No. 20-1009

IN THE
Supreme Court of the United States

DAVID SHINN, *ET AL.*,
Petitioner,

v.

DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,
Respondents.

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

BRIEF OF HABEAS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici curiae, listed in the Appendix, are law professors and legal scholars who study federal post-conviction law. *Amici curiae* have no personal interest in the outcome of this case. They all share an interest in seeing habeas law applied in a way that ensures the just adjudication of claims and proper interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

SUMMARY OF ARGUMENT

Respondents do not ask for an "exception" to 28 U.S.C. § 2254(e)(2). The provision's plain text permits a hearing here. Section 2254(e)(2) restricts a hearing on a federal habeas claim only when a prisoner "failed to develop" a factual predicate in state court. And the phrase "failed to develop" comes *directly* from this Court's pre-AEDPA law focusing the inquiry on a prisoner's fault. Consistent with both the statute's plain text and established principles of interpretation, the Ninth Circuit correctly concluded that respondents were not at fault for their underdeveloped state-court records, that they did not "fail[] to develop" them, and that § 2254(e)(2) did not bar a federal hearing.

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[1] Counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6. All parties have consented to the filing of this brief. Sup. Ct. R. 37.3(a).

I. This Court has historically focused on a prisoner's fault in deciding whether he is entitled to a federal evidentiary hearing to develop the factual record supporting his constitutional claim. That fault-based approach for excusing underdeveloped records developed in tandem with the fault-based approach for excusing procedural default, and the two excuses have remained aligned. In both contexts, this Court has always used agency principles to analyze whether a prisoner bears responsibility for his attorney's mistakes. The excuse doctrines have evolved together, but they remain anchored to rules about when a prisoner is *at fault*.

A. The Court first established a common excuse for both defects in two watershed cases decided on the same day in 1963. *Fay v. Noia*, 372 U.S. 391 (1963), held that a federal habeas court must excuse a state procedural default unless the prisoner deliberately bypassed state remedies. *Id.* at 438. *Townsend v. Sain*, 372 U.S. 293 (1963), endorsed the same standard for excusing an underdeveloped record, holding that a federal habeas court must hold an evidentiary hearing absent the same deliberate bypass. Rules about defaulting claims and rules about defaulting evidence looked the same way because they balanced the same interests—including a state interest in orderly procedure and a federal interest in protecting federal rights.

B. In the 1990s, the Court overruled the excuse requirements articulated in *Noia* and *Townsend*, but preserved the alignment between the two excuses and both inquiries' focus on prisoner fault. *Coleman v.*

Thompson, 501 U.S. 722 (1991), overruled *Noia*'s deliberate bypass rule, but the Court replaced it with a fault-based rule for cause and prejudice that turned in pertinent part on whether attorney mistakes were attributable to a prisoner. *Id.* at 750. The following Term, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), adopted the same cause and prejudice standard for prisoners who were at fault for "fail[ing] to develop" the state-court record. *Id.* at 8, 11. This Court, even in rejecting the substantive content of its earlier excuse doctrines, reiterated the importance of aligning those doctrines to promote "uniformity in the law of habeas corpus." *Id.* at 10. And the Court maintained its longstanding focus on a prisoner's fault.

II. Congress overhauled federal habeas law in AEDPA, but the statutory restrictions on evidentiary hearings preserved the centrality of prisoner fault, and the established alignment between cause for excusing procedural defaults and cause for excusing underdeveloped factual records. Section 2254(e)(2) restricted hearings only for those prisoners who "failed to develop" the record in state court—a phrase Congress borrowed directly from *Tamayo-Reyes*. As this Court has explained, a prisoner "fails" to develop the record only when he is "at fault and bears responsibility for the failure." *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

AEDPA, to be sure, "raised the bar" for prisoners who "fail[] to develop" the state-court record in important ways, including by imposing a new actual innocence requirement and a more demanding standard of proof. *See* 28 U.S.C. § 2254(e)(2). But Congress imposed more difficult hurdles only on prisoners "who

were not diligent in state-court proceedings" and it did not modify *Tamayo-Reyes*'s rules as to prisoners who are not at fault for failing to develop the record in state court. *Williams*, 529 U.S. at 433. Fault for underdeveloped facts therefore remains aligned with fault for defaulted claims, and both use the same agency rules to decide when attorney errors are attributed to the prisoner litigants.

