard originated with *Davis v. United States*, 411 U.S. 233 (1973), which (1) extended the "cause" provision of Federal Rule of Criminal Procedure 12(B)(2) to collateral review of federal criminal convictions and (2) added that "actual prejudice must be shown in order to obtain relief." *Davis, 411 U.S.*. at 245. The *Davis* Court explained that while a properly preserved racial-discrimination claim would trigger a presumption of prejudice, "actual prejudice must be shown in order to

obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." *Id.*; *see also Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963) (holding that where "objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule").

Three years later, in *Francis v. Henderson*, the Court expanded *Davis*'s cause-and-prejudice standard to federal habeas review of a state criminal conviction where the habeas petitioner had not complied with a state procedural rule requiring objections before trial. *Francis v. Henderson*, 425 U.S. 536, 541 (1976). The Court concluded that federal courts must "give effect" to "important and legitimate concerns" of "comity and federalism" during habeas proceedings, such that the finality concerns underlying Rule 12(b)(2) and *Davis* must be given "no less effect. . . when asked to overturn state criminal convictions." *Id.* at 541.

The Court later expanded the procedural-default rule/cause-and-prejudice exception to apply to any federal constitutional claim not raised in state court under state procedures (there, a waived objection to the admission of a confession). *Wainwright v. Sykes*, 433 U.S. 72, 87, 90 (1977). While precluding procedurally defaulted claims curbed habeas relief, the cause-and-prejudice exception afforded an adequate safeguard against potential miscarriages of justice. *Id.* at 90–91.

AEDPA, which codifies the exhaustion requirement but not the cause-and-prejudice exception, implicitly confirms the exception's equitable (rather than constitutional) roots. In particular, it permits district courts to deny unexhausted claims on the merits and precludes them from finding implied state waiver of exhaustion defenses. *See* 28 U.S.C. § 2254(b)(2)–(3). So, even as the Court has consistently narrowed federal court authority to set aside final state criminal judgments, AEDPA strengthened the rationale and tools for doing so.

Consistent with these doctrines and policies, maintaining the rule that requires state prisoners to show *both* cause and actual prejudice to excuse procedural defaults preserves finality and federalism by narrowing and limiting federal habeas proceedings. The Court should be particularly wary of lower-court developments that undermine the actual-prejudice rule.

II. Supreme Court Review Is Warranted Because Some Lower Courts Now Ignore the Actual-Prejudice Rule and Unjustifiably Permit Litigation of Defaulted Claims

As *Davis* suggests, the actual-prejudice standard is robust. It requires proof "not merely that the errors . . . created a *possibility* of prejudice, but that they worked to [the petitioner's] *actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 172 (1982) (emphasis in original) (rejecting actual prejudice from alleged improper jury instruction based on "strong

uncontradicted evidence" that would have compelled a guilty finding under a proper instruction). Accordingly, it stands as a meaningful barrier to federal review of defaulted claims challenging state court convictions.

The Court's precedents have neither weakened the standard nor implied that it plays a lesser role now than before. Yet in the wake of Supreme Court decisions bearing on the *cause* portion of the test, lower courts have begun to undermine the actual prejudice standard on their own.

1. Since *Davis,* the Court has shifted the meaning of the "cause" component of overcoming post-conviction procedural default—but not the "prejudice" component.

In *Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991), the Court held that because no constitutional right to counsel for post-conviction proceedings exists, habeas petitioners who procedurally default a claim during post-conviction do not have "cause" to excuse the default. In *Martinez v. Ryan*, 566 U.S. 1 (2012), however, it held that, when a State *requires* a prisoner to bring an ineffective assistance of trial counsel claim in a post-conviction proceeding, if the prisoner defaults that claim either because he is unrepresented or because his appointed post-conviction counsel renders ineffective assistance (under the *Strickland* test), the prisoner has established "cause" to excuse the procedural default—so long as the underlying ineffective assistance of trial counsel claim is "substantial." *Martinez*, 566 U.S. at 14. Then, in *Trevino v.*

Thaler, 569 U.S. 413 (2013), it applied the same rule in States that *effectively* require prisoners to bring an ineffective assistance of trial counsel claim in a collateral proceeding. *Trevino*, 569 U.S. at 429.

Critically, neither *Martinez* nor *Trevino* vitiated the "prejudice" portion of the cause-and-prejudice standard. *See Martinez*, 566 U.S. at 18 (noting for remand that the federal habeas court had not yet addressed the question of prejudice); *Trevino*, 569 U.S. at 421–22 (addressing only "cause" component). Indeed, even *after Martinez* and *Trevino*, the Court has invoked "actual prejudice" when considering a request to overcome procedural default of claims unrelated to ineffective assistance of counsel. *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (reviewing a denial of a certificate of appealability on the basis of whether actual prejudice was shown in connection with the procedurally defaulted claim).

