No. 20-86

In the
Supreme Court of the United States

CHARLES DANIELS, DIRECTOR, *et al.*,
Petitioners,

v.

RONALD ROSS,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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"The situation here occurs regularly," said Ronald Ross to the Ninth Circuit. Petition for Rehearing and Rehearing En Banc, *Ross v. Williams*, No. 16-16533, at 1 (9th Cir. October 1, 2018) (Dkt. 39-1). Now that he has prevailed before the *en banc* Ninth Circuit, he has changed his tune and tells this Court the opposite. Respondent's Brief in Opposition (hereinafter "Opp.") at 8.

The juxtaposition of Ross's representations to the Ninth Circuit with his representations to this Court, speaks for itself. But if that is not enough to leave this Court skeptical of Ross's attempts to downplay the far-reaching consequences of the Ninth Circuit's new relation-back rule, Ross's representation that his case is unique and unlikely to be repeated is flatly contradicted by his own arguments.

As Ross points out, the form petition *requires* a petitioner to attach the relevant state court orders to their petition. Opp. at 11. Consequently, the Ninth Circuit's new rule will be available to every *pro se* habeas petitioner in the Ninth Circuit that files a timely federal petition with the required state court orders attached and then seeks to amend his petition after expiration of the statute of limitations.

This contradiction in Ross's arguments is just the beginning of why this Court should be skeptical of Ross's attempts to downplay the Ninth Circuit's new rule. As the four main points laid out below establish, the Ninth Circuit's decision will reach far beyond the circumstances presented in this case and warrants this Court's review. It is reminiscent of the boundless rule this Court rejected in *Mayle v. Felix*, 544 U.S. 644

(2005), which, contrary to Ross's suggestion that Petitioners have never established any prejudice, is inherently prejudicial to state interests in finality of state judgments of conviction. 545 U.S. at 662-63 (noting that the statute of limitations is part of the AEDPA framework, which is designed to protect state interests in comity and finality).

First, Ross argues that Respondents have not identified a split of authority. Opp. at 8. But the absence of a split of authority is not a bar to this Court's review. This Court will grant review of cases where a lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). And the *en banc* opinion in this case conflicts with this Court's decisions—*Mayle*, in particular—recognizing that the Federal Rules of Civil Procedure[1] only apply in habeas cases to the extent they do not conflict with the statutes and rules specific to federal habeas review. *See also Banister v. Davis*, 140 S. Ct. 1968 (2020).

On this point, Ross argues that *Mayle* did not set forth a habeas specific standard for relation back. Opp. at 13-14. Even assuming that is true, Ross's point misses the mark. The rule this Court rejected in *Mayle*, and its rationale for doing so, is the central issue in this case. 545 U.S. at 656-64. Just like in *Mayle*, the question here is whether the Ninth Circuit's

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[1] As within the petition, Petitioners will refer to the Federal Rules of Civil Procedure as "Civil Rule _," and the Rules Governing Section 2254 Cases in the United States District Courts as "Habeas Rule __". *See* Petition for Writ of Certiorari (hereinafter "Pet.") at 1 nn.1-2.

creation of a new rule on the application of relation back creates a conflict between the statutes and rules governing habeas procedure and the Civil Rules. And it does, based on the same principles that led this Court to reject the rule the Ninth Circuit adopted in *Mayle*—an overly broad application of Civil Rule 15(c) conflicts with the AEDPA statute of limitations. *Id.* at 662-63.

But even if Ross's argument that *Mayle* does not set a specific standard for habeas cases is relevant, just ten years ago, the Ninth Circuit characterized *Mayle* as modifying the standard for relation back under Civil Rule 15(c) while resolving "the question of how to interpret the relation back doctrine within the context of APEDA's intents and constraints." *Smith v. Mahoney*, 611 F.3d 978, 994 (9th Cir. 2010). Ross's and the Ninth Circuit's reliance on *Dean v. United States*, 278 F.3d 1218, 1221 (11th Cir. 2002), to suggest the contrary is fundamentally misplaced because the Eleventh Circuit decided *Dean* before this Court decided *Mayle*. And other circuits have held that *Mayle* sets a standard for applying Civil Rule 15(c) that is specific to habeas cases. *See*, *e.g.*, *United States v. Ciampi*, 419 F.3d 20, 23-24 (1st Cir. 2005) (noting that "in the habeas context, the Rule 15 'relation back' provision is to be strictly construed"); *Pinchon v. Myers*, 615 F.3d 631, 642 (6th Cir.) (noting that *Mayle* "adopted a narrow reading" of Civil Rule 15(c)); *but see Anderson v. Bondex Intern., Inc.*, 552 Fed. App'x. 153, 155-58 (3d Cir. 2014) (rejecting claim that federal district court erred in applying *Mayle* in an ordinary civil case).

Second, Ross downplays the impact of this case by suggesting it will be limited by its facts. Opp. at 15, 17. Based on Ross's logic, he should have lost below. If cases are so limited by their facts, it is the dissent that correctly applied *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005), by focusing on this Court's recognition that Civil Rule 10(c) applied in that case because Dye made specific and repeated references to the hand-written memorandum he attached to his petition. App. 49.

But just as Ross has done with *Dye* in this case, habeas petitioners in the Ninth Circuit may now argue that the *en banc* court's new rule is a general rule that applies to any untimely amended petition that follows a prior timely filed petition with any attached exhibits that are a written instrument. And because the Ninth Circuit failed to define what qualifies as a "written instrument" or provide any guidance on when a petitioner has sufficiently "attempted" to set out a claim for relief, the rule in this case remains largely without limit.