III. Section 2254(e)(2)'s reference to a prisoner's "fail[ure] to develop" the state-court record directs a federal habeas court to the question of prisoner fault. Congress often selects words or phrases in a statute to incorporate evolving concepts—and did so in AEDPA. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007); *Felker v. Turpin*, 518 U.S. 651, 664 (1996). The aligned excuse doctrines have always looked to agency principles to determine whether attorney error is attributable to a prisoner, and the phrase "failed to develop" accordingly directs a federal habeas court to look to those principles when necessary.

Both this Court (in *Williams*) and the Ninth Circuit (here) looked to attorney-client agency rules to determine whether a prisoner could get an evidentiary hearing. A hearing was unavailable in *Williams* because, at that time, the mistakes of state post-conviction attorneys were charged to prisoners. *See Williams*, 529 U.S. at 437-40. But that agency rule has changed. This Court has since recognized that when state collateral proceedings are the first opportunity to enforce the Sixth Amendment right to effective assistance of counsel, a prisoner is not at fault for his lawyer's deficient litigation. *See Martinez v. Ryan*,

566 U.S. 1, 8 (2012). The Ninth Circuit thus applied § 2254(e)(2) the same way the *Williams* Court did: by looking to this Court's agency rules to determine whether the prisoner is at fault for his attorney's errors. A hearing is available here because, under the agency rule that *Martinez* announced, the prisoners did not "fail[] to develop" the pertinent facts.

ARGUMENT

I. THIS COURT HAS HISTORICALLY ALIGNED THE EXCUSES FOR PROCEDURAL DEFAULT AND FOR UNDEVELOPED STATE-COURT RECORDS

Federal courts have long recognized that habeas petitions can have procedural defects that restrict the habeas remedy, and have also long recognized that these defects are sometimes excused. One such defect is "procedural default," which refers generally to claims that a prisoner failed to present in state court as state procedural rules required and relates to another defect at issue here: a defect in state-court fact development that results in restrictions on federal evidentiary hearings.

This Court aligned the doctrines for excusing procedural defaults and for excusing underdeveloped factual records in 1963, and the doctrines have developed together since. For each, the prisoner's fault—or, really, lack of it—plays the central role: a federal habeas court excuses a procedural default or undeveloped record when the prisoner is not at fault for what might otherwise be treated as a mistake. The Court has revisited its original precedents over time without

changing the alignment of these excuse doctrines, always centering the issue of prisoner fault in their application. The excuses are animated by the same concerns. Their alignment promotes uniformity in federal habeas law. And each ensures that constitutional violations do not evade remedies because of neglect unattributable to the prisoner.

A. The Court First Applied A Deliberate Bypass Standard For Both Excuse Doctrines

On March 18, 1963, the Supreme Court issued two watershed habeas corpus decisions. One addressed a federal court's power to hear a state prisoner's procedurally defaulted claim, and the other considered when a federal court should hold an evidentiary hearing to expand a factual record inadequately developed in state court. The Court adopted the same standard for both, holding that a federal court must excuse a state prisoner's procedural default on a claim, or inadequate evidentiary record on a critical factual question, so long as those failures did not result from the prisoner's deliberate bypassing of state procedures.

The first case—*Fay v. Noia*, 372 U.S. 391 (1963)—held that a federal court *must* entertain a habeas corpus claim that was procedurally defaulted in state court unless the prisoner "deliberately bypassed the orderly procedure of the state courts." *Id.* at 438.

The prisoner in *Noia* did not appeal his state murder conviction and later sought habeas relief in federal court based on the parties' stipulation that his confession was coerced. *See id.* at 394-95. The district court refused to consider his petition, concluding that he had forfeited state remedies by failing to appeal

and thus was ineligible for relief under 28 U.S.C. § 2254. *Id.* at 395-96.[2]

The *Noia* Court disagreed, holding that federal habeas courts are never required to enforce a state procedural default in a situation like Noia's. In fact, the Court explained, federal courts retain discretion to enforce such a default in only limited circumstances—when the prisoner "deliberately bypassed the orderly procedure of the state courts and in doing so . . . forfeited his state court remedies." *Id.* at 438 (emphasis added). A State's own enforcement of its procedural rules encourages prisoners to comply with those rules, and one who inadvertently or negligently fails to do so suffers consequences under state law. The *Noia* Court considered this "sufficient to vindicate the State's valid interest in orderly procedure." *Id.* at 433. In the Court's view, only a prisoner's "deliberate circumvention of state procedures" as a "tactical or strategic litigation step" justified allowing "the federal court on habeas to deny him all relief." *Id.* at 439-40. Even a deliberate bypass chosen by counsel would not suffice. *Id.* at 439. Absent the prisoner's own deliberate bypass, the federal habeas court was required to excuse his state procedural default and hear his claim.

