No. 20-1009

IN THE

Supreme Court of the United States

DAVID SHINN, ET AL.,

Petitioners,

v.

DAVID MARTINEZ RAMIREZ & BARRY LEE JONES,

Respondents.

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

BRIEF FOR JONATHAN F. MITCHELL AND ADAM K. MORTARA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

Amici curiae have written and taught about this Court's criminal law and habeas corpus jurisprudence. Jonathan F. Mitchell has taught federal habeas corpus as a professor and visiting professor at several law schools and is the former Solicitor General of the State of Texas. Mr. Mitchell recently served as a court-appointed *amicus curiae* in *In re Hall*, No. 19-10345 (5th Cir.).

Adam K. Mortara is a Lecturer in Law at the University of Chicago Law School, where he has taught federal courts, federal habeas corpus, and criminal procedure since 2007. Mr. Mortara has also served as a court-appointed *amicus curiae* in criminal law and federal habeas cases, including by this Court in *Terry* v. *United States*, No. 20-5904, and *Beckles* v. *United States*, No. 15-8544, and by the Eleventh Circuit in *Wilson* v. *Warden*, No. 14-10681, and *Bryant* v. *Warden, FCC Coleman-Medium*, No. 12-11212. The arguments made are solely those of *amici* and are not the views of the law schools where *amici* have taught or their other faculty.

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs in accord with Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

The text of section 2254(i) of the Antiterrorism and Effective Death Penalty Act (AEDPA) should have ended this case long ago—"ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." Under that plain text, Ramirez cannot obtain relief here because his application depends on demonstrating that his post-conviction counsel was ineffective.

But this Court's prior decision in *Martinez* v. *Ryan*, 566 U.S. 1 (2012), precludes that straightforward result. With little analysis, *Martinez* concluded in a single paragraph that the "ground" specified in section 2254(i) must "entitle the prisoner to habeas relief," *id.* at 17, and because establishing cause for a procedural default does "not entitle the prisoner to habeas relief," section 2254(i) does not apply. But that conclusion is based on two false premises.

First, as Justice Gorsuch recently observed, no prisoner is ever *entitled* to the writ and a federal court always retains discretion to deny relief. *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring); 28 U.S.C. §§ 2241(a) ("[w]rits of habeas corpus *may* be granted") (emphasis added), 2254(d) ("application * * * *shall not* be granted * * * *unless* * * * *") (emphases added).

Second, "ground" is not synonymous with "claim." *Martinez*, 566 U.S. at 17 ("Martinez's '*ground* for relief' is his ineffective-assistance-of-trial-counsel *claim*.") (emphases added). A "ground" for relief is "[a] foundation or basis; [a] point[] relied on." *Ground*, *Black's Law Dictionary* (6th ed. 1990); accord *Ground*

of Action, *id.* ("The basis of a suit; the foundation or fundamental state of facts on which an action rests."). That is, a *ground* for relief is any fact, point, or argument a habeas petitioner offers in his effort to obtain the writ. A "claim," on the other hand, is narrower in definition. It refers to "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005).

The structure of the federal habeas statute further confirms the difference in definition between the two terms. See, e.g., 28 U.S.C. § 2254(a) ("court[s] shall entertain an application for a writ of habeas corpus * * * only on the *ground* that he is in custody in violation of the Constitution or laws or treaties of the United States") (emphasis added); *id.* § 2254(d) ("writ * * * shall not be granted with respect to any *claim* that was adjudicated on the merits") (emphasis added).

Stare decisis has no role to play here. Indeed, no decision that expands the availability of the writ to state prisoners is entitled to any *stare decisis* protection. Allowing a federal court to second-guess the decision of a state court inflicts serious harm on the integrity of a State and undermines its interest in finality—that interest in finality trumps fidelity to erroneous precedents in this area.

Even if relevant, traditional *stare decisis* factors do not counsel against overruling *Martinez*. Its single paragraph of reasoning rests on demonstrably false premises. And prisoners have no reliance interests in state trial courts committing federal constitutional errors (the contemporaneous objection rule exists to prevent such errors from happening in the first place),

and therefore no such interests could be disturbed by eliminating a road to relief that Congress said should not be granted anyway. Cf. *Lockhart* v. *Fretwell*, 506 U.S. 364, 373 (1993) ("Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions * * * *"). Finally, this Court has a constitutional obligation to enforce congressional enactments as "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and it would violate the Constitution to allow pragmatic *stare decisis* considerations and court-created doctrines to prevail over the unambiguous text of a "supreme" federal statute.

