No. 19-1302

In The Supreme Court of the United States

DAVID SHINN,

Petitioner,

v.

GEORGE RUSSELL KAYER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR IDAHO, ARKANSAS, INDIANA, MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, AND TEXAS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

The amici States participate in the "vital relation of mutual respect and common purpose existing between the States and the federal courts" and accordingly share an interest in "limit[ing] the scope of federal intrusion into state criminal adjudications" and in "safeguard[ing] . . . the integrity of their criminal and collateral proceedings." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). These interests are enshrined in the Antiterrorism and Effective Death Penalty Act (AEDPA); its purpose is to "further the principles of comity, finality, and federalism" by limiting the availability of habeas relief for federal claims that are litigated in state court. *Id.* The question in this case goes directly to these interests—it concerns the application of 28 U.S.C. § 2254(d)(1) and the deference that is owed to state court judgments in criminal and collateral proceedings. Eight amici States respectfully submit this brief in support of petitioner.[1]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case was wrong on the merits in ways that "cannot be stressed enough." App. 279. The panel majority analyzed the state-court judgment de novo instead of deferentially, again ignored this Court's rules for analyzing

[1] The undersigned attorney attests that, pursuant to Supreme Court Rule 37.2(a), all counsel of record received timely notice of the amici states' intention to file this brief.

questions under 28 U.S.C. § 2254(d)(1), and premised its analysis on its own mistaken view of Arizona state law. As explained by the petitioner and Judge Bea, writing for the dissent from the majority's denial of rehearing en banc, all of these missteps call for this Court's all-too-familiar review and summary reversal. Pet. 15-26; App. 255-89. But this Court's correction is also warranted for more fundamental reasons. This time around, the Ninth Circuit has misapplied AEDPA in a way that erodes its threefold purpose—comity, federalism, and finality.

With respect to comity and federalism, the panel majority failed to follow "the rule established in [*Harrington v. Richter*, 562 U.S. 86 (2011)]" when it reviewed the state court's decision without any discernible deference. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018). This "was not just wrong," *id.*, but went against comity and federalism. By not assessing Kayer's "ineffectiveness claim with the appropriate amount of deference," *id.*, the majority failed to give effect to "part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 103. This Court has made it crystal clear that "AEDPA demands more" than mere de novo review; indeed, deferring to the lower court's reasonable applications of federal law is "the only question that matters under § 2254(d)(1)." *Id.* at 102 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)). The panel majority also went against comity

and federalism by deploying a new approach to assess whether the state post-conviction court correctly assessed prejudice under state appellate precedent. While the majority's newfound state-centric method had a veneer of comity and federalism, it ultimately advanced neither purpose: the analysis discounted the states courts' reasonable interpretations of established federal law while elevating the majority's own de novo view of state law.

The Ninth Circuit's decision also undermined finality in two distinct senses. First, the panel majority eroded AEDPA's mandate that federal habeas courts look solely to clearly established federal law when assessing state-court merits determinations; at the same time, the majority resolved the case on its own view of how Arizona's high court would have resolved the case (despite what it actually did). This approach invites perpetual relitigation of state convictions on two fronts; it simultaneously widens the permissible scope of AEDPA relief while narrowing the deference that should be given to state courts. Second, the majority's decision was the latest in a series of Ninth Circuit refusals to apply AEDPA deference, a "fundamental error[] that this Court has repeatedly admonished courts to avoid." *Beaudreaux*, 138 S.Ct. at 2560. The Ninth Circuit's serial failures to uphold this Court's AEDPA standards necessarily undermine states' interests in concluded litigation. For all of these reasons, review and summary reversal is warranted.

ARGUMENT

I. The Ninth Circuit's De Novo Review Under Section 2254(d)(1) Contravened AEDPA and Undermined Principles of Comity and Federalism

A. Comity and Federalism are Part of the Bedrock of AEDPA

By now "[t]here is no doubt Congress intended AEDPA to advance [the] doctrines" of comity, federalism, and finality. *Williams*, 529 U.S. at 436. In 1996, following several decades of "relatively expansive . . . independent review of federal claims," J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J.L. & PUB. POL'Y 109, 119-20 (2004), Congress enacted AEDPA in order to build "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). "Familiar" reasons justified this recalibration. *Richter*, 562 U.S. at 103. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (internal quotation marks omitted)). "After all," explained one senator at the time AEDPA was enacted, "State courts are required to uphold the Constitution and to faithfully apply federal laws"; as such, "[t]here is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts." 142 Cong. Rec. s3446-02, 3447 (daily ed. Apr.

