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 THE STATES OF TEXAS, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the judicially created exception to procedural default created by *Martinez v. Ryan*, 566 U.S. 1 (2012), renders the congressionally created evidentiary bar of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(e)(2), inapplicable to a federal court's merits review of a claim for habeas relief?

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oregon, South Carolina, South Dakota, Utah, and West Virginia.[1] Amici States have a substantial interest in ensuring that federal courts respect the comity, finality, and federalism interests that animate AEDPA. The Ninth Circuit overlooked these interests and effectively countermanded AEDPA—specifically, 28 U.S.C. § 2254(e)(2)—to allow respondents David Martinez Ramirez and Barry Lee Jones to invalidate state-court convictions using evidence Congress chose to exclude from federal-habeas proceedings.

In addition, Texas and other Amici States are frequent litigants in AEDPA-governed cases, and thus have an independent interest in promoting its correct application. For these reasons, Amici States file this brief in support of Arizona.

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. The parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

I. Relying on *Martinez v. Ryan*, the Ninth Circuit allowed respondents to attack their state criminal convictions with evidence that was never diligently developed in state court. In *Martinez*, however, this Court "narrow[ly]" answered a "precise question": "whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." 566 U.S. at 9. This Court warned in *Davila v. Davis*, 137 S. Ct. 2058 (2017), against "[e]xpanding the narrow exception announced in *Martinez*," because doing so "would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." *Id.* at 2070 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). Notwithstanding this warning, the Ninth Circuit improperly used *Martinez* to create a workaround for defendants trying to sidestep AEDPA's evidentiary bar in 28 U.S.C. § 2254(e)(2). That approach conflicts with this statute as well as this Court's binding precedent construing AEDPA. Moreover, a fair reading of *Martinez*'s explicitly limited holding does not justify the Ninth Circuit's result below.

II. The Ninth Circuit's decisions typify the "significant systemic costs" to which *Martinez* opened the door. *Davila*, 137 S. Ct. at 2068. For instance, the interplay between *Martinez* and section 2254(e)(2) has repeatedly led to burdensome, unwarranted evidentiary development within the Fifth Circuit, where the State of Texas is a frequent habeas litigant. Examples from other circuits indicate that Texas's experience is by no means unique: Courts have struggled to apply the equitable rule of *Martinez* within the statutory confines of section

2254(e)(2). As a result, the State's interests in the effective administration of criminal justice face lengthy delays for evidentiary development that ought to be foreclosed by AEDPA.

III. Permitting equitable exceptions to statutory commands is rarely—if ever—proper. Creating such exceptions here presents at least two broader threats to federal-habeas proceedings. *First*, that approach would allow habeas litigants to hold back evidentiary development for federal court, depriving state courts of the chance to correct their own errors (if any). *Second*, allowing equity to trump AEDPA would undermine the diligence demanded by section 2254(e)(2), and there is little reason to believe that result would remain cabined to petitioners pursuing relief via *Martinez*. Following Congress's intent expressed in section 2254(e)(2), however, avoids the attendant damage to comity, finality, and federalism.

ARGUMENT

I. The Ninth Circuit Improperly Legislated Its Own Exception to Section 2254(e)(2) of AEDPA.

In AEDPA, Congress chose to limit not only the claims that a petitioner may bring in federal habeas, 28 U.S.C. § 2254(a)-(b), but also the evidence that a petitioner may use to support those claims, *id.* § 2254(d)-(e); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Subsections (d) and (e)(2) work in tandem: the former limits evidence for claims adjudicated in state court; the latter (subject to two conditions inapplicable here) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186 (citing *Williams v. Taylor*, 529 U.S. 420, 427-29 (2000)). These restrictions apply whether a petitioner seeks to

introduce new evidence through a live evidentiary hearing or written submission. *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam).

These dual restrictions reflect Congress's considered judgment. The restriction on claims presented in state court reflects a respect for the state judicial system and a presumption that state-court proceedings do not often present the sort of catastrophic miscarriages of justice that federal habeas relief is meant to cure. *See Pinholster*, 563 U.S. at 181-83, 183 n.3. And the evidentiary limitation requires habeas petitioners to present their *best* case before the state courts, not to sandbag in favor of bringing their best evidence in a later-in-time federal forum. *See* Pet. Br. 37-38. Subsections (d) and (e)(2), working in agreement, respect the presumption that state courts should nearly always have the final say, and that state-court proceedings are not just a dress rehearsal for federal habeas.

Instead of following the plain text or this Court's clear directions from cases like *Pinholster*, *Williams*, and *Holland*, the Ninth Circuit expanded *Martinez*'s holding that ineffective assistance by state-habeas counsel may excuse procedural default of certain *claims* to a free-floating equitable exception to AEDPA's separate bar on introducing *evidence* not diligently developed in state court. *Jones v. Shinn*, 943 F.3d 1211, 1222 (9th Cir. 2019). The *Ramirez* panel did the same, *Ramirez v. Ryan*, 937 F.3d 1230, 1242-44 (9th Cir. 2019); indeed, it pretended section 2254(e)(2) "did not exist at all," *Jones v. Shinn*, 971 F.3d 1133, 1134 (9th Cir. 2020) (Collins, J., dissenting from the denial of rehearing en banc).

Those holdings are untenable for at least two important reasons. *First*, the Ninth Circuit's equitable exception to AEDPA conflicts with this Court's statutory-

interpretation precedent. *Second*, no exception to section 2254(e)(2) flows from a fair reading of *Martinez*.

A. There is no equitable exception to override section 2254(e)(2)'s statutory command.

Section 2254(e)(2) requires a habeas petitioner to diligently develop the factual bases for his claims in state court. When he does not, section 2254(e)(2) limits the evidence the petitioner may use to challenge a state criminal judgment by barring new evidence in federal court when the habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2).

Both Ramirez and Jones blame their state-habeas counsel for failing to develop the factual basis for their ineffective-assistance claims. *Ramirez*, 937 F.3d at 1239-40; *Jones*, 943 F.3d at 1220-21. Even if that contention helps habeas petitioners overcome procedural default, it falls short in helping them overcome the separate barrier of AEDPA. *See* Pet. Br. 36. The Ninth Circuit's contrary conclusion is contrary to the statute, ignores key precedent from this Court, and is unsupported by its own logic.