ARGUMENT

I. *MARTINEZ* SHOULD BE OVERRULED.

On its face, section 2254(i) prohibits the "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings" from "be[ing] a ground for relief." 28 U.S.C. § 2254(i). In one scantly reasoned paragraph, however, *Martinez* rendered this language ineffective—or nearly so—based on two premises: (1) that prisoners are ever "*entitle*[*d*] * * * to habeas relief," and (2) that "ground" is synonymous with "claim." *Martinez*, 566 U.S. at 17 (emphasis added). Both premises are demonstrably false.

A. The federal habeas statute is cast in discretionary language. 28 U.S.C. § 2241(a) ("[w]rits of habeas corpus *may* be granted") (emphasis added). When it uses mandatory language, it does so ordinarily to describe the circumstances under which the writ "shall *not* be granted." *Id.* § 2254(b)(1), (d) (emphasis added); *id.* § 2244(a), (b) (requiring dismissal of most

claims presented in second habeas application). *Martinez*'s view that "ground for relief" means "entitle[ment]" to the writ is thus based on the faulty premise that a habeas petitioner can somehow be entitled to the writ. See *Edwards*, 141 S. Ct. at 1570 (Gorsuch, J., concurring) (courts are "invest[ed]" with the "discretion to decide whether to issue the writ or to provide a remedy"); *id.* at 1566 n.4 (Thomas, J., concurring). Because no court must issue the writ, *Martinez* erred in defining "ground for relief" so narrowly as to exclude those arguments (like cause and prejudice) necessary but insufficient to cause the writ to issue.

B. *Martinez* compounded that error by equating "ground for relief" with "claim." *Martinez*, 566 U.S. at 17. Under the Court's view, "ground for relief" encompasses only federal *claims*, so that grounds providing "cause and prejudice" are excluded. *Ibid.* The Court did not address, much less explain, the discrete use of "ground" and "claim" in the text of the federal habeas statute. Compare 28 U.S.C. § 2254(a) ("court[s] shall entertain an application for a writ of habeas corpus * * * only on the *ground* that he is in custody in violation of the Constitution or laws or treaties of the United States") (emphasis added), with *id.* § 2254(d) ("writ * * * shall not be granted with respect to any *claim* that was adjudicated on the merits") (emphasis added).

Section 2254(i)'s use of "ground for relief" instead of "claim" is strong evidence that there is a distinction. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 25, at 170 (2012) ("[W]here [a] document has used one term in one place, and a materially different term in another, the

presumption is that the different term denotes a different idea."); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("The short answer is that Congress did not write the statute that way.") (internal quotation marks omitted).

Common definitions of "claim" and "ground" bear out such a distinction, with "claim" the narrower term and "ground" encompassing all the reasons, factual and legal, that the petitioner relies on in his attempt to obtain the writ. *Gonzalez*, 545 U.S. at 530 ("claim" means "an asserted federal basis for relief from a state court's judgment of conviction"); accord *Claim*, *Black's Law Dictionary*, *supra* ("To demand as one's own or as one's right; to assert; to urge; to insist. A cause of action. Means by or through which a claimant obtains possession or enjoyment of privilege or thing."); *Cristin* v. *Brennan*, 281 F.3d 404, 418 (3d Cir. 2002) ("a 'claim' would be the substantive argument entitling the petitioner to that relief"); *McSwain* v. *Davis*, 287 F. App'x 450, 462 (6th Cir. 2008); *Coleman* v. *Hardy*, 628 F.3d 314, 320 (7th Cir. 2010); *Henry* v. *Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1232 (11th Cir. 2014) (W. Pryor, J.).

Correspondingly, Congress uses the term "claim" throughout the federal habeas statute when referring to the specific *right* that does or does not permit a court to issue the writ. See, e.g., 28 U.S.C. § 2254(d) ("writ * * * shall not be granted with respect to any *claim* that was adjudicated on the merits") (emphasis added); *id.* § 2254(e)(2) ("If the applicant has failed to develop the factual basis of a *claim* * * * the court shall not hold an evidentiary hearing on the *claim* unless * * * the *claim* relies on * * * *") (emphases

added); *id.* § 2244(b)(1) ("A *claim* presented in a second or successive habeas corpus application * * * that was presented in a prior application shall be dismissed.") (emphasis added); *id.* § 2244(c) (explaining when a "claim" can be reviewed in a second application); *id.* § 2255(a) ("A prisoner * * * *claiming the right* to be released * * * *") (emphasis added).