17, 1996) (statement of Sen. Hatch). By passing AEDPA Congress sought to correct course; "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams v. Taylor*, 529 U.S. 362, 386 (2000).

AEDPA does exactly that. It advances comity and federalism by design. Among other things, the statute requires state-court exhaustion of federal claims (28 U.S.C. § 2254(b)(2)); sets a statute of limitations for seeking habeas review of those claims (28 U.S.C. § 2244(d)(1)); establishes a high bar for appealing federal district court denials of habeas relief (28 U.S.C. § 2253(c)(3)); and drastically curtails successive petitions (28 U.S.C. § 2244(b)(1)).

These changes coincided with developments in this Court's own habeas jurisprudence, which were unmistakably trending towards increased deference in the years preceding AEDPA. For example, the Court in *Coleman v. Thompson* reaffirmed that it would "not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment"—a "doctrine . . . grounded in concerns of comity and federalism." 501 U.S. 722, 729-30 (1991). Likewise, the Court thought requiring petitioners to exhaust "available state remedies as to any of [their] federal claims" is a procedural bar "grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Id.* at 731.

All of these statutory mechanisms and common law doctrines are getting at the same "foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Titlow*, 571 U.S. at 19. This Court has long held that because "States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause," "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Id.* (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). For States this is a matter of deep practical importance; the balance here is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Coleman*, 501 U.S. at 731 (quoting *Rose v. Lundy*, 455 U.S. 509 (1982)).

28 U.S.C. § 2254(d)(1) is one final—and crucial—"part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 103. Section 2254(d)(1) mandates that a habeas writ "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings," unless that adjudication "resulted in a decision that was contrary to, or involved in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." On its face this is pure federalism. And this Court has affirmed that

Section 2254(d)(1) establishes "a highly deferential standard for reviewing claims of legal error by the state courts." *Titlow*, 571 U.S. at 18-19.

As such, the "pivotal question" for Section 2254(d)(1) in cases, like this one, reviewing an application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), "is whether the state court's application of the *Strickland* standard was *unreasonable*." *Richter*, 562 U.S. at 101 (emphasis added). The Court explained that "[t]his is different from asking whether defense counsel's performance fell below *Strickland*'s standard," insofar as that would be "no different than" a de novo analysis conducted on direct review. *Id.* Here the bar is higher: under Section "2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Id.* (emphasis in original, quoting *Williams*, 529 U.S. at 410).

Applying this highly deferential standard, and determining whether a state-court determination of federal law is unreasonable under Section 2254(d)(1), boils down to two steps. First, "a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision." *Richter*, 562 U.S. at 102. Second, the court "must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id*. This analysis is not optional; habeas courts "must" make these determinations in order to find a violation of Section 2254(d)(1). *See id.* In fact, it is "the only question that matters under § 2254(d)(1)." *Id.* (quoting *Lockyer*,

538 U.S. at 71); *see also Beaudreaux*, 138 S. Ct. at 2560 (concluding the Ninth Circuit "was not just wrong" but "committed fundamental errors" by not applying "the rule established in *Richter*").

B. The Ninth Circuit's Contravention of Section 2254(d)(1) Went Against Comity and Federalism

In this case the Ninth Circuit contravened Section 2254(d)(1)—and it did so in ways that fundamentally undermine comity and federalism. First, the panel majority did not bother to apply the test this Court articulated in *Richter* and restated in *Beaudreaux*. The majority never determined what theories could have supported the state post-conviction court's decision. And it never asked whether a fairminded jurist could disagree that such theories were compatible with this Court's established case law. App. 54-75. The majority simply concluded that the evidence Kayer "presented to the [post-conviction court] was sufficient to establish a statutory mitigating circumstance"; that the additional evidence "could have changed the outcome of the sentencing proceeding"; and that, therefore, had the evidence been presented at sentencing there was "a reasonable probability Kayer's sentence would have been less than death." App. 59, 64, 70-71. This was "de novo review, plain and simple," as Judge Bea's dissent points out. App. 274.