1. Under the text of AEDPA, state-habeas counsel's "lack of diligence" is attributable to Ramirez and Jones. As this Court has held, section 2254(e)(2)'s use of "failed to develop" includes a "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Williams*, 529 U.S. at 432 (emphasis added); *accord Holland*, 542 U.S. at 652. As a result, section 2254(e)(2)'s opening clause bars Ramirez and Jones from developing evidence in federal court to support the procedurally defaulted claims. *See Williams*, 529 U.S. at 439-40 ("[A] diligent attorney would have done more. Counsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2)."); *see*

also Holland, 542 U.S. at 653 ("[Petitioner] complains that his state postconviction counsel did not heed his pleas for assistance. Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied." (citation omitted)). *Holland* specifically applied section 2254(e)(2) to bar evidence for an ineffective-assistance claim.

This result can be seen most clearly by comparing the Ninth Circuit's reading of section 2254(e)(2) to pre-AEDPA rules on the evidence a federal habeas court may consider in resolving claims not developed in state court. Under those rules, a habeas petitioner's attempt to introduce new evidence was governed by the cause-and-prejudice standard from the procedural-default context. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992). Even before AEDPA, any lack of diligence by state-habeas counsel would be attributable to the habeas petitioner under "well-settled principles of agency law." *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *see Davila*, 137 S. Ct. at 2065. This Court applied *Coleman*'s rule to this very context in *Keeney*, when it refused to allow new evidence based on state-habeas "counsel's negligent failure to develop the facts." 504 U.S. at 4; *see id.* at 7-11.

AEDPA then replaced the judicially developed cause-and-prejudice standard for receiving new evidence with section 2254(e)(2), which "raised the bar" for federal habeas petitioners. *Williams*, 529 U.S. at 433. Far from intending, a weaker rule than the one adopted in *Keeney* just a few years earlier, *see* Pet. Br. 23-26, *Williams* concluded that "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence." *Williams*, 529 U.S. at 434.

It follows that the statutory trigger to section 2254(e)(2)'s bar on new evidence—"the applicant has failed to develop the factual basis of a claim in State court proceedings"—uses "failed to develop" just as *Keeney*: as including "attorney error." *Keeney*, 504 U.S. at 10 n.5; *see Williams*, 529 U.S. at 433-34. So when state-habeas counsel fails to develop the factual basis for a claim, the habeas petitioner is barred from presenting new evidence on that claim in federal court. *See* Pet. Br. 25-26. Put another way, by invoking *Martinez* to overcome procedural default, Ramirez and Jones tacitly admit that they "would have had to satisfy" the pre-AEDPA cause standard to excuse a "deficiency in the state-court record." *Williams*, 529 U.S. at 434. In doing so, a habeas petitioner triggers being "controlled by § 2254(e)(2)." *Id.*

2. This Court has confirmed that a habeas petitioner may not use discovery in federal court to develop procedurally defaulted claims. *Williams* and *Holland* explained that section 2254(e)(2) bars evidentiary development in federal court when state-habeas counsel negligently fails to develop an ineffective-assistance claim (or any other claim) in state court. Ramirez and Jones both concede that their state-habeas counsel did just that—indeed, that is their only argument for excusing procedural default in the first place. *Cf. Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) ("[Petitioner] does not satisfy *Williams*, because his claims, by their very nature, are premised on the failure of 'the prisoner's counsel' to develop the factual basis of the claims in state court." (quoting *Williams*, 529 U.S. at 432)). For that reason, section 2254(e)(2) bars their use of this new evidence in support of their underlying claims.

In interpreting section 2254(e)(2), *Williams* did not make an equitable judgment; it gave effect to what

"Congress intended." 529 U.S. at 433. And *Williams* concluded that section 2254(e)(2) codified the rule that state-habeas counsel's lack of diligence in developing evidence is attributed to the prisoner. *Id.* at 437, 439-40. In applying section 2254(e)(2), the Court is "interpreting and applying not a judge-made doctrine but a statutory requirement, and therefore must honor Congress's choice." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (quotation marks omitted).

3. The Ninth Circuit's ruling in this case ignores both this text and this case law. The *Ramirez* panel referred to *Williams* only in passing, and it ignored *Holland* altogether. *See Ramirez*, 937 F.3d at 1245-46. The *Jones* panel cited neither *Williams* nor *Holland*. *See Jones*, 943 F.3d at 1220-22. It also failed to grapple with the effect of state-habeas counsel's lack of diligence. *See Jones*, 971 F.3d at 1140 (Collins, J., dissenting from the denial of rehearing en banc) ("*Jones* made no effort to reconcile its holding with *Holland* or [*Williams*]."). This omission is telling. Because Ramirez and Jones rely on the ineffectiveness of their state-habeas counsel, they are barred from developing evidence in federal court to support their claims. *See* 28 U.S.C. § 2254(e)(2).

The Ninth Circuit's free-wheeling evidentiary approach conflicts with Congress's choices. In *Ross*, this Court spelled out how judge-made rules interact with statutory requirements. 136 S. Ct. at 1857. Section 2254(e)(2) is a statutory requirement. *Williams*, 529 U.S. at 436. Procedural default, on the other hand, is a judge-made equitable doctrine. *Martinez*, 566 U.S. at 13; *see Dretke v. Haley*, 541 U.S. 386, 392 (2004). This Court held in *Ross* that this distinction limits the power of courts:

> No doubt, judge-made . . . doctrines, even if flatly stated at first, remain amenable to

> judge-made exceptions. . . . But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, foreclosing judicial discretion.

136 S. Ct. at 1857 (citation omitted). The Ninth Circuit's reasoning, which improperly engrafted a judge-made exception onto a statute, is irreconcilable with *Ross*. *See* Pet. Br. 29-30.

Like the judge-made exception to the Prison Litigation Reform Act's exhaustion requirement at issue in *Ross*, procedural default is a "judge-made" doctrine. *See id.* Thus, "[t]he rules for when a prisoner may establish cause to excuse a procedural default are elaborated" only "in the exercise of the Court's discretion." *Martinez*, 566 U.S. at 13. But section 2254(e)(2) is a statutory provision, so it "stands on a different footing." *Ross*, 136 S. Ct. at 1857. Congress set the rule with section 2254(e)(2), which "foreclos[es] judicial discretion" for judge-made exceptions. *Id.* Under AEDPA, a federal habeas petitioner may develop evidence only in two narrow circumstances, neither of which applies here. 28 U.S.C. § 2254(e)(2)(A)(i)-(ii).