For example, in alignment with his reliance on *Dean*, Ross shades his argument to suggest that the Ninth Circuit's new rule merely allows petitioners to replead claims the petitioner identified but insufficiently pleaded in his original petition. Opp. at 11-12, 15-16. But relation back is not so limited. In addition to repleading claims he already "attempted" to set out, the petitioner may plead new legal theories that share a common core of operative facts with the claims he "attempted" to be set out in the original petition. *See*, *e.g.*, *Nguyen v. Curry*, 346 F.3d 1287, 1297 (9th Cir. 2013) ("But the 'time and type' language in *Mayle* refers not to the claims, or grounds for relief.

Rather, it refers to *the facts that support those grounds*.") (emphasis in original).

How specific does a claim have to be to establish an "attempt" to set it out? Is it enough to say counsel was ineffective in preparing for trial? If so, would that then open the door to a petitioner raising a multitude of claims that trial counsel failed to (1) file pretrial motions to suppress or motions in limine, (2) seek a change of venue, (3) investigate particular witnesses, (4) research the law on the availability of a particular defense, and (5) retain an expert witness? Would it be enough to say counsel was ineffective on direct appeal to then open the door to a petitioner raising a multitude of claims alleging that appellate counsel was ineffective for not raising on direct appeal?

The *en banc* majority did focus on the need for a petitioner to show that the operative facts of his amended petition arise from a common core of operative facts with the claims he "attempted" to set out in his original petition. App. 16-17. But by evasively declining to provide guidance on when a claim is "attempted to be set out," the *en banc* majority completely dulls the teeth of that limitation. And without clear, easy to apply limits on this rule, it is easy to see that the dissenting judges' concerns about habeas petitioners pleading "broad, malleable claims for relief" and attaching the state court petition, as required by the form petition, are not a farfetched. App. 47.

Third, Ross suggests that the opinion from below has no impact on application of Habeas Rule 2(c) because (1) Petitioners conflate the difference between

pleading standards and relation back, and (2) the Ninth Circuit did not say it was addressing the scope of Habeas Rule 2(c). Opp. at 16. But that argument fails to confront the fallacy Petitioners' identified in the Ninth Circuit's logic on this issue: if Civil Rule 10(c) makes something part of the petition for *some* purposes, it makes that thing part of the petition for *all* purposes. That includes setting out the facts supporting a petitioner's claims for relief. And this must be true when the case Ross relies upon to establish that Civil Rule 10(c) applies to habeas cases is a case about sufficiency of the pleading, not relation back. *Dye*, 546 U.S. at 4.

If the facts in an attachment to the petition are part of the petition for *all* purposes, they must be part of the petition for both pleading and relation back. As a result, Ross's arguments that the Ninth Circuit's new rule does not conflict with the purposes of various aspects of Habeas Rule 2 fall flat. And that problem is exacerbated by the lack of guidance on what is a written instrument, which incentivizes habeas petitioners to attach more documents to their petition.

Fourth Ross argues that he would still prevail under Petitioners' rule. Opp. at 19. Ross is wrong. He did not incorporate the state court order in his petition to present any facts supporting his claims for relief. Opp. App. 2-10. And even Ross is correct that his petition would survive under a narrow standard, that is all the more reason for this Court's intervention. The Ninth Circuit did not decide this case on such narrow grounds. Instead, the lower court crafted a sweeping rule that is now entrenched in a published *en*

banc opinion that, contrary to *Mayle*, creates a conflict between the Civil Rules and the AEDPA statute of limitations and the Habeas Rules. And if questions remain about whether Ross's petition would survive under any rule this Court adopts, the Court can vacate the judgment and remand to allow the lower courts to resolve that issue.

* * *

Fifteen years ago, this Court rebuked the Ninth Circuit's attempt to apply Civil Rule 15(c) in a way that would swallow the statute of limitations. *Mayle*, 545 U.S. at 662. In doing so, this Court grounded its decision on the principle that application of relation back in habeas cases must be applied in a way that does not undermine the AEDPA statute of limitations, which is aimed at protecting state interests in finality. And this Court turned to the specific pleading requirement from Habeas Rule 2(c) to provide a necessary limiting principle. *Id*. at 654-55.

The panel majority heeded this Court's directive from *Mayle* and interpreted Civil Rule 15(c) and Civil Rule 10(c) in a way that was faithful to this Court's repeated acknowledgement that the Civil Rules must conform to the Habeas Rules, not the other way around. But an *en banc* panel of the Ninth Circuit reversed and established a new rule that, like the rule this Court rejected in *Mayle*, is boundless and threatens to swallow the statute of limitations. And in doing so, it improperly interpreted the Civil Rules as controlling application of habeas procedure, when this Court has made abundantly clear that it is the rules and statutes that govern habeas cases that control

application of the Civil Rules in the habeas context. *Mayle*, 545 U.S. at 654-55; *see also Banister v. Davis*, 140 S. Ct. 1968 (2020).

While this Court typically waits for a split to form before it undertakes review of an issue, the consequences of the Ninth Circuit's sweeping rule are already known. Ross does not dispute that the Rules Committee already acknowledged it wrote Habeas Rule 2 and implemented the use of a form petition to discourage the kind of behavior the Ninth Circuit's new rule now rewards. And the ultimate consequences of this new rule will damage the system as a whole. This Court should not wait for a split to develop before addressing this important issue.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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