This was more than just an error. It was an error that directly contravened comity and federalism. This

Court established the rule in *Richter* precisely so habeas courts would not simply assess prejudice de novo, as if "adjudicating a *Strickland* claim on direct review of a criminal conviction" in state court. 562 U.S. at 101. Sidestepping this Court's rule and treading its own (by now well-worn) path, the Ninth Circuit not only "ignored 'the only question that matters under § 2254(d)(1),' " it left behind the federalism and comity concerns that underpin the rule. *Id.* at 102 (quoting *Lockyer*, 538 U.S. at 71). By never considering theories that supported the state-court decision, the panel majority necessarily never took seriously Arizona's "good-faith attempts to honor constitutional rights." *Richter*, 562 U.S. at 103. And by not determining whether reasonable jurists could disagree with such theories, the majority necessarily left deference by the wayside—it "treated the unreasonableness question as a test of its confidence in the result *it* would reach" in the first instance. *Id.* (emphasis added). This "was not just wrong," it undermined the purpose of the statute. *Beaudreaux*, 138 S.Ct. at 2560.

Some have criticized these standards, and this Court's "construction of the statutory language in AEDPA," as "extraordinarily severe." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1242 (2015). True enough, AEDPA compliance can be a "difficult" standard "to meet." *Richter*, 562 U.S. at 102. But "that

is because it was meant to be." *Id.* Section "2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Id.* "It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents"—but it "goes no further." *Id.* And it "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)). It does all of these things to prevent the routine defenestration of state court judgments—the whole purpose of the statute.

The Ninth Circuit's decision went against comity and federalism in an additional and "quite literally unprecedented" way. App. 277. The lynchpin of the panel majority's argument was a foray into state law; the majority "turned to the Arizona Supreme Court's precedent" to examine Arizona's "subjective sentence-reduction trends in similar cases," "settl[ing] on the Arizona Supreme Court opinion in [*State v. Brookover*, 601 P.2d 1322 (Ariz. 1979)]." Pet. 18. The panel majority "concluded that the post-conviction court had erred by not recognizing that, under *Brookover*, the Arizona Supreme Court was reasonably likely to reduce Kayer's sentence to life." *Id*. This was wrong on the merits for many reasons, as explained by the petitioner and Judge Bea. Pet. 22-25; App. 275-81. In any event, "by holding that the Arizona courts were objectively

unreasonable in failing to adopt [the Ninth Circuit's] analysis of Arizona law," the court appeared, at least at first glance, to have thrown a bone towards federalism. App. 276-77 (where Judge Bea admitted that "the panel majority's resort to the 'best evidence' of what the Arizona Supreme Court would have done—its decisions—has a certain first-blush plausibility").

But a bit of scrutiny shows that even in venturing to state law the panel majority was not advancing comity or federalism. As already noted, the starting point for a Section 2254(d) analysis is asking whether the state court decision was "contrary to, or involved in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Here that clearly established law is *Strickland*, and reviewing whether the post-conviction court reasonably applied it simply requires a direct comparison between the state court's analysis and this Court's decisions. That is federalism.

By focusing instead on how a state "appellate court, applying a de novo review standard, has resolved cases involving unrelated and differently situated capital defendants," Pet. 19 (footnote omitted), the Ninth Circuit jumbled the established pecking order of AEDPA deference. Petitioner and Judge Bea correctly pointed out that, under the panel majority's approach, "federal habeas review of every *Strickland* claim" would "turn on the state in which the petitioner was sentenced." App. 277. This is not AEDPA, which rightly

hinges on *this* Court's clearly established law, not fifty localized takes on it. 28 U.S.C. § 2254(d)(1).

And even if the panel majority's state-centric paradigm shift had a surface gloss of federalism, it vanishes upon close inspection. In actuality, the majority's *Brookover*-bound journey into state law turned deference inside out. Instead of deferring to the Arizona courts' application of federal law, the majority upended the state court's analysis based on its *own* interpretation of state law. Under this approach, a federal court could override a lower state court's good-faith application of federal law because in *its* judgment the state court failed to apply state precedent along the way. And a federal court could do so even though we know—through the state appellate court's own decisions—that state law relief would be a dead end.

That is exactly what happened here. Petitioner well states the "obvious point" that "the Arizona Supreme Court had the opportunity, through Kayer's petition for review from the denial of post-conviction relief, to point out Judge Kiger's purported error and express a belief that a life sentence was warranted, under *Brookover* or otherwise, in light of the postconviction arguments raised regarding prejudice." Pet. 21-22. As it happens, "[t]he Arizona Supreme Court declined this opportunity." Pet. 22. And yet the panel majority concluded, based on its own reading of bygone, inapposite Arizona Supreme Court precedent, that there was a "reasonable probability" that the Arizona Supreme Court *would have* reduced Kayer's sentence under state precedent. App. 71.