4. This conclusion is entirely consistent with how other parts of AEDPA interact with other equitable doctrines. Consider this Court's equitable-tolling precedent. *Compare, e.g.*, *Holland v. Florida*, 560 U.S. 631, 645-46 (2010), *with* 28 U.S.C. § 2244(d)(1) (imposing a one-year limitations period). When Congress enacts a statute of limitations, it presupposes a background "traditional equitable tolling principle." *Honda v. Clark*, 386 U.S. 484,

501 (1967). Thus, equitable tolling is implied in the statute; it is not an equitable *exception* to statutory requirements. *See id.* But section 2254(e)(2) is entirely a creature of statute; there is no common-law analogue to be read into its terms. *Cf., e.g.*, *Hallstrom v. Tillamook County*, 493 U.S. 20, 27-28 (1989) (distinguishing statute of limitations from pre-suit-notice requirement not subject to equitable tolling). As a result, it is not subject to judge-made exceptions for the reasons described in *Ross*.

Likewise, the Court should reject any notion that section 2254(e)(2)'s statutory commands are subject to other equitable doctrines. Section 2254(e)(2), like section 2254(d)(1), "contains unequivocally mandatory language" addressed to federal-habeas courts. *See Ward v. Stephens*, 777 F.3d 250, 257 n.13 (5th Cir. 2015) (quotation marks omitted); *see also Langley v. Prince*, 926 F.3d 145, 162 (5th Cir. 2019) (en banc), *cert. denied*, 140 S. Ct. 2676 (2020) ("a State's lawyers cannot waive or forfeit § 2254(d)'s standard"); *accord EEOC v. Fed. Labor Relations Auth.*, 476 U.S. 19, 23 (1986) (per curiam) (a party's failure to raise a statutory instruction "speak[ing] to courts" does not lead to forfeiture).[2] Section 2254(e)(2) commands that "*the court* shall not" consider evidence outside the state-court record unless its conditions are satisfied. 28 U.S.C. § 2254(e)(2) (emphasis added). Thus, its limit may not be forfeited or otherwise limited by principles not contemplated by Congress.

[2] *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (in retroactivity context, laws are jurisdictional when they "speak to the power of the court rather than to the rights or obligations of the parties" (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., partially concurring and concurring in judgment))).

Ward, 777 F.3d at 257 n.3; *see also McGehee v. Norris*, 588 F.3d 1185, 1194 (8th Cir. 2009) (only express waiver by the State can excuse section 2254(e)(2)'s requirements).

5. Finally, equity is not the only consideration in play. Congress passed section 2254(e)(2) with an eye toward countervailing concerns for finality and comity. *See Williams*, 529 U.S. at 436-37. Those same concerns are routinely considered to outweigh generalized concerns for equity—for example, by sua sponte raising bars to relief in federal-habeas proceedings. *E.g.*, *Day v. McDonough*, 547 U.S. 198, 207 (2006) (statute of limitations may be raised sua sponte); *Caspari v. Bohlen*, 510 U.S. 383, 386-89 (1994) (non-retroactivity may be raised sua sponte); *Granberry v. Greer*, 481 U.S. 129, 134 (1987) ("comity and federalism" animate considering exhaustion sua sponte). Indeed, section 2254(e)(2) speaks to federal courts' powers at a stage when the risks to comity and federalism are particularly acute—when new facts and arguments may never have been presented to a state court at all. *See* Pet. Br. 36-37. Accordingly, AEDPA presupposes that federal courts will hold habeas petitioners to their faults unless they satisfy section 2254(e)(2)'s conditions.

B. *Martinez* does not justify the results below.

To justify its departure from the text and history of AEDPA, the Ninth Circuit relied on supposedly logical and pragmatic reasons to admit new evidence under the guise of *Martinez*. Neither the rule of *Martinez* nor the principles behind it dictate that result.

1. This Court's decisions in *Martinez* had nothing to do with section 2254(e)(2). No party in *Martinez* raised section 2254(e)(2). Instead, the question presented and briefed in *Martinez* focused on whether the Court should

recognize "a constitutional right to an effective attorney in [a] collateral proceeding." 566 U.S. at 5. Section 2254(e)(2)'s evidentiary rule is irrelevant to that question, as well as to the "more narrow" (but unbriefed) question that *Martinez* ultimately decided: "[W]hether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." *Id.*

The Ninth Circuit's rule cannot be gleaned from this Court's follow-up to *Martinez*'s rule, *Trevino v. Thaler*, 569 U.S. 413 (2013), which accounted for particularities of other states' postconviction-review systems. *Id.* at 417-18. As with *Martinez*, section 2254(e)(2) was not at issue. The federal courts had found Trevino's claims procedurally defaulted before *Martinez*, but intervening Fifth Circuit precedent held that *Martinez* was inapplicable in Texas's postconviction-review system. *Id.* at 420. This Court ultimately reversed for further proceedings in light of *Martinez*. *See id.* at 429. The Court ruled that because Texas's "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies." *Id.*

Nothing in *Trevino* indicated that the petitioner had been diligent under section 2254(e)(2). Trevino's federal-habeas counsel had developed new mitigation evidence in district court, which prompted the district court to permit Trevino to exhaust an ineffective-assistance-of-trial-counsel claim in state court. *Id.* at 419-20. Trevino's failure to present his claim in initial state-habeas proceedings, however, had rendered his claim procedurally

barred under Texas law. *Id.* Accordingly, in its now-vacated decision, the Fifth Circuit held that Trevino had not shown a "fundamental miscarriage of justice" to overcome procedural default. *Trevino v. Thaler*, 449 F. App'x 415, 428 (5th Cir. 2011). This Court, however, recognized a new path to overcoming procedural default in Texas cases by applying the rule of *Martinez*—a petitioner could allege *ineffective assistance* in failing to raise the ineffective-assistance-of-trial-counsel claim in initial state-habeas proceedings. *See Trevino*, 569 U.S. at 429. There was no occasion to address whether that new avenue for overcoming procedural default triggered section 2254(e)(2).[3]

2. Indeed, the decisions below also conflict with *Martinez* itself. *Martinez* created a "narrow exception" to *judge-made* procedural-default rules. 566 U.S. at 9. That exception excuses the bar on considering defaulted *claims* if state-habeas counsel was ineffective for not raising a substantial ineffective-assistance claim. *Id.* But that exception does not affect AEDPA's independent *statutory* bar on what *evidence* federal courts may consider in federal-habeas proceedings. *See, e.g.*, *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016) ("The Supreme Court, in *Martinez*, created a narrow exception to procedural default that 'merely allows' federal merits-review 'of a claim that otherwise would have been procedurally defaulted.'" (quoting *Martinez*, 566 U.S. at 17)).