The second case—*Townsend v. Sain*, 372 U.S. 293 (1963)—considered the federal court's power to hold

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[2] At the time, that provision stated: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." *Id.* at 396 (quoting 28 U.S.C. § 2254).

an evidentiary hearing to expand a factual record inadequately developed in state court. The Court aligned that excuse with the one it announced for procedural default, on the same day. As relevant here, the Court held that when "evidence crucial to the adequate consideration of [a prisoner's] constitutional claim was not developed" in the state courts, absent the prisoner's deliberate bypass under *Noia*, "a federal hearing is compelled." *Id.* at 317.

Like Noia, the prisoner in *Townsend* alleged that his state conviction was the product of an involuntary confession and thus a deprivation of his constitutional rights. *See id.* at 295-307. The question in *Townsend*, however, was whether the district court should have held an evidentiary "hearing to ascertain the facts which are a necessary predicate to a decision of the ultimate constitutional question"—even though those facts had not been developed in state court. *Id.* at 309.

In addressing that question, the Court first made clear that whenever a prisoner "alleges facts which, if proved, would entitle him to relief," the federal habeas court always *may*, in its discretion, "receive evidence and try the facts anew." *Id.* at 312. That discretion disappears—and a "federal court . . . *must* hold an evidentiary hearing"—"if the habeas applicant did not receive a full and fair evidentiary hearing in a state court." *Id.* (emphasis added). Thus, "[i]f, for any reason not attributable to the inexcusable neglect of petitioner, evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled." *Id.* at 317 (citation omitted). In other words, the Court extended *Noia*'s procedural standard to evidentiary

hearings, recognizing that both doctrines were driven by similar motivations—*viz.*, the protection of "legitimate state interest in orderly criminal procedure." *Id.*

In sum, when the Court expanded state prisoners' access to federal habeas relief in the 1960s, it aligned the excuse criteria for procedural defaults and for underdeveloped factual records—in both, focusing on the prisoner's responsibility for the failure. *Noia* held that a federal habeas court always *may* excuse a state procedural default—and that unless the prisoner deliberately bypassed state processes, the federal court *must* excuse the default. This rule, in the *Noia* Court's view, struck the appropriate balance between state interests in orderly judicial procedures and the federal interest in safeguarding federal rights. The *Townsend* Court found that the same balance warranted the same rule for evidentiary hearings on federal habeas review. *Townsend* accordingly held that a federal habeas court always *may* excuse an undeveloped record and conduct a hearing—and that unless the prisoner deliberately bypassed developing the factual record in state court, the federal court *must* excuse the deficient record and hold a hearing of its own. The Supreme Court, in brief, adopted a regime requiring federal habeas courts to excuse state-court defects in the absence of fault of the prisoner—and applied this rule equally to procedural defaults and evidentiary hearings.

B. The Court Held That The Excuse Doctrines Remain Aligned Even As It Revised The Underlying Criteria

Three decades later, in the 1990s, the Court exchanged the deliberate bypass standard of *Noia* and

Townsend for a more stringent rule, reasoning that federal courts owed greater deference to state criminal proceedings. But even as the Court shifted to an excuse rule requiring a showing of cause and prejudice, it did so for *both* procedural defaults and evidentiary hearings. The Court's new cause-and-prejudice standard also maintained the focus on the prisoner's level of responsibility for the state-court failings, making clear that a prisoner was still entitled to present his claim or obtain an evidentiary hearing if he was not at fault. The concept of "fault," moreover, used agency rules to determine when mistakes of counsel were attributable to the prisoner.