In effect, instead of asking whether the state court reasonably applied federal law as determined by this Court, the Ninth Circuit asked whether the state court correctly applied the decisions of the Arizona Supreme Court as determined by the Ninth Circuit. This is de novo twice removed. Worse than that, it is anti-deference going both ways: it overrides the lower state court's reasonable interpretations of established federal law and overlooks the Arizona Supreme Court's decision to decline review on post-conviction. Second-guessing two layers of state jurists for failure to apply the Ninth Circuit's own view of state law is not true federalism.

* * *

Like it did in *Richter* and *Beaudreaux*, the Ninth Circuit here "gave § 2254(d) no operation or function in its reasoning." 562 U.S. at 104; 138 S.Ct. at 2559-60. And, as it was before, it is "not apparent" here "how the Court of Appeals' analysis would have been any different without AEDPA." *Richter*, 562 U.S. at 101. The panel majority's "analysis illustrates a lack of deference to the state court's determination and an improper intervention into state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system"—contrary to comity and federalism. *Id.* at 104. This Court should review and summarily reverse.

II. The Ninth Circuit's De Novo Review Under Section 2254(d)(1) Contravened AEDPA and Undermined Finality

Finality is another vital State interest that "Congress intended AEDPA to advance." *Williams*, 529 U.S. at 436. Too-frequent review of state decisions "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 562 U.S. at 103 (quoting *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)); *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963) (noting that "[a] procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands").

Justice Harlan explained why, therefore, he thought it "a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process": because "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Williams v. United States*, 401 U.S. 667, 691 (1971) (concurring in part and dissenting in part). Unending litigation

"subvert[s] the criminal process itself" but also "seriously distort[s] the very limited resources society has allocated to the criminal process." *Id.* This "drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed." *Id.* And of course, the "very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Id.*

This Court has therefore long recognized the "injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time," and that common-law limitations on habeas relief—like those central to ADEPA—"seek to vindicate the State's interest in the finality of its criminal judgments." *Williams*, 529 U.S. at 436.

The decision below undermined finality. It did so in particular because the panel majority's novel analytical approach, described above, will doubtlessly perturb states' "significant interest in repose for concluded litigation" over federal claims. *Richter*, 562 U.S. at 103. Devolving AEDPA analysis of "clearly established Federal law" down to a review of the "law as determined by state supreme courts," App. 277, would hamstring this Court's ability to clearly establish federal law in the first place. Meanwhile, deferring to how the federal

appellate courts would have applied state law—despite what those state supreme courts actually did—would hamper state courts' own ability to litigate federal claims to conclusion. Under the majority's flawed approach two doors would be left wide open for endless relitigation of state convictions.

III. The Decision Below was the Latest in a Series of Ninth Circuit Decisions Contravening AEDPA, Which Itself Undermines Finality for States Within that Circuit

The decision below went against finality in a second, larger sense. The panel majority's decision did not reflect a one-time glitch or an isolated misapplication of this Court's well-established standards. The majority's decision was, unfortunately, yet another attempt to wriggle free from AEDPA's restraints. Time and time again, this Court has made plain that AEDPA "demands more" than de novo review in a deferential disguise. *Richter*, 562 U.S. at 102. But time and time thereafter, the Ninth Circuit has ignored those admonitions and declined to apply the deference that AEDPA demands. *See*, *e.g.*, *Beaudreaux*, 138 S. Ct. at 2558-61; *Kernan v. Cuero*, 138 S. Ct. 4 (2017); *Johnson v. Williams*, 568 U.S. 289, 297 (2013) (concluding that, "[u]nlike the District Court, the Ninth Circuit declined to apply the deferential standard of review contained in § 2254(d)"); *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (finding "there can be no doubt of the Ninth Circuit's error below" after applying "the deference to state court decisions required by § 2254(d)" to "the state court's already deferential review"); *Felkner v. Jackson*,

562 U.S. 594, 598 (2011); *Premo v. Moore*, 562 U.S. 115, 123 (2011).

It goes without saying that amici States' significant interest in concluded litigation is not served when the very statute enacted to achieve that end is repeatedly defied. Finality is served, however, when this Court makes things right. Because the decision below, like its predecessors, "calls out for the Court's review and summary correction," Pet. 15, this Court should again step in and reverse.

CONCLUSION

For the foregoing reasons, and those set forth by the Petitioner, this Court should grant review of the Ninth Circuit's decision and summarily reverse.

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