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[3] If some hidden principal of diligence appeared in *Martinez*, it has eluded state courts, too. By now, state "courts have uniformly recognized" that "*Martinez* does not provide a basis for state courts to excuse petitioners from compliance with state procedural rules." *See Ex parte Preyor*, 537 S.W.3d 1, 2-3 (Tex. Crim. App. 2017) (Newell, J., concurring) (citing cases).

Far from establishing the free-wheeling rule espoused by the Ninth Circuit, this Court took pains to limit its holding: the judge-made rule developed in *Coleman*—that attorney negligence is chargeable to the client—"governs in *all* but the limited circumstances recognized here." *Martinez*, 566 U.S. at 16 (emphasis added). Thus, *Martinez* itself instructs that its rule does not apply beyond the judge-made procedural-default doctrine, as *Martinez* did not cite section 2254(e)(2) or discuss the types of evidence that a federal court may consider in habeas proceedings. And, as the Court specifically stated that its holding raised no stare decisis concerns, *Martinez* could not have overruled *Williams* or *Holland*. *See id.* at 15.

Later, this Court in *Davila* affirmed the Fifth Circuit's refusal to extend *Martinez*—notably, repudiating Ninth Circuit precedent that *had* extended *Martinez*—and confirmed that "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." 137 S. Ct. at 2070 (quoting *Engle*, 456 U.S. at 128). *Davila* thus precludes extending *Martinez* as the Ninth Circuit did here.

3. Against that backdrop, there is no logical or pragmatic reason to engraft an equitable exception onto section 2254(e)(2).

a. The Ninth Circuit's resort to the "logic" animating *Martinez* is unavailing. It is not "illogical" "for a court to allow full evidentiary development and hearing on the *Martinez* 'claim,' but not allow consideration of that very same evidence as to the merits of the underlying trial-counsel [ineffective-assistance] claim." *Jones*, 943 F.3d at 1221 (citation omitted). Courts have held fast to section 2254(e)(2)'s requirements in similar contexts

concerning untimely factual development. The Fourth, Fifth, and Sixth Circuits, for instance, have foreclosed factual development in federal court when state-habeas counsel exhausts, but fails to factually develop, a claim in state-habeas proceedings. *See, e.g.*, *Gray v. Zook*, 806 F.3d 783, 799 & n.10 (4th Cir. 2015); *Escamilla v. Stephens*, 749 F.3d 380, 394-95 (5th Cir. 2014); *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013). Even the Ninth Circuit has so held. *Floyd v. Filson*, 949 F.3d 1128, 1147-48 (9th Cir. 2020).

The logic for adhering to section 2254(e)(2) is manifest: "[t]o allow such relitigation with counsel's newly proffered evidence would effect a complete end run around the state court system and would violate AEDPA specifically." *Ibarra v. Davis*, 738 F. App'x 814, 818-19, 819 n.4 (5th Cir. 2018) (per curiam). Properly read, section 2254(e)(2) prevents courts from using a cause-and-prejudice hearing for *Martinez* purposes as a Trojan Horse to present new evidence on the merits. But the Ninth Circuit has done just that: it allowed the development of evidence in federal court to establish procedural default under *Martinez*, then posited that this new evidence must be considered on merits review. *See Jones*, 971 F.3d at 1142 (Collins, J., dissenting from the denial of rehearing en banc).

There is also nothing "illogical" about limiting a judge-made exception to prevent it from swallowing the Congress-made rule. *See* Pet. Br. 31-33. That is precisely what *Martinez* tried to do. And the Court reiterated that in *Davila*, 137 S. Ct. at 2068-69, repudiating the Ninth Circuit's "logical" extension of *Martinez* to appellate ineffective-assistance claims, *see Nguyen v. Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013). The Ninth Circuit cannot appeal to a "logic" that this Court effectively disclaimed

by cabining the *Martinez* exception and rejecting efforts to expand it. *See* Pet. Br. 38.

The *Jones* panel purported to avoid section 2254(e)(2) by invoking a non-controlling "conclusion" of a "four-judge plurality" from *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc) (plurality op.). *Jones*, 943 F.3d at 1221-22 (discussing *Detrich*). Leaving aside that such an opinion is not the law even in the Ninth Circuit, its reasoning is unpersuasive. *Detrich* is premised on the notion that "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his [state-habeas] counsel's ineffectiveness had been in [state-habeas] proceedings." 740 F.3d at 1247. But procedural default and section 2254(e)(2) are *separate* barriers to habeas relief; if they conflict, the Court should revisit *Martinez*, not judicially revise AEDPA.

The *Ramirez* panel chose simply to blind itself to section 2254(e)(2). *See* 937 F.3d at 1248. The district court in *Ramirez* considered additional evidence to determine whether Ramirez showed cause and prejudice. *Ramirez v. Ryan*, No. CV-97-01331-PHX-JAT, 2016 WL 4920284, at *12 (D. Ariz. Sept. 15, 2016). The *Ramirez* panel went further: not only should the district court have allowed Ramirez to develop evidence to establish his state-habeas counsel's deficient performance, the district court (on remand) must allow Ramirez to develop evidence "to litigate the merits of his ineffective assistance of *trial* counsel claim, as he was precluded from such development because of his post-conviction counsel's ineffective representation." 937 F.3d at 1248 (emphasis added). This order collapsed the distinction of a prejudice showing under *Martinez* with the merits of a claim on habeas review, eliminating section 2254(e)(2) altogether.