2. As Ohio details in the petition, however, following *Martinez* and *Trevino*, some Circuits have allowed a petitioner who defaulted in state court to proceed in federal court upon a mere showing of cause, but others have not. *See* Pet. for Writ. of Cert. a 16–23.

In this case, the Sixth Circuit held that Ohio is a *Martinez-Trevino* State and that White had established cause to overcome his procedural default (untimely filing his post-conviction petition) because "he raised a substantial ineffective-assistance claim" and "was without counsel during his post-conviction proceedings." Pet. App. 15a. Yet without addressing the

question of "actual prejudice," the Sixth Circuit remanded the case for a *merits* determination of White's ineffective-assistance claim. Pet. App. 15a–16a.

Similarly, the Third Circuit, in *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 939 (3d Cir. 2019), remained conspicuously silent on the subject of actual prejudice as it outlined the showings necessary to avoid procedural default.

In an even more overt abandonment of the actual-prejudice standard, the Seventh Circuit in *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017), expressly held that satisfying the *Martinez-Trevino* standard for "cause" also established "actual resulting prejudice" with no further showing needed.

The Ninth Circuit also negates a separate showing of post-conviction-stage prejudice, albeit with opaque layering of various standards. In *Rodney v. Filson*, 916 F.3d 1254, 1260 (9th Cir. 2019), it squarely announced that a pro se post-conviction relief petitioner is "not required to make any additional showing of prejudice over and above the requirement of showing a substantial trial-level IAC claim." Where the petitioner had a lawyer at the post-conviction relief stage, *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), holds that "to establish 'prejudice,' he must establish that his 'underlying ineffective-assistance-of-trial-counsel claim is a substantial one'" (citing *Martinez*, 566 U.S. at 14). And while the Ninth Circuit said in *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th Cir. 2019) that a petitioner must prove (in addition to cause) "a

reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different," it then over-dubbed the *trial-counsel Strickland* standard. *Id; see also Clabourne*, 745 F.3d at 377 (commenting that post-conviction prejudice "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective"). So, to establish sufficient prejudice to overcome state post-conviction procedural default, a federal habeas petitioner in the Ninth Circuit need only show "a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Ramirez*, 937 F.3d at 1245. Such a standard adds nothing to the *Strickland* "some merit" requirement for establishing cause.

In that regard, the Third, Sixth, Seventh and Ninth Circuits have created a post-*Martinez-Trevino* split with two other circuits. Since *Martinez* and *Trevino,* the Eleventh Circuit has expressly required a showing that "there is at least a reasonable probability that the result of the proceeding would have been different absent . . . collateral counsel's failure to raise" the ineffective-assistance-of-counsel claim. *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957–58 (11th Cir. 2016) (internal quotations omitted). And the Fifth Circuit has required a petitioner to show "a reasonable probability that he would have been granted state habeas relief if not for counsel's deficiency." *Wessinger v. Vannoy*, 864 F.3d 387, 391 (5th Cir. 2017). *But see Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014) (observing that "[t]he question then becomes whether Canales can actually

prove prejudice due to the deficient performance of his *habeas* counsel," but remanding "for the district court to consider whether Canales can prove prejudice as a result of his *trial* counsel's deficient performance" antecedent to consideration of the merits of his habeas claim) (emphasis added).

In short, confusion abounds whether a federal habeas petitioner who defaulted at the PCR stage must make a separate showing of prejudice from the PCR default and not merely "some merit" to a trial-counsel *Strickland* claim.

3. Justice Scalia, perhaps, would not find this confusion surprising, given his questions about the meaning of "some merit" as it relates to the "cause" standard. *See Martinez*, at 21 n.2 (2012) (Scalia, J., dissenting) (noting that the Court did not identify how "some merit" differs from "the normal rule that a prisoner must demonstrate actual prejudice to avoid the enforcement of procedural default).

Regardless, the circuit conflict should not be ignored. As detailed above, federal habeas doctrine has moved consistently in the direction of limiting the scope of federal courts' authority to set aside final state criminal judgments. The Court, however, has allowed a critical gap to open by not squarely reinforcing the continued significance of the "prejudice" inquiry on defaulted federal claims. The failure of the Sixth Circuit (and others) to require proof of "actual prejudice" permits habeas petitioners to overcome state court procedural defaults in a greater array of cases, which threatens fundamental, well-established safeguards of the finality of state judgments.

Supreme Court review is warranted to clarify that, even after *Martinez* and *Trevino*, habeas petitioners must still demonstrate actual prejudice to excuse procedural default of ineffective-assistance claims at the state-court PCR stage. States should have every opportunity to defend their criminal convictions from collateral attack in federal court, including by invoking record evidence that the petitioner was not actually prejudiced by the default. The Court should take the opportunity to ensure all States have that chance, and Ohio's petition provides a timely vehicle for doing so.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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