No. _____

In the
Supreme Court of the United States

Robert Ybarra, Jr.

Petitioner,

v.

William Gittere, et al.,

Respondents.

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

Petition for Writ of Certiorari

CAPITAL CASE

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QUESTIONS PRESENTED

(Capital Case)

Robert Ybarra, Jr., is on death row in Nevada. He is intellectually disabled. During a state court hearing on his claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), Ybarra's experts testified that he had an IQ of 60, had deficits in adaptive behaviors, and that the onset of his disability was during the developmental period. The State's expert testified he received an IQ score of 66, but concluded on the basis of the Test of Memory Malingering that Ybarra malingered the 66 score, and must have also malingered the score of 60.

On appeal, to resolve the disputes about the testing, the Nevada Supreme Court assumed that only testing from the developmental period was relevant. Thus, because the court ruled the developmental period ended at age-18, the Nevada Supreme Court believed *only* pre-18 evidence needed to be considered. Because all the testing occurred after Ybarra turned 18, the Nevada Supreme Court rejected Ybarra's *Atkins* claim.

On federal habeas review, the Ninth Circuit concluded that the Nevada Supreme Court's decision was reasonable under 28 U.S.C. § 2254(d) because, the Ninth Circuit reasoned, there were alternative reasons supporting the Nevada Supreme Court's decision. The Ninth Circuit's approach implicates two questions, both reflecting a split between the circuit courts of appeal.

1. In *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012), this Court held that when a state court gives alternative grounds for rejecting a federal claim, 28 U.S.C. § 2254(d) prohibits habeas relief "unless each ground supporting the state court

decision is examined and found to be unreasonable under AEDPA." Does the rule announced in *Wetzel* apply where the rationales offered by the state court are so dependent upon one another that they cannot be accurately described as "alternative"?

2. In *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018), this Court explained that deference under 28 U.S.C. § 2254(d) is a "straightforward inquiry" requiring a federal court to "simply review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable." May a federal court instead manufacture other reasons—not adopted by the state court in its reasoned decision—and defer to those reasons?

LIST OF PARTIES

Petitioner Robert Ybarra Jr. is an inmate at Ely State Prison. Respondent William Gittere is the warden of Ely State Prison.

List of Related Proceedings

Ybarra v. State, Nevada Supreme Court, No. 12624 (Oct. 10, 1980).

State v. Ybarra, Seventh Judicial District Court of Nevada, No. 1511 (July 23, 1981).

Ybarra v. State, Nevada Supreme Court, No. 13590 (Mar. 28, 1984).

Ybarra v. Nevada, United States Supreme Court, No. 84-5504 (Feb. 25, 1985).

Nevada v. Ybarra, Seventh Judicial District Court of Nevada, No. 1736 (July 9, 1986).

Ybarra v. Sumner, United States District Court for Nevada, No. CV-N-87-125-ECF (Feb. 29, 1988).

Ybarra v. Sumner, First Judicial District Court of Nevada, No. 88-0350H (Dec. 30, 1988).

Ybarra v. Director, Nevada Supreme Court, No. 19705 (June 29, 1989)

Ybarra v. Godinez, United States District Court of Nevada, No. CV-N-89-529-ECR (Mar. 31, 1993).

Ybarra v. McDaniel, Seventh Judicial District Court, No. 1736 (June 29, 1998).

Ybarra v. Warden, Nevada Supreme Court, No. 32762 (July 6, 1999).

Ybarra v. McDaniel, United States Supreme Court, No. 99-7182 (Feb. 28, 2000).

Ybarra v. State, Nevada Supreme Court, No. 43981 (Nov. 28, 2005).

Ybarra v. Gittere, United States District Court for Nevada, No. 3:00-cv-00233-GMN-VPC (Oct. 31, 2006).[1]

Ybarra v. McDaniel, Seventh Judicial District Court of Nevada, No. HC-0303002 (June 26, 2008).

Ybarra v. State, Nevada Supreme Court No. 52167 (Mar. 3, 2011).

Ybarra v. McDaniel, Ninth Circuit Court of Appeals, No. 07-99019 (Sept. 6, 2011).

Ybarra v. Baker, United States Supreme Court, No. 11-10652 (Oct. 9, 2012).

Ybarra v. Filson, Seventh Judicial District Court of Nevada, No. HC-1702005 (Mar. 31, 2017).

Ybarra v. Filson, Ninth Circuit Court of Appeals, Nos. 13-17326, 17-15793, 17-71465 (Sept. 1, 2017).

Ybarra v. State, Nevada Supreme Court, No. 72942 (Sept. 13, 2019).