After deciding *Noia*, the Court declined to extend it in a series of cases culminating in *Wainwright v. Sykes*, 433 U.S. 72 (1977), which sharply restricted *Noia*'s reach. There, the Court rejected the idea that *Noia* "laid down an all-inclusive rule," *id.* at 85, and refused to extend that rule "beyond the facts of the case eliciting it." *Id.* at 88. Accordingly, the *Sykes* Court declined to apply the presumption in favor of excusing a procedural default, instead holding that—where the procedural default was a failure to contemporaneously object at trial—"a showing of cause for the noncompliance" and "actual prejudice resulting from the alleged constitutional violation" were required. *Id.* at 84. *Sykes* had little difficulty concluding that the prisoner failed on the cause prong, as he appeared to be at fault for the forfeiture: he "advanced no explanation whatever for his failure to object at trial." *Id.* at 91.

Sykes cabined *Noia*, but left the narrowest interpretation of the earlier holding intact until *Coleman*

v. Thompson, 501 U.S. 722 (1991), overruled *Noia in toto*. The prisoner in *Coleman* unsuccessfully sought postconviction relief in state court, and the state appellate courts refused to review that decision because his attorney had filed an untimely notice of appeal. *Id.* at 727. The *Coleman* Court, like the *Noia* Court, considered what claims a federal court may nonetheless hear despite a prisoner's procedural default. This time, the Court held that the *Sykes* rule applied to all procedural defaults, and that Coleman's default must remain unexcused unless he could satisfy its cause-and-prejudice standard or demonstrate that a failure to consider the federal claim would result in a "fundamental miscarriage of justice." *Id.* at 750.

The Court reasoned that *Noia* had "undervalued the importance of state procedural rules" and the "interest in finality" such rules serve. *Id.* at 750. The Court rejected the "irrational distinction" between rules for different procedural defaults that had developed with *Sykes*, overruling *Noia* in favor of "applying the cause and prejudice standard uniformly." *Id.* at 750-51.

In formulating the cause standard, the Court emphasized the centrality of the prisoner's *fault*. "[C]ause," the Court explained, is anything "that cannot fairly be attributed to [the prisoner.]" *Id.* at 753. Cause is most obviously absent if the prisoner himself commits the error that results in the default of his claim. In those situations, the default is clearly attributable to the prisoner, and the prisoner is clearly at fault.

Coleman underscored that rules of agency would be necessary to evaluate cause if a third party committed the error that lead to the default. Specifically, the Court determined that a prisoner can be at fault for *his attorney's* errors if those errors are attributable to the prisoner under "principles of agency law." *Id.* at 754; *see also id.* at 753 (attorney errors can generally be attributed to the petitioner "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation"); *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (describing *Coleman*'s application of "principles of agency law" (quotation omitted)).

Applying those agency principles to the facts of Coleman's case, the Court concluded that Coleman was responsible for his attorney's failure to file a timely notice of appeal. *Coleman*, 501 U.S. at 754. The Court nonetheless recognized that in other cases, agency principles might apply differently and the attorney's error might instead "be seen as an external factor—*i.e.*, 'imputed to the State,'" not the prisoner. *Id.* In those cases, the State "must bear the cost of any resulting default and the harm to state interests that federal habeas review entails." *Id.*; *see also Maples v. Thomas*, 565 U.S. 266, 283 (2012) ("[U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him."); *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring) ("Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.").

The Term after deciding *Coleman*, the Court emphatically reaffirmed that the rules for evaluating prisoner fault, and thus for applying the excuse doctrines, operate in sync.

In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the prisoner alleged that his guilty plea was invalid, in part because his translator had not completely and accurately translated for him the elements of the offense. *Id.* at 3. Those facts, if proven, would have entitled him to relief, but because of his postconviction counsel's negligence, Tamayo-Reyes had "fail[ed] to develop" those facts in state court postconviction proceedings. *Id.* at 4. The lower courts held that under *Townsend*, Tamayo-Reyes was entitled to an evidentiary hearing on federal habeas review because "counsel's negligent failure to develop the facts did not constitute a deliberate bypass." *Id.*

Tamayo-Reyes overruled *Townsend*'s deliberate-bypass standard and imported the excuse requirement for procedural defaults into the context of evidentiary hearings. In doing so, *Tamayo-Reyes* settled on language that now appears in the statutory provision at issue here: "failed to develop." The Court held that when, as in *Tamayo-Reyes*, a prisoner "fail[s] to develop the facts in state-court proceedings"—*i.e.*, when he is at fault for the undeveloped record—he is entitled to an evidentiary hearing only if he can demonstrate "cause and prejudice" for that failure. *Id.* at 8, 11.