The Ninth Circuit's errors mirror the ones this Court faced in *Pinholster*. In earlier decisions, the Court had merely assumed that section 2254(d)'s limit on evidence, "despite its mandatory language, simply does not apply when a federal habeas court has admitted new evidence that supports a claim previously adjudicated in state court." 563 U.S. at 184. But in *Pinholster*, the Court followed the plain text of AEDPA and "reject[ed] that assumption." *Id.* at 185. It also faulted the Ninth Circuit for improperly divining unstated premises from this Court's earlier opinions. *Id.* at 184-85. It is similarly misguided to divine an unstated premise about evidentiary development from *Martinez*'s procedural-default rule. Habeas petitioners already benefit—at substantial cost to "comity, finality, and federalism," *Davila*, 137 S. Ct. at 2064—from the change to equitable rules occasioned by *Martinez*.

b. The *Jones* panel relied on two other lower-court decisions, neither of which supports its expansion of *Martinez*. 943 F.3d at 1222 (citing *Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013); *Barrientes v. Johnson*, 221 F.3d 741, 771 & n.21 (5th Cir. 2000)). In *Sasser* and *Barrientes*, the courts reasoned that if the respective habeas petitioners overcame procedural default, it necessarily followed that they had not "'failed to develop' the factual basis of a claim" to trigger section 2254(e)(2). *Barrientes*, 221 F.3d at 770-71; *see also Sasser*, 735 F.3d at 853-54.

Any notion that a habeas petitioner who overcomes procedural default has necessarily not "failed to develop the factual basis of a claim," 28 U.S.C. § 2254(e)(2), is a relic from the days before *Martinez*. Before *Martinez*, error by state-habeas counsel (which qualifies as "failed to develop" under section 2254(e)(2)) could not amount to

cause to overcome procedural default, so there was little chance of reaching different results under the equitable and statutory regimes. *Williams* bears this out. For one claim, error by state-habeas counsel triggered section 2254(e)(2). *See Williams*, 529 U.S. at 437-40. For another, there was no attorney error, so the Court could address section 2254(e)(2) and procedural default together. *See id.* at 444. By relying on state-habeas counsel's negligence to establish cause to overcome the procedural default of their ineffective-assistance claims, Ramirez and Jones effectively conceded that they "failed to develop the factual basis of a claim in State court." 28 U.S.C. § 2254(e)(2). So they may not rely on new evidence in federal court to prove that claim.

Moreover, neither *Sasser* nor *Barrientes* surmounts section 2254(e)(2) in the *Martinez* context. The Fifth Circuit decided *Barrientes* long before *Martinez* and thus could not have answered the question presented here. Indeed, *Barrientes* did not even concern attorney error, and the court merely held that "[*i*]*n this case*, *if* Barrientes establishes cause for overcoming his procedural default, he has certainly shown that he did not 'fail to develop' the record under § 2254(e)(2)." 221 F.3d at 771 (emphasis added). Since its decision in *Barrientes*, the Fifth Circuit has held that (1) whether and how section 2254(e)(2) interacts with *Martinez* is an open question, *Canales v. Stephens*, 765 F.3d 551, 571 n.2 (5th Cir. 2014), and (2) *Martinez* does not provide an end-run around section 2254(e)(2), *Ibarra*, 738 F. App'x at 818-19 & n.4.

Sasser, meanwhile, reached its conclusion through faulty analysis and without briefing on this issue. *Sasser* merely cited state-habeas counsel's alleged negligence and *Williams*'s rule that section 2254(e)(2) "does not preclude district courts from holding an evidentiary

hearing if the petitioner 'was unable to develop his claim in state court despite diligent effort.'" 735 F.3d at 853-54 (quoting *Williams*, 529 U.S. at 437). But again, *Williams* makes clear that lack of diligence by "the prisoner *or* the prisoner's counsel" triggers section 2254(e)(2)'s evidentiary bar. 529 U.S. at 432 (emphasis added). *Sasser* never addressed this inconsistency, let alone resolved it.

c. Supposed pragmatic reasons for ignoring section 2254(e)(2)'s plain text are equally misguided. As noted above, the Ninth Circuit speculated that *Martinez* would be a "dead letter" if state-habeas counsel's negligence under *Martinez* also triggers section 2254(e)(2)'s bar on evidence. Not so. Actual applications of *Martinez* demonstrate these principles working in tandem. *See, e.g.*, *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 933, 937-44 (3d Cir. 2019) (excusing procedural default under *Martinez* and granting relief on ineffective-assistance claim "[b]ecause, on the face of the [trial-court] record, trial counsel's assistance was manifestly ineffective"); *see also Preston v. Superintendent Graterford SCI*, 902 F.3d 365, 368 n.1, 376-78 (3d Cir. 2018) (excusing procedural default under *Martinez* by relying solely on the state-court record). And there are other record-based ineffective-assistance claims for which *Martinez* will still do work if courts remain faithful to the text of section 2254(e)(2). *See Davila*, 137 S. Ct. at 2067-68. Examples could include when counsel requests an incorrect jury instruction, or per se ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). Moreover, to the extent that giving meaning to *Martinez* requires courts to create wholesale exceptions to section 2254(e)(2), that is a reason to reconsider *Martinez*—not to judicially rewrite AEDPA.

II. Permitting Evidentiary Development Via *Martinez* Imposes Severe Costs on Comity, Finality, and Federalism that Section 2254(e)(2) Seeks to Avoid.

Section 2254(e)(2) "carries out 'AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance.'" *Pinholster*, 563 U.S. at 185 (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)). It does so by "ensur[ing] that '[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.'" *Id.* at 186 (quoting *Williams*, 529 U.S. at 437).

Unfortunately, courts struggle to apply *Martinez* consistently with the "comity, finality, and federalism" that AEDPA was meant to protect. *Davila*, 137 S. Ct. at 2070. Federal courts permit burdensome evidentiary development notwithstanding section 2254(e)(2). The State of Texas provides examples from within the Fifth Circuit where evidentiary development should have been foreclosed by section 2254(e)(2) but was allowed anyway. Examples from other circuits confirm that Texas's experience is hardly unique. Even if courts ultimately rule for states on the merits, states still bear the "intru[sion] on state sovereignty" of federal-habeas review. *Id.* at 2069. And justifying evidentiary development under section 2254(e)(2) ultimately proves unworkable under the merits-driven framework of *Martinez*.