"Ground" means "[a] foundation or basis; points relied on." *Black's Law Dictionary*, *supra*. That is, a "ground" encompasses all "points" or "facts" the petitioner is using to support his request for the writ. Congress's use of the term "ground" in subsections (a) of 2254 and 2255—and subsection (c) of 2244—underscores the difference between "claim" and "ground." There is no generic "claim" that one "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Instead, that fact is merely a necessary "ground" to be encompassed by any viable federal right (*i.e.*, claim) asserted for relief. See *Williams* v. *Taylor*, 529 U.S. 362, 378 n.10 (2000) (plurality op.) (describing section 2254 as a "jurisdictional grant"); accord *Bailey* v. *Hill*, 599 F.3d 976, 978 (9th Cir. 2010) ("Section 2254(a)'s 'in custody' requirement is jurisdictional * * * *"); *McCormick* v. *Kline*, 572 F.3d 841, 848 (10th Cir. 2009) (same).

Likewise, section 2244(c) allows a court to discharge an application on the "ground" that the Supreme Court has already passed judgment on the petitioner's case. Swapping in "claim" here would make no sense. Courts are not asserting a "claim" or right to the writ when *discharging* an application. And "ground" cannot mean something different throughout the statute. See *Lomax* v. *Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020) ("In all but the most unusual

situations, a single use of a statutory phrase must have a fixed meaning across a statute.") (internal quotation marks omitted). But if one defines "ground" as a fact or point in support of the result (here the discharge of an application, in section 2254(i) the petition for relief), then it makes sense in both sections of the statute.[1]

When an assertion of ineffective assistance of post-conviction counsel is a *ground* the petitioner relies on in seeking relief—as it is here where Ramirez wants to use it to excuse his procedural default—the text of AEDPA bars the issuance of the writ. *Martinez*'s contrary, atextual holding should be set aside.[2]

II. *STARE DECISIS* DOES NOT AND CANNOT COUNSEL OTHERWISE.

Stare decisis should never stand in the way of overruling a decision that *expanded* the availability of

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[1] It is no answer to say that AEDPA's predecessor used the term "ground," such that "claim" is a mere update. That would be tantamount to saying that Congress's use of the term "claim" numerous other times in AEDPA was intentional, while its use of "ground" in section 2254(i) was absentminded. See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 454 (2002) (Thomas, J.) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.") (internal quotation marks omitted).

[2] At the risk of repetition, *Martinez* is of course not the only habeas case that this Court should reconsider. At some point, the Court should overrule *Reed* v. *Ross*, 468 U.S. 1 (1984), which *Martinez*, 566 U.S. at 13–14, cites. See, e.g., Brief for Jonathan F. Mitchell and Adam K. Mortara in Support of Petitioner at 3–4, 18–19, *Mathena* v. *Malvo*, No. 18-217; Brief for Jonathan F. Mitchell and Adam K. Mortara in Support of Neither Party at 8 n.4, 17 n.10, *Edwards* v. *Vannoy*, No. 19-5807.

the federal writ to state convicts. Cf. *Lockhart*, 506 U.S. at 372–73 (holding new rule in favor of government applies retroactively to cases on collateral review). Nothing in the Constitution mandates that federal courts sit in review of state court decisions. And when Congress fashioned such jurisdiction in 1867, the Court narrowly tailored the writ's availability to respect the finality of convictions by state courts of competent jurisdiction. See *Edwards*, 141 S. Ct. at 1567–68 (Gorsuch, J., concurring); Brief for Jonathan F. Mitchell and Adam K. Mortara in Support of Petitioner at 1–2, 10, *Brown* v. *Davenport*, No. 20-826.

When this Court began to expand the writ and "depart[] from [the finality] principle," Congress and later Justices of this Court fought to temper it. *Edwards*, 141 S. Ct. at 1568–71 (Gorsuch, J., concurring) (quoting *Brown* v. *Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result)) (second alteration in original); see also Mitchell & Mortara *Davenport* Brief, *supra*, at 1–2. That is because "finality, 'the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination, is *essential* to the operation of our criminal justice system.'" *Edwards*, 141 S. Ct. at 1571 (Gorsuch, J., concurring) (quoting *Prost* v. *Anderson*, 636 F. 3d 578, 582 (10th Cir. 2011)); accord *Martinez*, 566 U.S. at 26 (Scalia, J., dissenting) ("Criminal conviction ought to be final before society has forgotten the crime that justifies it.").