Tamayo-Reyes also repeatedly emphasized the interest in aligning excuses across procedural doctrine. It observed that *Coleman* "applied the cause-and-prej-

udice standard uniformly to [all] state procedural defaults." *Id.* at 7. *Tamayo-Reyes* then held that the cause-and-prejudice excuse for defaulted evidentiary development should be the same as it was for defaulted claims—finding it "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim." *Id.* at 8. *Tamayo-Reyes* found the "concerns that motivated the rejection of the deliberate bypass standard" in the procedural default context "equally applicable" in the context of evidentiary hearings. *Id.* "It is hardly a good use of scarce judicial resources," the Court explained, "to duplicate fact-finding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings." *Id.* at 9.

Tamayo-Reyes described the excuse doctrines for procedural defaults and evidentiary hearings as inextricably intertwined and emphasized the value of "uniformity in the law of habeas corpus." *Id.* at 10. Applying a "different rule" for procedural default and evidentiary hearings, the Court cautioned, "could mean that a habeas petitioner would not be excused for negligent failure to object to the introduction of the prosecution's evidence, but nonetheless would be excused for negligent failure to introduce any evidence of his own to support a constitutional claim." *Id.* The *Tamayo-Reyes* Court thus applied the excuse requirement it had developed for procedural defaults, remanding to allow the prisoner an opportunity to either "show cause for his failure to develop the facts in state-court proceedings" or demonstrate that failure

to permit development of the claim would result in a fundamental miscarriage of justice. *Id.* at 11-12.

Observing the parallelism across doctrines, *Tamayo-Reyes* phrased the "cause" criterion as a rule of fault. Specifically, the Court explained that the restriction was supposed to operate in those cases where the prisoner was at fault for factual underdevelopment—where a prisoner "has *negligently failed to take advantage of opportunities* in state court proceedings." *Id.* at 9 (emphasis added).

Although the *Tamayo-Reyes* Court rejected deliberate bypass as the standard for when a prisoner "is entitled to an evidentiary hearing" in federal court, *id.* at 11, the Court did not alter *Townsend*'s holding that a federal habeas court is always "afforded a degree of discretion in determining whether to hold" a permissive hearing on the merits of the underlying claim, *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996). That rule retained force until AEDPA appeared to abrogate it. *See infra* at Part II.

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When Congress included the phrase "failed to develop" in § 2254(e)(2), it did not invent that phrase out of whole cloth. The phrase came from *Tamayo-Reyes*, where it encapsulated an established way of thinking about fault, developed and then reaffirmed over the course of decades. This Court has always maintained parallel doctrines for excusing a procedural default or an underdeveloped evidentiary record, these doctrines have always emphasized the importance of a prisoner's fault, and they have always used the same

agency rules to determine when attorney mistakes were attributed to prisoners.

II. AEDPA RATIFIED, WITH RESPECT TO HEARINGS, THE LONGSTANDING FOCUS ON PRISONER FAULT AND ON AGENCY RULES FOR ATTRIBUTING LAWYER MISTAKES TO PRISONERS

In 1996, Congress enacted AEDPA. Congress did not disrupt the judge-made cause standard for excusing procedural defaults as part of that statute. But it did set forth in Section 2254(e)(2) rules for when a prisoner can obtain an evidentiary hearing in federal court. Although Section 2254(e)(2) made it more difficult to obtain a hearing in the presence of fault, the the statute's incorporation of the "fail[ure] to develop" language from *Tamayo-Reyes* makes plain Congress's intent to codify the fault standard developed in the caselaw, including the prisoner-attorney agency rules that go with it. On that understanding of "failed to develop," the concept of "cause" remains consistent across procedural rules, as it has always been.

Section 2254(e)(2) provides that "[i]f" a prisoner "has failed to develop the factual basis of a claim in State court proceedings," the district court "shall not hold an evidentiary hearing on the claim unless" the prisoner can show that the claim relies on either a new constitutional rule or a previously unavailable factual predicate. 28 U.S.C. § 2254(e)(2). In other words, Section 2254(e)(2) establishes a heightened showing that some prisoners must satisfy to obtain an evidentiary hearing in federal court. That heightened showing, however, applies *only* "if" a prisoner "fail[s] to develop" the necessary state-court record.

Congress's use of a prisoner's "fail[ure] to develop" the state court record as the trigger for Section 2254(e)(2)'s application confirms that Congress intended to preserve key aspects of pre-AEDPA precedent governing evidentiary hearings.

