No. 20-1009

In the Supreme Court of the United States

DAVID SHINN, *et al.*,

Petitioners,

v.

DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,

Respondents.

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

REPLY BRIEF

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REPLY BRIEF OF PETITIONERS

The Ninth Circuit's decisions here elevate the *Martinez v. Ryan*, 566 U.S. 1 (2012), exception to the court-created procedural default doctrine over the Anti-terrorism and Effective Death Penalty Act's (AEDPA's) restriction on federal evidentiary development in review of state-court convictions. *See* 28 U.S.C. § 2254(e)(2). Eight Ninth Circuit judges, led by Judge Daniel Collins, opined that the decisions below involved an unwarranted expansion of federal judicial authority. App. 185-212, 349-76. Thirteen states agree, and they have also explained how a federal court's failure to follow § 2254(e)(2) imposes burdensome systemic costs and eviscerates the interests in comity, finality, and federalism that Congress intended AEDPA to protect. *See* Br. of Texas, *et al.*; *see generally Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

Ramirez and Jones (hereinafter "Respondents") avoid, for the most part, engaging directly with the question presented, instead contorting Petitioners' arguments and the rulings below to assert various nonexistent vehicle problems. To the extent Respondents address the Petition's merits, they fail to address, let alone rebut, the serious separation-of-powers concerns that Petitioners, amici, and the dissenting Ninth Circuit judges raised. *See* Pet. 21–24; App. 189, 206–07; Br. of Texas, *et al.*, at 3–9. They likewise fail to resolve the conflict between the decisions below (which hold that post-conviction counsel's ineffectiveness allows a prisoner to evade § 2254(e)(2)'s bar) and this Court's opinions in *Holland v. Jackson*, 542 U.S. 649, 653 (2004), and *Williams v. Taylor*, 529 U.S. 420, 432–35 (2000) (which hold that

post-conviction counsel's negligence *activates* § 2254(e)(2)'s bar).

Instead, Respondents rewrite *Martinez* to provide not only an avenue for excusing procedural default but also a right to full evidentiary development on the previously defaulted claim. BIO 20–26. They further engraft *Martinez*'s limited exception to *Coleman v. Thompson*, 501 U.S. 722, 752–55 (1991)—which by its express terms applies only to the procedural-default context—onto § 2254(e)(2). *See Martinez*, 566 U.S. at 16 ("The rule of *Coleman* governs in all but the limited circumstances recognized here."). And they bemoan the perceived absurd results stemming from applying § 2254(e)(2) to a post-*Martinez* merits review. These arguments, however, do not militate against certiorari; they instead lay bare the confusion *Martinez* has caused in the § 2254(e)(2) context and support Petitioners' arguments for certiorari.

Because this Court created the *Martinez* equitable pathway around procedural default, only this Court can clarify that decision's contours. This Court should accordingly grant certiorari, explain that procedural default and § 2254(e)(2) are separate and distinct bars to habeas relief and that *Martinez* concerns only the former, and recognize that one procedural bar (*e.g.* § 2254(e)(2)) can still apply even if another (*e.g.* procedural default) is set aside. And this Court should grant certiorari now, before the Ninth Circuit's approach gains traction nationwide, further burdening state criminal-justice systems and blunting AEDPA's impact.

I. The Ninth Circuit violated separation-of-powers principles and contravened this Court's precedent by applying *Martinez* to override AEDPA.

Respondents fail to answer Petitioners' argument that the court-created equitable rule of *Martinez* cannot negate the Congressionally imposed statutory restriction of § 2254(e)(2). They likewise make no effort to rebut the separation-of-powers concerns that Petitioners, Judge Collins, and the amici states convincingly raised. *See* Pet. 21–24; App. 189, 206–07; Br. of Texas, *et al.*, at 3–9. Instead, Respondents attempt to expand *Martinez* beyond its express terms, arguing that it contemplates evidentiary development on the merits and that its narrow exception to *Coleman*'s general rule that a prisoner is bound by post-conviction counsel's negligence essentially trumps § 2254(e)(2). Pet. 20–26.

But as the Petition shows (at 24–28), *Martinez* does not address evidentiary development, let alone provide an independent, judge-create right to it. Rather, *Martinez*'s "limited" and "narrow" holding is simple: when a state (like Arizona) channels ineffective-assistance-of-trial-counsel claims into an initial-review collateral proceeding, counsel's ineffectiveness at that proceeding may constitute cause to excuse a procedural default. *Martinez*, 566 U.S. at 9, 15. *Martinez* provides a pathway around procedural default but it does not provide a way to elude other, independent bars to habeas relief. Respondents' interpretation of *Martinez* thus finds no support in *Martinez*'s language. *See Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017) (describing *Martinez* exception as "highly circumscribed" and refusing to extend it outside the trial-ineffectiveness context).