"[I]f the rule of law means anything, it means the final result of proceedings in courts of competent jurisdiction *establishes* what is correct 'in the eyes of the law.'" *Edwards*, 141 S. Ct. at 1571 (quoting *Herrera* v. *Collins*, 506 U.S. 390, 399–400 (1993)). States should not be "forced to suffer the indignity of having

their final judgments reopened" merely because this Court erroneously expanded the narrow writ. *Id.* at 1569; accord *Martinez*, 566 U.S. at 26 (Scalia, J., dissenting) ("[T]he very reason for a procedural-default rule[is] the comity and respect that federal courts must accord state-court judgments.").

Even if *stare decisis* did not give way to finality, it "is not an inexorable command." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). It gives way where the prior precedent is "egregiously wrong," has engendered little reliance interest, and has eroded over time. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part). Traditional *stare decisis* factors counsel in favor of overruling *Martinez*.

As already explained, the construction of section 2254(i) offered in *Martinez* was egregiously wrong the day it issued and based on demonstrably false premises. This Court must enforce section 2254(i) according to what it says, not according to the misinterpretations adopted in previous opinions of this Court. A federal statute is "the supreme Law of the Land" under Article VI of the Constitution, and *stare decisis* considerations and court-created doctrines should never be allowed to trump this Court's constitutional duty to enforce "supreme" congressional enactments. See Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1 (2011).[3]

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[3] *Stare decisis* may of course be used to inform the construction of an ambiguous federal statute, and this Court does not violate the Supremacy Clause by invoking *stare decisis* to adhere to a permissible interpretation of statutory language that may nonetheless depart from the preferred interpretation of the present-day Court. But under no circumstance may *stare decisis* be used

No reliance interests are at stake. No defendant can be said to have a reliance interest that is premised on the possibility that his trial will involve federal constitutional error. "I am relying on *Martinez* v. *Ryan* because I know my trial court counsel will be ineffective and I also know that my state postconviction counsel will be ineffective for failing to point that out, so overruling *Martinez* frustrates my reliance interests." Even the best jailhouse lawyer could not come up with such sophistry. And acceptance of any reliance argument would be akin to sanctioning the deliberate bypass of state procedures—a move not even the *Fay* v. *Noia* Court would countenance. 372 U.S. 391 (1963).

Also, the writ here is discretionary. See *supra* at 2, 5. So prisoners can hardly be said to rely on its availability, especially where they do not "have any claim of reliance on past judicial precedent." *Lockhart*, 506 U.S. at 373; see also *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) ("cases involving procedural and evidentiary rules * * * do not produce such reliance" because these rules "do[] not affect the way in which parties order their affairs") (alteration and internal quotation marks omitted); *McCarthan* v. *Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1097 (11th Cir. 2017) (en banc) (W. Pryor, J.) ("As a fundamental matter, rules about collateral review do not create significant reliance interests.").

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to trump the text of an unambiguous federal statute such as section 2254(i). See generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1 (2001).

Reliance interests are particularly weak here where the *Martinez* exception simply offers a petitioner a *shot* at presenting their merits argument—merits arguments which again can never *entitle* the prisoner to relief. A prisoner cannot reasonably rely on threading two needles *and* a judge choosing to pull the thread through.

And the underpinnings of *Martinez* have eroded. *Martinez* was intended to be a "narrow exception" to the rule that ineffective assistance in post-conviction proceedings did not constitute cause to overcome procedural default. 566 U.S. at 9. Two dissenters, however, foresaw that this "narrow exception" "lack[ed] any principled basis, and w[ould] not last." 566 U.S. at 19 n.1 (Scalia, J., dissenting); *id.* at 24 (rebuking Court for "wholeheartedly embrac[ing]" a rule that the Court's longstanding precedent "flatly repudiated"). Their prescience was proven right just a year later when the Court "t[ook] all the starch out of" *Martinez*'s "crisp limit" and engendered "endless * * * state-by-state litigation." *Trevino* v. *Thaler*, 569 U.S. 413, 432–33 (2013) (Roberts, C.J., dissenting). Now, again, the Court confronts the question of how to apply *Martinez*.

All of the traditional *stare decisis* factors thus weigh in favor of setting *Martinez* aside and enforcing the plain text of AEDPA. See Brief for Petitioners at 36, *Shinn* v. *Ramirez*, No. 20-1009 (agreeing the "solution [may be] to revisit *Martinez*"); *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 470 (2015) (Alito, J., dissenting) ("Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule, and experience has pointed up the precedent's

shortcomings.") (quoting *Pearson*, 555 U.S. at 233) (cleaned up).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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