Ybarra v. Nevada, United States Supreme Court, No. 19-8239 (June 29, 2020).

Ybarra v. Filson, Ninth Circuit Court of Appeals, No. 20-99012 (June 9, 2023).

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[1] Though judgment was entered on October 31, 2006, Ybarra later filed a motion under Fed. R. Civ. P. 60(b) raising a claim under *Atkins v. Virginia*, 536 U.S. (2002), which would later serve as the basis for this appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at *Ybarra v. Gittere*, 69 F.4th 1077 (9th Cir. 2023). *See also* App. 1. The order of the district court denying relief is unpublished, but available at 2020 WL 5731793. *See also* App. 39. The opinion of the Nevada Supreme Court denying relief is reported at *Ybarra v. State*, 247 P.3d 269 (Nev. 2011). *See also* App. 103. The order of the Seventh Judicial District Court of Nevada denying relief is unreported. *See* App. 143.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 9, 2023. A petition for rehearing was denied on Sept. 14, 2023. Justice Kagan extended the time to file a petition for a writ of certiorari until Feb. 11, 2024. *Ybarra v. Gittere*, No. 23A508 (Dec. 6, 2023). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

With AEDPA, as with all statutes, Congress passed a law "represent[ing] the work of a wide swath of the people's representatives and reflect[ing] compromises both complex and crude so that a large nation might live together in peace."[2] AEDPA sought to "curb the abuse of the statutory writ of habeas corpus," by, among other things, "requir[ing] deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law."[3] 28 U.S.C. § 2254(d) codifies this requirement; its plain text requires a federal court to review the reasonableness of a state court's decision. For nearly three decades this Court's decisions have been consistent: under 28 U.S.C. § 2254(d), federal courts look to the state court's decision, and that decision's reasoning.[4]

Notwithstanding Congress's and this Court's clear direction, some circuit courts read § 2254(d) to require deference not to the state court's decision, but to its conclusion. Under this approach "so long as a plausible argument exists to support

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[2] Neil M. Gorsuch, *A Case for Textualism in A Republic, If You Can Keep It* 128, 133 (2019).

[3] H.R. Conf. Rep. 104-518, 94th Cong. 2d Sess. 111 (1996), *quoted in* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure*, § 3.2 (7th ed. Matthew Bender).

[4] *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011); *Dunn v. Reeves*, 141 S. Ct. 2405, 2407 (2021).

the ruling," the state court decision is reasonable "even if its actual rationale was unreasonable."[5]

The idea that § 2254(d) does not require deference to the actual decision of a state court has spread, creating a jurisdictional split on two questions relevant to this case.

First, in *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012), this Court held that where a state court gives alternative reasons for denying a federal claim, § 2254(d) prohibits relief "unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA." The Fourth Circuit has held that this rule does not apply if the state court's reasons overlap. The Sixth Circuit applied *Wetzel* even if the state court's reasons overlap. In ruling against Ybarra, the Ninth Circuit has sided with the Sixth Circuit.

Second, in *Harrington v. Richter*, 562 U.S. 86, 102 (2011), this Court explained that where a state court does not provide reasoning for its decision, federal courts must determine what arguments or theories "could have supported the state court's decision." Some circuits applied the "could have supported" framework even if the state court provided a reasoned decision. However, in *Wilson v. Sellers*, this Court again explained that federal courts are to "review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable." 138 S. Ct. 1188, 1192 (2018). Notwithstanding *Wilson*, the Eleventh Circuit continues to apply the "could have supported" framework in cases where the state

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[5] *Sheppard v. Davis*, 967 F.3d 458, 467 (5th Cir. 2020).

court provided reasons for its decision. The Third Circuit has explicitly rejected this approach. The Fifth Circuit has acknowledged an apparent conflict between *Richter* and *Wilson*, but has not resolved it. In ruling against Ybarra, here, too, the Ninth Circuit has sided with the "could have supported" circuits, notwithstanding its own precedent explicitly rejecting this approach.

Here, the Ninth Circuit ignored glaring unreasonableness from the Nevada Supreme Court's decision, and sided with the circuits that ignore whether an error infects a court's reasoning and with the circuits that ask what arguments "could have supported" a state court decision.

STATEMENT OF THE CASE

Shortly after this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), Ybarra filed a petition in state court raising a claim of intellectual disability. *See* App. 145–46. At an evidentiary hearing on this claim, three expert witnesses testified. Two experts for Ybarra testified that he met all three criteria for intellectual disability. The State's expert testified that he only evaluated under one prong—significant subaverage intellectual functioning—concluding based on one test that Ybarra was malingering on the State's intelligence test, and further concluding that Ybarra must have malingered on the defense intelligence testing too. The State's expert did not testify about the other two prongs of intellectual disability; of importance here, the State's expert did not testify about the age of onset at all.