Respondents' efforts to navigate around *Holland* and *Williams* similarly fail. Respondents contend that a prisoner who received ineffective state post-conviction counsel was not "at fault" for failing to develop his claim within the meaning of *Williams* and § 2254(e)(2).[1] BIO 21–24. But those cases hold the exact opposite, *see Holland*, 542 U.S. at 653; *Williams*, 529 U.S. at 430–34, and *Martinez* does not address—let alone overrule—them. And as previously discussed, *Martinez*'s exception to *Coleman* does not extend beyond the procedural-default context. In fact, this Court expressly reaffirmed *Coleman*'s continued application in all other contexts. *See Martinez*, 566 U.S. at 16 ("The rule of *Coleman* governs in all but the limited circumstances recognized here."). Thus, *Coleman*'s rule applies in the § 2254(e)(2) context, and a prisoner remains bound by the state-court record.

Respondents' merits argument thus rests on two fundamental legal mistakes: that *Martinez* contemplates evidentiary development on the merits and that it relaxes *Coleman* in the § 2254(e)(2) context. Under a correct reading of this authority, neither Respondents' arguments, nor the Ninth Circuit's decisions below, hold water.

II. There is no absurdity in enforcing a procedural bar even if a different bar is set aside.

Having failed to rebut Petitioners' legal analysis, Respondents resort to an absurd-results argument. *See* BIO 24–26. They assert that enforcing

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[1] This analysis was not the basis for the Ninth Circuit's holding in either *Jones* or *Ramirez*. To the contrary, neither panel attempted to reconcile its decision with *Holland* or *Williams*, through the "at fault" language or otherwise.

§ 2254(e)(2) after a prisoner excuses a procedural default under *Martinez* would mean that a prisoner could never succeed on the merits of any such claim because that claim will necessarily lack support in the state-court record. This argument, too, is easily dismissed.

First, Petitioners, amici, and Judge Collins have all explained that some procedurally defaulted ineffective-assistance claims could be reviewed on the state-court record. Pet. 24–26; App. 205 (Collins, J., dissenting); Br. of Texas, *et al.* 15–17. Respondents' only response to this explanation is that *most* claims would not be reviewable without additional evidentiary development. BIO 24 & n.9. But even if this is true, it furthers AEDPA's general intent of limiting the availability of habeas relief. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996); *see generally* App. 208 (Collins, J., dissenting). And it furthers § 2254(e)(2)'s specific intent of restricting federal courts' discretion to hold evidentiary hearings. *See Pinholster*, 563 U.S. at 185 n.8 (observing that § 2254(e)(2) is not focused on "preserving the opportunity for hearings … but rather on *limiting* the discretion of federal district courts in holding hearings") (quotations omitted). Further, to the extent any absurdity exists between application of both *Martinez* and § 2254(e)(2), this illustrates why this Court should grant certiorari.

In any event, when two unrelated procedural bars apply to a claim, and one is set aside, there is no absurdity in enforcing the surviving bar. *E.g. Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1249 (11th Cir. 2014) (*Martinez* does not affect separate timeliness bar); *Lopez v. Ryan*, 678 F.3d 1131, 1136–37 (9th Cir. 2012) (noting distinction

between procedural default and § 2254(e)(2)). For this reason, Respondents' concern that applying § 2254(e)(2) would place federal judges "in nonsensical positions" of developing evidence for cause-and-prejudice purposes and then excluding that evidence on merits review falls flat. BIO 26. A judge would not be in a "nonsensical position" if the judge simply analyzes in the first instance (as the district court in *Jones* failed to do) whether § 2254(e)(2) would independently bar relief and recognizes that, if it would, *Martinez* is irrelevant. *See* App. 207–08 (Collins, J., dissenting) ("There is no point in conducting a *Martinez* hearing to discover 'cause' to excuse a procedural default if the defaulted claim will inevitably fail on the merits because (due to the *other* procedural obstacle) evidence outside the state record cannot be considered in any event.").[2]

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[2] Respondents opine that the district court would never have learned of Jones's "likely innocence" or his "exculpatory evidence" had the court applied § 2254(e)(2). BIO 26, 31. Respondents overlook that much of the evidence Jones proffered to support his ineffective-assistance claim was already considered by the district court in connection with his failed attempt to excuse his procedural default through actual innocence. *See* Dist. Ct. No. CV–01–00592–TUC–TMB, Dkt. 128, 129, 134, 135, 141. The court therefore learned of Jones's purported innocence years before the hearing, but simply determined that Jones was not, in fact, innocent. The court's order granting relief based on counsel's ineffectiveness does not equate to a finding of innocence. In fact, the Ninth Circuit acknowledged that the issue of his guilt on the first-degree murder count was "a close question" based on a theory that Jones withheld medical treatment from the victim. App. 45–48. Jones's claimed innocence thus does not make this case an unsuitable vehicle to review the question presented.

III. The cases below are ideal vehicles to address the important and recurring question presented.

Despite Respondents' efforts to recast the decisions below, *see* BIO 12–15, 20–21, each case in fact presents the question whether § 2254(e)(2) bars considering evidence outside the state-court record to review the merits of a claim after a court has applied *Martinez* to excuse a procedural default.[3] In *Jones*, the panel allowed extra-record evidence developed for a cause-and-prejudice hearing (which, as Judge Collins correctly recognized, *see* App. 207–08, should never have happened in the first place because of the § 2254(e)(2) bar) to be considered on merits review. The panel made clear that it was "explicitly hold[ing]" that "*Martinez*'s procedural-default exception applies to merits review." App. 17.