This Court interpreted the meaning of Section 2254(e)(2)'s "fail[ure] to develop" language in *Williams v. Taylor*, 529 U.S. 420 (2000). The Court acknowledged that the word "fail," in some circumstances, is "used in a neutral way, not importing fault or want of diligence." *Id.* at 431. But that was not the way Congress used the term in the context of Section 2254(e)(2). *Id.* There, Congress used the word "fail" "[i]n its customary and preferred sense" to "connote[] some omission, fault, or negligence on the part of the person who has failed to do something." *Id.* at 431-32 (citing two editions of Webster's New International Dictionary and Black's Law Dictionary in support). A person "fails" within the context of Section 2254(e)(2), in other words, when he is "at fault and bears responsibility for the failure." *Id.* at 432.

That interpretation, the Court explained, "has support in [*Tamayo-Reyes*], a case decided four years before AEDPA's enactment." *Id.* *Tamayo-Reyes repeatedly uses* the very language that § 2254(e)(2) incorporated textually, consistently referring to the prisoner's "failure to develop" material facts in the state-court record as the trigger for the heightened showing to obtain a federal evidentiary hearing. *See Tamayo-Reyes*, 504 U.S. at 4 (referring to district court's finding that "failure to develop" the critical facts was attributable to inexcusable neglect); *id.* (re-

ferring to court of appeals finding that "counsel's negligent failure to develop those facts did not constitute a deliberate bypass"); *id.* at 5 (certiorari granted to decide whether deliberate bypass is correct standard for excusing "a habeas petitioner's failure to develop a material fact in state-court proceedings"); *id.* at 5 n.2 (describing *Townsend* as governing "habeas petitioners who failed to adequately develop federal claims in state-court proceedings"); *id.* at 8 ("As in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum"). And this Court made clear in both *Tamayo-Reyes* and *Coleman* that a prisoner "fail[s] to develop" facts only when he is, in some way, at fault for the inadequate state court record. That can occur when the prisoner himself is negligent or deliberately bypasses state court proceedings. Or it can occur when the attorney's error is in some way attributable to the prisoner under agency principles. *See Tamayo-Reyes*, 504 U.S. at 10 n.5; *Coleman*, 501 U.S. at 753-54; *supra* at 11-16.

By including the same "failed to develop" language in the opening clause of Section 2254(e)(2), Congress incorporated the same threshold standard of fault into the statute. *Williams*, 529 U.S. at 433 ("there is no basis in the text of § 2254(e)(2) to believe Congress used 'fail' in a different sense than the Court did in [*Tamayo-Reyes*]"); *see also Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (when a word or phrase is "obviously transplanted from another legal source,

whether common law or other legislation, it brings the old soil with it" (quoting *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018)); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Indeed, this Court has recognized as much, acknowledging that "Congress intended to preserve . . . [*Tamayo-Reyes*]'s holding" that only "prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams*, 529 U.S. at 433; *see id.* at 434 (Section 2254(e)(2) "codifies [*Tamayo-Reyes*]'s threshold standard of diligence . . . for excusing the deficiency in the state-court record.").[3]

In so doing, Congress also preserved the longstanding alignment between the doctrines for excusing procedurally defaulted claims and for obtaining an evidentiary hearing in federal court—at least for prisoners who diligently pursue their rights in state court. Because prisoners who are not at fault for an inadequate state-court record have not "fail[ed] to develop" the record within the meaning of

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[3] That is likely why no jurisdiction has adopted Petitioners' proposed rule. In addition to the Ninth Circuit cases pending before the Court, see also *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 279 (6th Cir. 2019) (Section 2254(e)(2) permits prisoner who overcomes default under *Martinez* to pursue "full reconsideration of the claims" because he "has not yet been able to develop a factual record in support of his ineffective-assistance claim"); and *Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) (if "postconviction counsel's alleged ineffectiveness" establishes "cause for any procedural default" under *Martinez*, then "the district court is authorized under 28 U.S.C. § 2254(e)(2) . . . to hold an evidentiary hearing on the claims" (quotation omitted)).

§ 2254(e)(2), those prisoners need not satisfy § 2254(e)(2)'s other requirements; they need only make the pre-AEDPA showing. *Williams*, 529 U.S. at 434, 444. Put differently, for prisoners who are diligent in state court, the excuse doctrines for both procedural default and evidentiary hearings work just the same after AEDPA as they did before, and they remain aligned now as they were then.