A shared assumption of *all* the experts was that post-developmental-period testing was still relevant in determining whether Ybarra has intellectual disability. The state trial court denied relief.

Ybarra appealed. The Nevada Supreme Court adopted an assumption contrary to all the experts about post-developmental period evidence. Specifically, the Nevada Supreme Court believed that in evaluating intellectual disability, only evidence from before Robert Ybarra turned 18 was relevant. Five times, the Nevada Supreme Court confirmed this understanding:

1) After holding the "developmental period" "is the period before a person reaches 18 years of age," the Nevada Supreme Court wrote, "The district court found that the developmental period was childhood to age 18 but *nevertheless* considered evidence of mental retardation between the ages of 18 and 25." App. 119 n.8 (emphasis added).
2) As to a 1981 IQ test, administered when Ybarra was 27, the Nevada Supreme Court wrote, "we need not decide the relevance, if any, of the Flynn effect and the necessity of adjusting the 1981 IQ score because the 1981 IQ test, *as with all of Ybarra's tests*, was administered well after he turned 18 years of age. Therefore, this issue has *little value* in evaluating whether Ybarra presented sufficient evidence to establish mental retardation . . . ." App. 135 (emphasis added).
3) Footnoting the above point, the Nevada Supreme Court added, "This is true even had we accepted Dr. Schmidt's characterization of the developmental period as being up to age 25 years." App. 135 n.17.

4) Regarding the Test of Memory Malingering, administered when Ybarra was 54 years old, the Nevada Supreme Court wrote: "as with the 1981 IQ score, the TOMM score is of *little* value in determining whether Ybarra met his burden of proving significant subaverage intellectual functioning, as the TOMM was administered well after Ybarra reached 18 years of age." App. 137 (emphasis added).

5) Finally, footnoting its adaptive behavior discussion, the Nevada Supreme Court wrote, "Although the district court considered evidence of adaptive behavior deficits from Ybarra's childhood to age 18 and age 18 to 25, the developmental period as we have defined it makes evidence related to the former primarily relevant." App. 140 n.20.

This is, without ambiguity, contrary to the clinical guidelines for assessing intellectual disability, and would have the effect of making relief under *Atkins* available only to those with the fortuity of a pre-18 intellectual disability diagnosis.[6]

Ybarra sought relief in federal district court, but was denied. On appeal, the Ninth Circuit, initially, agreed with Ybarra that the Nevada Supreme Court's age of onset analysis was a problem. During the first Ninth Circuit oral argument on Ybarra's *Atkins* issue, Judge Clifton explained:

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[6] *See* James W. Ellis, Caroline Everington, & Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 Hofstra L. Rev. 1305, 1338–39 (2018); *see also* Stephen Greenspan, George W. Woods, & Harvey N. Switzky, *Age of Onset and the Developmental Period Criterion in The Death Penalty and Intellectual Disability* 77, 78–80 (Edward A. Polloway, ed. 2015); Marc J. Tasse & John H. Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies* 135 (2018).

> [W]hen I read that opinion it struck me too, I did a real double take. It basically appears to say, well, we don't have to pay attention to the IQ test 'cause they were all given after he turned 18 so they're of little value . . . . Is that the position, is that the reasoning of the Nevada Supreme Court because I got to say it struck me as a howler. There are lots of people that don't have IQ tests before 18, are they just out of luck?

Oral Argument at 37:40–39:11, *Ybarra v. Filson* (Nos. 13-17326, 17-15793, 17-71465) (June 16, 2016), https://www.youtube.com/watch?v=KaKFjpJBKeM; 2016 WL 3996724 (Unofficial Tr.).

The Ninth Circuit initially reversed, explaining that "Ybarra plausibly argues that the Nevada Supreme Court made an unreasonable determination of fact under § 2254(d)(2)" because the "Nevada Supreme Court made a number of" errors "comparable" to those highlighted by this Court in *Brumfield v. Cain*, 576 U.S. 305 (2015):

> For example, [the Nevada Supreme Court] ignored evidence that Ybarra was bullied in school on the ground that it was irrelevant under Prong 2. The trial court initially expressed concern over the notion that "the victim [of the bullying] . . . has the problem," and the Nevada Supreme Court apparently agreed because it stated that evidence of bullying does "little to demonstrate adaptive behavior deficits." But the AAMR specifically lists "gullibility" and an inability to "avoid[] victimization" as examples of limited social adaptive skills.