A. Within the Fifth Circuit, the State of Texas has repeatedly been forced to litigate defaulted claims even though section 2254(e)(2) ought to have barred the underlying evidence. The State of Texas currently has at least three cases pending before the Fifth Circuit that

present this issue. *See Green v. Davis*, 479 F. Supp. 3d 442, 507-10 (S.D. Tex. 2020), *appeal filed sub nom. Green v. Lumpkin*, No. 20-70021 (5th Cir. 2020); *Ramey v. Davis*, 942 F.3d 241, 254-57 (5th Cir. 2019) (granting COA in part); *Balentine v. Davis*, No. 2:03-CV-039-D, 2018 WL 2298987, at *1 (N.D. Tex. May 21, 2018), *appeal filed sub nom. Balentine v. Lumpkin*, No. 18-70035 (5th Cir. 2018). Of course, the Fifth Circuit has held that petitioners are not *entitled* to evidentiary hearings under *Martinez*. *Segundo*, 831 F.3d at 351. But on the other hand, another Fifth Circuit panel held in conjunction with granting a certificate of appealability that the district court abused its discretion by not holding such a hearing. *Washington v. Davis*, 715 F. App'x 380, 385-86 (5th Cir. 2017) (per curiam). The panel accordingly ordered the district court to conduct evidentiary development on remand. *Id.* Thus, in *Washington*, the State's interests in finality and the administration of justice have been frustrated for nearly four years as evidentiary development proceeds in district court.

Predictably, evidentiary development has devolved into a patchwork of irreconcilable rulings as the State has been subjected to numerous evidentiary hearings in federal district courts across Texas. Some district courts believed they had discretion to allow evidentiary development, but chose not to do so.[4] Others allowed the

[4] *See, e.g.*, *Ramey v. Davis*, 314 F. Supp. 3d 785, 803 n.9 (S.D. Tex. 2018); *Murphy v. Davis*, No. 3:10-CV-163-N, 2017 WL 291171, at *28 (N.D. Tex. Jan. 23, 2017); *Ochoa v. Davis*, No. 3:09-CV-2277-K, 2016 WL 5122107, at *26 (N.D. Tex. Sept. 21, 2016). Some considered new documentary evidence, even though this Court has held that section 2254(e)(2) prevents consideration of both. *See Holland*, 542 U.S. at 653 (the restrictions of section 2254(e)(2) "apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing").

development of new evidence to establish "cause" and "prejudice" under *Martinez*, but never decided whether they could consider that evidence for the underlying merits.[5] Another considered the evidence for both purposes, as in *Jones* and *Ramirez*.[6]

The pattern has emerged outside the Fifth Circuit, too. Some courts have repeated the Ninth Circuit's error by allowing evidentiary development without referencing section 2254(e)(2)'s evidentiary bar. For instance, the Seventh Circuit applied *Martinez* in *Brown v. Brown*, then remanded for an evidentiary hearing on whether state-habeas counsel was deficient, without ever acknowledging or grappling with section 2254(e)(2)'s evidentiary bar. 847 F.3d 502, 513-14, 517 (7th Cir. 2017). Or consider the Fourth Circuit's decision in *Sigmon v. Stirling*, where the majority considered new documentary evidence presented in federal court without mentioning section 2254(e)(2). 956 F.3d 183, 198 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1094 (2021).

The Eleventh Circuit has similarly struggled with evidentiary development under section 2254(e)(2). One panel allowed federal evidentiary development in conjunction with *Martinez* without mentioning section 2254(e)(2). *See Sullivan v. Sec'y, Fla. Dep't of Corr.*, 837 F.3d 1195, 1204-07 (11th Cir. 2016). But a different panel

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[5] *See, e.g.*, *Balentine v. Davis*, No. 2:03-CV-39-J-BB, 2017 WL 9470540, at *4-16 (N.D. Tex. Sept. 29, 2017), *report and recommendation adopted*, 2018 WL 2298987, at *1; *Carpenter v. Davis*, No. 3:02-CV-1145-B-BK, 2017 WL 2021415, at *2-3 (N.D. Tex. May 12, 2017); *Braziel v. Stephens*, No. 3:09-CV-1591-M, 2015 WL 3454115, at *8-10 (N.D. Tex. May 28, 2015); *Garcia v. Stephens*, No. 3:06-CV-2185-M, 2015 WL 13856623, at *5-11 (N.D. Tex. May 28, 2015).

[6] *See Norman v. Stephens*, No. V-12-054, 2015 WL 5732122, at *12 (S.D. Tex. Sept. 30, 2015).

held that a district court's discretion to allow evidentiary development about a *Martinez* claim is limited by section 2254(e)(2), which "prohibits a district court from holding an evidentiary hearing if a petitioner fails to develop the factual basis for a claim in state court proceedings." *See Lucas v. Fla. Dep't of Corr.*, 842 F. App'x 357, 363-64 (11th Cir. 2021) (per curiam). *Lucas* stands in stark contrast with the cases described above that suggest (or require) evidentiary development notwithstanding section 2254(e)(2).

Cases like these underscore that the inconsistent treatment of evidentiary development will only deepen if federal courts can fashion exceptions to section 2254(e)(2). The result undermines Congress's goal in creating uniform rules governing habeas proceedings. *Cf. Clay v. United States*, 537 U.S. 522, 531 (2003) (explaining that section 2244(d)(1)(A) of AEDPA "is to be determined by reference to a uniform federal rule").

B. Even in cases where the State ultimately prevails on the merits, allowing habeas petitioners to evade rules "*limiting* the discretion of federal district courts" to permit evidentiary development, *Pinholster*, 563 U.S. at 185 n.8, nevertheless "aggravate[s] the harm to federalism that federal habeas review necessarily causes," *Davila*, 137 S. Ct. at 2069-70. By definition, *Martinez*-based arguments arise only after a state has had its chance for habeas review. And the attendant evidentiary development extends federal proceedings years, if not decades, after the crime of conviction, which itself poses unique challenges in postconviction review. *Cf. Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam) (retrial decades after the crime "pos[es] the most daunting difficulties for the prosecution").

Take, for instance, *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). Notwithstanding the statutory funding question at issue in *Ayestas*, the State argued that section 2254(e)(2) independently barred federal-habeas courts from considering newly developed evidence. *Id.* at 1095. When this Court vacated and remanded to the Fifth Circuit, the Court passed on answering the section 2254(e)(2) question. *Id.* The Court left it to the Fifth Circuit to decide section 2254(e)(2)'s scope. *Id.* ("We decline to decide in the first instance whether [the State's] reading of § 2254(e)(2) is correct."). On remand, however, the Fifth Circuit denied relief on other grounds without addressing the State's section 2254(e)(2) argument. *Ayestas v. Davis*, 933 F.3d 384 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1107 (2020). Even though the State ultimately prevailed, its interests in finality and the administration of justice were delayed for years.