That is not to say that Congress made no change to the pre-AEDPA standards for obtaining an evidentiary hearing in federal court. Congress "raised the bar" for prisoners who "fail to develop"—*i.e.*, are at fault for—the state-court record in four significant ways.

First, Section 2254(e)(2) allows prisoners to argue that they should receive a hearing because their claim relies on a new rule of constitutional law (made retroactively applicable by the Supreme Court). 28 U.S.C. § 2254(e)(2)(A)(i). But prisoners making that argument must also show that this new rule of law would lead to an innocence verdict—*i.e.*, that "no reasonable factfinder would have found the applicant guilty of the underlying offense" under that new rule. *Id.* § 2254(e)(2)(B).

Second, a prisoner can argue that a new "factual predicate" shows he is actually innocent of the underlying offense. *Id.* § 2254(e)(2)(A)(ii), (B). But again, that argument alone is not enough—the prisoner must also show that the new "factual predicate . . . could not have been previously discovered through the exercise of due diligence." *Id.* § 2254(e)(2)(A)(ii).

Third, Section 2254(e)(2) heightens the standard of proof prisoners must satisfy in showing that they would have received an innocence verdict if not for the constitutional error. Previously, prisoners had only to show by a preponderance of the evidence that their convictions were unconstitutional. *See, e.g.*, *Smith v. Freeman*, 892 F.2d 331, 341 (3d Cir. 1989); *Thomas v. Zant*, 697 F.2d 977, 989 (11th Cir. 1983). Now, to receive an evidentiary hearing, non-diligent prisoners must show "the facts underlying the claim would be sufficient to establish by *clear and convincing* evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B) (emphasis added).

Last, Section 2254(e)(2) altered the federal court's discretion when it comes to granting evidentiary hearings. Under pre-AEDPA precedent, the federal district court always retained discretion to hold an evidentiary hearing; the deliberate bypass—and later cause and prejudice—standard simply delineated when a hearing was permissible and when it was required. *Lonchar*, 517 U.S. at 326 (a federal habeas court is always "afforded a degree of discretion in determining whether to hold" a permissive hearing"); *see supra* at 8-9, 15. AEDPA adopted different goalposts, delineating when a hearing is permissible and when it is *prohibited*. When a prisoner is at fault for failing to develop a state-court record, the district court no longer retains the discretion to order an evidentiary hearing if it so chooses. Instead, the court "shall not" hold such a hearing "unless" the prisoner

satisfies Section 2254(e)(2)'s heightened showing. 28 U.S.C. § 2254(e)(2).

In short, Section 2254(e)(2) imposed more significant hurdles on prisoners "who were not diligent in state-court proceedings," but it did not modify *Tamayo-Reyes*'s rules as to prisoners who are not at fault for failing to develop the state-court record. *Williams*, 529 U.S. at 433; *accord* 1 Federal Habeas Corpus Practice & Procedure § 20.2 ("But AEDPA leaves entirely intact the portion of *Townsend* that *Tamayo-Reyes* also previously left intact—governing evidentiary hearings on facts that the state or the state courts are responsible for not having developed in state court."). To the contrary, Section 2254(e)(2) brought "the old soil with it" by choosing to use the "fail to develop" language used throughout *Tamayo-Reyes*. *Stokeling*, 139 S. Ct. at 551.

III. IN CONCLUDING THAT ATTORNEY ERROR WAS NOT CAUSE FOR AN UNDERDEVELOPED RECORD, *WILLIAMS V. TAYLOR* APPLIED ATTORNEY-CLIENT AGENCY PRINCIPLES THAT NO LONGER GOVERN

Section 2254(e)(2) thus marks a prisoner's fault as the touchstone for determining whether a prisoner must satisfy a heightened showing to obtain an evidentiary hearing, and when there is a question about whether a prisoner bears the fault of his attorney, the aligned excuses both look to the pertinent agency principles. That is what this Court did in *Williams v. Taylor*, 529 U.S. 420 (2000), and that is what the Ninth Circuit did here. Attorney mistakes permitted

a hearing here but not in *Williams* because the textually referenced agency rule changed, not because the interpretations of the statute are any different.