Respondents attempt to sow confusion by arguing that the district court did not actually "hold an evidentiary hearing" on Jones's ineffective-assistance claim within § 2254(e)(2)'s meaning; it merely considered already-existing evidence developed for a different purpose. BIO 14–15. This is a distinction without a difference, as § 2254(e)(2) governs consideration of new evidence even when no hearing is held. *See Holland*, 542 U.S. 652–53 (recognizing that § 2254(e)(2) applies when "a prisoner seeks relief

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[3] Respondents imply, but do not directly assert, that the *Jones* and *Ramirez* cases are improperly joined under Rule 12.4. Pet. 12 n.3. Judge Collins' combined dissent in these cases puts to rest any argument that the cases do not "involve identical or closely related questions." *See* Rule 12.4, Rules of the United States Supreme Court.

based on new evidence *without* an evidentiary hearing”).

Likewise, in *Ramirez*, the Ninth Circuit found that Ramirez was “entitled” to *additional* evidentiary development on merits review merely because his claim’s default was excused under *Martinez*.[4] *See* App. 248. The panel offered no explanation why the statute permitted this outcome or how it could be reconciled with *Holland* and *Williams*. *Id.* Accordingly, despite the procedural distinctions, the panels in both cases determined, as the question presented asserts, that *Martinez* rendered § 2254(e)(2) “inapplicable to a federal court’s merits review of a claim for habeas relief.” Pet i.

Respondents further attempt to minimize the question presented’s impact, but it is in fact an issue of nationwide importance. Respondents focus on the lack of an inter-circuit conflict, *see* BIO 15–20, but, as stated above, they fail to rebut the larger conflict between the panel decisions and this Court’s authority in *Holland*, *Williams* and *Martinez* itself. Further, Respondents overstate the extent to which other circuit decisions align with the panel opinions below. *See* BIO 16–17. As both the Petition (at 23–24 n.4) and the amici states’ brief (at 21) observe—but

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[4] Respondents’ allegations of waiver as to Ramirez’s case are easily dismissed. *See* BIO 12–14. As Judge Collins noted, while some *Martinez*-related record expansion had already occurred, the issue of *additional* record expansion did not arise until the panel opinion was issued, at which point Petitioners promptly challenged it in their petition for rehearing. App. 212 n.4. There was accordingly no waiver of Petitioners’ argument that *Martinez* did not override § 2254(e)(2)’s limitations and permit, let alone entitle Ramirez to, the additional record expansion the panel ordered.

Respondents overlook—the Eighth Circuit has recently called *Sasser v. Hobbs*, 735 F.3d 833, 853–54 (8th Cir. 2013), into question by acknowledging that it contributes to tension in the case law. *See Thomas v. Payne*, 960 F.3d 465, 473 n.7 (8th Cir. 2020). And in any event, *Sasser* is "based on a clear misreading of … *Williams*." App. 209 (Collins, J., dissenting).

Similarly, *White v. Warden, Ross Corr. Institution*, 940 F.3d 270, 279 (6th Cir. 2019), does not account for *Williams* or *Holland*, relying instead on Judge William Fletcher's plurality opinion in *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013), which erroneously, *see* § II, *supra*, embraced the perceived absurdity of applying § 2254(e)(2) to post-*Martinez* merits review. Moreover, Respondents admit that the § 2254(e)(2) issue was not fully briefed in *White*. BIO 19 n.8. And *Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000), predates *Martinez*. Further, as amici note, *Barrientes* "did not even concern attorney error." Br. of Texas, *et al.* 15. The same is true of Justice Kagan's opinion concurring in the denial of certiorari in *Thompson v. Lumpkin*, 140 S. Ct. 977 (Mem. Mar. 22, 2021). *See* BIO 17.

Nor is the question presented premature, as Respondents allege. BIO 18–20, 27–31. The Petition (at 28–33) established the crushing burden imposed by evidentiary hearings in federal court addressing convictions and sentences that have survived state-court review. The amici states have elaborated on this discussion and also highlighted the nationwide confusion on the issue. Br. of Texas, *et al.*, 17–22. This Court has previously declined to expand *Martinez*'s reach precisely because of the associated systemic costs and the impact on federalism interests. *Davila*, 137 S. Ct. 2069–70.

Allowing "further percolation" on this issue in the courts of appeals, *see* BIO 19, would needlessly tax both the state and federal systems with additional hearings, each of which will "aggravate the harm to federalism that federal habeas review necessarily causes." *Davila*, 137 S. Ct. at 2069–70. This Court should thus intervene now, expressly hold that *Martinez* does not affect § 2254(e)(2)'s restrictions on merits review, and vacate the Ninth Circuit's decisions.

CONCLUSION

This Court should grant the petition for writ of certiorari.

April 16, 2021

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