The Fifth Circuit has repeated this pattern in numerous other cases. In *Canales*, for example, the Fifth Circuit noted the open evidentiary question presented by *Martinez* but allowed the district court to decide on remand whether to consider such evidence under section 2254(e)(2). *Canales*, 765 F.3d at 571 n.2. In a subsequent appeal, however, the Fifth Circuit merely assumed that it could consider the petitioner's new evidence and denied relief on the merits. *Canales v. Davis*, 966 F.3d 409, 412 (5th Cir. 2020), *petition for cert. filed sub nom. Canalas v. Lumpkin*, No. 20-7065 (U.S. Jan. 28, 2021).

The Fifth Circuit has rejected petitioners' claims based on new evidence notwithstanding section 2254(e)(2) at least four other times. *See Speer v. Lumpkin*, 845 F. App'x 345, 349-50 (5th Cir. 2021) (per curiam); *Trevino v. Davis*, 861 F.3d 545, 550-51 (5th Cir. 2017); *Norman*, 817 F.3d at 234; *Newbury v. Stephens*, 756 F.3d

850, 874 (5th Cir. 2014) (per curiam); *see also Ochoa v. Davis*, 750 F. App'x 365, 367-68 & n.2 (5th Cir. 2018) (per curiam) (acknowledging the tension between an affidavit produced in federal court and section 2254(e)(2) "[w]ithout deciding the propriety of considering the affidavit"); *Murphy v. Davis*, 901 F.3d 578, 590-91 & n.5 (5th Cir. 2018) ("As we conclude the district court did not abuse its discretion in denying an evidentiary hearing, we do not consider whether it would be barred from doing so by [section 2254(e)(2)]."). Congress could not have intended section 2254(e)(2)'s rule against considering new evidence to function by letting courts consider new evidence.

C. Some courts hold evidentiary hearings—so-called "*Martinez* hearings"—ostensibly to establish cause and prejudice under *Martinez* but not the underlying merits. *See, e.g.*, *Detrich*, 740 F.3d at 1247. In theory, section 2254(e)(2) bars courts from developing evidence "on the claim" that state-habeas counsel failed to diligently develop, but *not* to establish cause and prejudice under *Martinez*. *See id.* (quoting 28 U.S.C. § 2254(e)(2)). That justification fails for at least two reasons.

First, unless there is a path to relief on the merits with evidence that *can* be considered, allowing evidentiary development is improper. *See* Pet. Br. 39-41. In general, when a petitioner has "failed to develop" his claims "properly before the [state] courts," evidentiary development is unwarranted. *Schriro v. Landrigan*, 550 U.S. 465, 479 (2007). "There is no point in conducting a *Martinez* hearing to discover 'cause' to excuse a procedural default" because "evidence outside the state record cannot be considered in any event." *Jones*, 971 F.3d at 1142 (Collins, J., dissenting from the denial of rehearing en banc).

Doing so is affirmatively harmful because when a court holds a *Martinez* hearing for a claim that fails without the evidence developed at that hearing, section 2254(e)(2)—and the federalism and comity concerns it was written protect—becomes the "dead letter." *Cf. Detrich*, 740 F.3d at 1247. The State is put through the burden of an evidentiary hearing regardless of whether the petitioner has any viable claim for relief. As noted above, the Eighth Circuit in *Sasser* was the first court to hold, like the *Jones* panel, that *Martinez* allows further factual development on a procedurally defaulted claim despite section 2254(e)(2). 735 F.3d at 853-54. But the Eighth Circuit has since "note[d] the tension in the case law" that *Sasser* created—that state-habeas "counsel's ineffectiveness permits an applicant to *avoid* the requirements of § 2254(e)(2)." *Thomas v. Payne*, 960 F.3d 465, 473 n.7 (8th Cir. 2020).

Second, the *Martinez* hearing process adopted by the Ninth Circuit is a backdoor for discovery to bolster an ineffective-assistance claim on the merits. That is because the inquiry is functionally inseparable from the underlying claim that the habeas petitioner received ineffective assistance at trial. To be entitled to relief under *Martinez*, a habeas petitioner must show, among other things, a cause in the form of "substantial" ineffective-assistance claim, the absence of which prejudiced him in state habeas. *Martinez*, 566 U.S. at 14. The Ninth Circuit went further and held it would be "illogical" not to consider that same evidence, developed at a purpose-made evidentiary hearing, for the merits as well. *Jones*, 943 F.3d at 1221; *Ramirez*, 937 F.3d at 1248. But if Ramirez and Jones needed more evidence to establish that a claim is "substantial" and prejudicial under *Martinez*, then the state-court record is necessarily insufficient to grant

relief on that claim. *Martinez*, 566 U.S. at 14. Tellingly, the courts made no effort to limit evidentiary development to circumstances where, for instance, a substantial claim appears on the face of the trial record and the petitioner merely disputes state-habeas counsel's failure to litigate it. *See* Pet. Br. 30-32.

III. Equitable Exceptions to Section 2254(e)(2) Threaten Other Harms in Federal-Habeas Review of State Convictions.

The exercise of judicial power to craft equitable exceptions to federal statutes always presents troubling implications. It is particularly troubling here, however, when Congress specifically passed a statute trying to *limit* federal judicial power to interfere with state criminal convictions. Any rule about AEDPA's interaction with *Martinez* should account for at least two broader concerns with that approach.

A. Disregarding AEDPA's bar on evidentiary development based on *Martinez* leads to perverse incentives in postconviction review. The Ninth Circuit's rule effectively invites petitioners to sandbag state courts. After all, creative practitioners can package almost any trial issue into a claim of ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). "Ineffective-assistance claims can [thus] function 'as a way to escape rules of waiver and forfeiture,' and they can drag federal courts into resolving questions of state law." *Shinn v. Kayer*, 141 S. Ct. 517, 523, (2020) (per curiam) (citation omitted). And "[w]hy wouldn't a defendant hold back or forego developing one claim in his first postconviction petition in the hope that he may earn another round of postconviction proceedings by raising it for the first time in his federal habeas petition?" *Dickens v. Ryan*, 740 F.3d 1302,

1328 (9th Cir. 2014) (en banc) (Callahan, J., concurring in part and dissenting in part).