It is settled that words—even when codified—can incorporate evolving meanings and novel applications. This Court previously has recognized that Congress often uses particular words in statutes in order to ensure that their meaning "can enlarge or contract . . . as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 544 (2019) (Ginsburg, J., concurring) (quoting *West v. Gibson*, 527 U.S. 212, 218 (1999)). The Sherman Antitrust Act, for example, uses the term "restraint of trade" to describe prohibited arrangements. In selecting that term, this Court has held, Congress intended to incorporate the term's "changing content," and "authorized courts to oversee the term's 'dynamic potential.'" *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 461 (2015) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-32 (1988)). Put otherwise, the term "invokes the common law itself, and not merely the static content that the common law had assigned the term in 1890" when the statute was enacted. *Bus. Elecs. Corp.*, 485 U.S. at 732. Other examples abound. *See also H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 243 (1989) ("The limits of the relationship and continuity concepts that combine to define a [Racketeer Influenced and Corrupt Organizations] pattern . . . cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists. The development of these concepts

must await future cases . . . ."); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968) (statutory term "communications" includes cable television even though unforeseen at the time); *Browder v. United States*, 312 U.S. 335, 339-40 (1941) (applying statute to new, unforeseen "use" of passport).

This Court has specifically recognized that AEDPA is one such statute that must be interpreted in light of evolving habeas law. *See Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007) ("The phrase 'second or successive' is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of [AEDPA]."); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (restrictions AEDPA "places on second habeas petitions" account for "complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments and judicial decisions" (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

In using the phrase "failed to develop" in Section 2254(e)(2), Congress simply directed courts to apply (when necessary) rules about when lawyers' mistakes are attributed to clients. But those rules of attribution can change over time, and Congress was aware of that potential for change when it enacted AEDPA. Congress froze prisoner fault as the trigger for § 2254(e)(2)'s restrictions, but it did not freeze the agency rules that determine when a prisoner bears responsibility for his lawyer's negligence.

Williams (discussed below) applied the attorney-prisoner agency rule as it stood under *Coleman*, but *Martinez v. Ryan*, 566 U.S. 1, 8 (2012), altered it. In *Martinez*, the Court acknowledged that *Coleman* had

applied "principles of agency law" to conclude that a prisoner (as the principal) generally is responsible for "[n]egligence on the part of [his] postconviction attorney" (his agent). *Id.* at 10 (quotation omitted); *see also Davila*, 137 S. Ct. at 2065 (discussing *Coleman*'s application of "principles of agency law"); *Holland*, 560 U.S. at 659 (Alito, J., concurring) (same). "*Coleman*, however, did not present the occasion to apply th[ese] principle[s] to determine whether" the same holds true as to "attorney errors in initial-review collateral proceedings," *Martinez*, 566 U.S. at 1,—that is, "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial," *id.* at 8. When explicitly presented with that question in *Martinez*, the Court determined that a prisoner is not at fault for an attorney's ineffectiveness in those circumstances, thus carving out a "narrow exception" to the agency principles embodied in *Coleman*. *Id.* at 9.

Incorporating *Martinez*'s adaption of *Coleman*'s agency principles into analysis of Section 2254(e)(2), as the Ninth Circuit did, is therefore fully consistent with this Court's precedent in *Williams v. Taylor*. In *Williams*, the Court concluded that the attorney's lack of diligence in preserving a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), was attributable to the prisoner and thus the prisoner had "fail[ed] to develop the factual basis of a claim" under the opening clause of § 2254(e)(2). *See Williams*, 529 U.S. at 437-40. The Court, following AEDPA's directive, applied then-governing principles of agency law when it explained: "Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault,

attributable to the prisoner *or the prisoner's counsel*." *Id.* at 432 (emphasis added). Petitioner and his *amici* grasp onto this indication that the prisoner would be charged with his counsel's errors, but the Court's commentary simply reflected the controlling agency principles of the day, as announced in *Coleman*. The lawyer-prisoner agency rule has since changed. The text of Section 2254(e)(2), both by its plain meaning and as interpreted in this Court's precedents, requires courts to apply the operative agency rule. *See supra* at 16-20. Under the agency rule stated in *Martinez*, respondents Jones and Ramirez did not "fail[] to develop" the facts showing constitutional error in their conviction and sentence, respectively.

CONCLUSION

Respondents need not ask for any "exception" to 28 U.S.C. § 2254(e)(2). The statute as written permits a federal court to take evidence on the claims presented. The Court should uphold the Ninth Circuit's decision.

Respectfully submitted,

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APPENDIX

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