Under the Ninth Circuit's rule, *Martinez* all but guarantees petitioners at least one *Strickland* claim that a federal court can review de novo, with new evidence, and without the constraint of AEDPA deference to a state court's adjudication of that claim. *See* 28 U.S.C. § 2254(d)(1)-(2). That approach serves no benefit "in a federal system, [where] the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman*, 501 U.S. at 731. Congress did not pass AEDPA to give federal petitioners a state-free bite at the habeas apple.

As this Court held in *Pinholster*, section 2254(d)(1) of AEDPA is supposed to prevent just such an outcome: a petitioner many not rely on new facts and evidence to attack a state-court decision that adjudicated the merits of his claim. 563 U.S. at 181-84. Before AEDPA, federal courts gave no deference to state-court legal determinations, and petitioners could rely on new facts to attack state-court decisions. To protect comity, however, courts limited the new evidence on which petitioners could rely in federal court. *See Vasquez v. Hillery*, 474 U.S. 254, 257-58 (1986). Petitioners could rely on new facts and evidence only if they "merely . . . supplement[ed]" evidence presented in state court, and not if they "fundamentally alter[ed] the legal claim already considered by the state courts." *Id.* at 260.

Even though petitioners might have litigated a *Strickland* claim in state court, *Martinez* creates an incentive to repackage new facts into a "new" *Strickland* claim in federal court. For instance, in *Escamilla*, the Fifth Circuit restated the general proposition that "*Martinez* does not apply to claims that were fully adjudicated

on the merits by the state habeas court." 749 F.3d at 394. But in the next breath, the court suggested that *Martinez* could allow for new evidence that "fundamentally altered" the claim. *Id.* at 395.

Thus, allowing a *Martinez* exception to section 2254(e)(2) could invite what *Pinholster* sought to prohibit: relitigating adjudicated claims with new evidence. *Pinholster* read AEDPA to preclude the use of *all* new facts and evidence to attack a state court's adjudication of a claim. 563 U.S. at 182-85. Where a state-habeas court adjudicated a petitioner's claim on the merits, AEDPA prevents federal courts from relying on new facts or legal arguments in evaluating the adjudication of that claim. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam); *Pinholster*, 563 U.S. at 181-82. But *Martinez* incentivizes petitioners to avoid that result by fracturing their *Strickland* claims.

To use *Martinez* as the mechanism to introduce new facts and evidence would eviscerate the "comity, finality, and federalism" AEDPA was designed to protect. *Davila*, 137 S. Ct. at 2064. Indeed, *Pinholster* itself suggests that sections 2254(d) and 2254(e) work in tandem to prevent such end-runs around state postconviction review. *See* 563 U.S. at 186. The Court should adhere to the rule that section "2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Id.*

B. If section 2254(e)(2) is amenable to equitable override, there is little reason to believe courts will cabin equitable overrides to the *Martinez* context. Although *Martinez* is limited to ineffective-assistance-of-trial-counsel claims, petitioners invoke other cause-and-prejudice doctrines to litigate defaulted claims. As written,

section 2254(e)(2)'s diligence requirement preserves AEDPA's strict channeling of claims—and the facts supporting them—to state courts. Commingling equitable doctrines with section 2254(e)(2) threatens to swallow the diligence demanded by Congress.

For instance, consider claims that alleged suppression of evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), caused a petitioner to default a habeas claim in state court. The doctrine of *Brady* holds that prosecutors cannot withhold material favorable evidence from the defense. *Id.* at 87. *Brady* applies only to "the discovery, after trial[,] of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Under the doctrine of *Banks v. Dretke*, 540 U.S. 668 (2004), a meritorious *Brady* claim can establish cause and prejudice to overcome procedural default. *Id.* at 691. Several years earlier, *Williams* involved an attempt to litigate a such a claim. *See* 529 U.S. at 437. But the Court in *Williams* nevertheless required diligence in developing the state record to avoid triggering section 2254(e)(2). *See id.* at 439-40. If, however, federal courts can allow evidentiary development under *Martinez* despite state-habeas counsel's non-diligence, it is unclear why a court could not also do so under *Banks*.

Or consider claims that alleged abandonment by counsel during state-habeas proceedings triggered a state procedural bar. *See Maples v. Thomas*, 565 U.S. 266 (2012). In *Maples*, this Court held that state-habeas counsel's "abandonment" of the habeas petitioner could establish cause for missing a state-habeas appellate deadline. *Id.* at 281-82. The Court held that the attorneys' sub silentio "departure from [their firm] and their commencement of employment that prevented them

from representing Maples ended their agency relationship with him." *Id.* at 284. Accordingly, a missed deadline by the attorneys could not be attributed to the petitioner. *Id.* at 281 (citing *Coleman*, 501 U.S. at 753). *Maples* did not mention section 2254(e)(2), let alone purport to overrule *Williams*. In fact, the Court emphasized it was *not* disturbing *Coleman*'s rule that habeas petitioners are generally bound by the diligence (or lack thereof) of their state-habeas counsel's performance. *Id.*

But following remand, the Eleventh Circuit nevertheless ordered the district court to hold an evidentiary hearing on Maples' s claim. *Maples v. Comm'r, Ala. Dep't of Corr.*, 729 F. App'x 817, 828 (11th Cir. 2018). In doing so, the Eleventh Circuit reversed the district court's attempt to resolve the case on the record before the Alabama postconviction-review court. *Id.* at 820-21. The court dispensed with section 2254(e)(2) in a footnote, stating that "[b]ecause Maples 'did not fail to develop the factual basis of his claim[ ] in state court through any omission, fault, or negligence that can fairly be attributed to him,' 28 U.S.C. § 2254(e)(2) does not [ ] bar him from accessing an evidentiary hearing." *Id.* at 821 n.5. Thus, the narrow rule announced in *Maples* (saving a claim from complete forfeiture of federal-habeas review) yielded a windfall (evidentiary development in federal court). As a result, a state's administration of criminal justice is still on hold nearly a decade after this Court decided *Maples*.

These examples show the difficulty in applying judicially created exceptions to section 2254(e)(2). These doctrines inevitably focus courts onto the facts supporting merits relief, much like the Ninth Circuit did in sidestepping section 2254(e)(2). That approach swallows the rule that petitioners *cannot* rely on new evidence *unless* they

satisfy section 2254(e)(2)'s requirements. As *Martinez* illustrates, a doctrine that *triggers* section 2254(e)(2)'s threshold diligence barrier is best understood as barring evidentiary development.

CONCLUSION

The Court should reverse the judgments below.

Respectfully submitted.

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