App. 86 (citations omitted). Of particular importance here, the Ninth Circuit also acknowledged the Nevada Supreme Court's misunderstanding of the developmental period prong: "Similarly, under Prong 3, the Nevada Supreme Court suggested that any diagnostic test conducted after the age of 18 was 'of little value.' But the AAMR

specifically contemplates retrospective assessment when there are no test scores available from the developmental period." App. 86–87.

The Ninth Circuit elaborated: "in this case, where the only clinical experts to testify on Prongs 2 and 3 opined that the prongs were satisfied, we find these statements troubling." App. 87.

The Ninth Circuit also previewed the problem presented here: deference for intermingled reasons versus deference for alternative reasons. Acknowledging the State's argument that the State's expert reached a malingering conclusion, the Ninth Circuit wrote:

> We agree that the malingering determination was reasonable in light of this clinical expertise. But it is not clear that the malingering determination was the basis for the Nevada Supreme Court's determination under Prong 1. The court opined that "[t]he record as a whole . . . portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning." Again, we are troubled by this statement. The relevant clinical guidelines specify that "[t]he assessment of intellectual functioning is a task that requires specialized professional training." For this reason, although the malingering determination was reasonable because it was supported by expert testimony, the Prong 1 determination was unreasonable to the extent that it was based on the court's lay perception that Ybarra did not "look like" a disabled person.

App. 88 (citations omitted). And, summarizing the dilemma, the Ninth Circuit remanded to the U.S. District Court to consider these issues anew, again emphasizing the challenge of intermingled unreasonable and reasonable reasons:

> The state may be correct that the malingering determination constitutes an "independent basis" for the intellectual disability determination, thus rendering it reasonable under AEPDA . . . . Alternatively, Ybarra may be correct that lay stereotypes and nonclinical factors infect the state court's entire analysis, thus rendering it

> unreasonable. Rather than passing on these issues in the first instance, we leave the task to the district court.

App. 88.

On remand, the U.S. District Court agreed that relying solely on pre-18 evidence would be wrong: "Plainly, petitioners raising an *Atkins* claim may rely on scores from tests conducted after their developmental period to demonstrate their intellectual functioning within the period." App. 64. The district court read the Nevada Supreme Court opinion to encompass alternative reasons and, finding those reasons reasonable, the court denied relief. App. 55–63. The district court did not consider whether the Prong 3 error infected the rest of the Nevada Supreme Court's reasoning.

This time, the Ninth Circuit affirmed. The Ninth Circuit explained, "the Nevada Supreme Court gave 'three reasons' for rejecting Ybarra's arguments" about the 1981 IQ test. App. 30. And two of these reasons, the Ninth Circuit held, were reasonable. First, the Ninth Circuit concluded, the Nevada Supreme Court was reasonable in affirming the district court's calculation of an adjustment for norm obsolescence. App. 32. Second, the Ninth Circuit concluded, the Nevada Supreme Court was reasonable in concluding the "record as a whole . . . portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning" because it was part of the state trial court's malingering analysis. App. 33. And only third was the Nevada Supreme Court's conclusion that all post-18 IQ tests were of "little value." *See* App. 24. Because, the Ninth Circuit reasoned, the first two reasons could be considered alternatively, even if the third reason were

unreasonable, the decision could be upheld on either or both of the other two. App. 32–33.

Thus, the Ninth Circuit explained, even if the Nevada Supreme Court misunderstood the age of onset prong to prohibit consideration of all post-18 evidence, the Nevada Supreme Court opinion was still reasonable.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for writ of certiorari because, on two questions relevant to the disposition of Ybarra's case, the Ninth Circuit has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a).

I. This Court should resolve two circuit splits in how federal courts apply deference to the specific reasons offered by a state court.

A. The Circuits are split in applying *Wetzel v. Lambert*, 565 U.S. 520 (2012), in cases where a state court gives multiple, but overlapping, reasons for its decision.

The Fourth and Sixth Circuits have split on whether the rule announced in *Wetzel v. Lambert*, 565 U.S. 520 (2012), applies where the state court gives multiple, but overlapping, reasons for its decision. This split will not resolve itself and it requires this Court's intervention.

In *Long v. Hooks*, an en banc Fourth Circuit majority applied *Wetzel* in the context of a claim under *Brady v. Maryland*. 972 F.3d 442, 446 (4th Cir. 2020). Following the petitioner's conviction, various post-trial disclosures demonstrated a pattern of deliberate police suppression of material evidence. *Id.* The state trial court concluded that the cumulative effect of the withheld *Brady* evidence would

have had no impact on the petitioner's trial. *Id.* But the state court applied an "erroneously high burden." *Id.* at 458.[7] The federal district court dismissed the petitioner's federal habeas petition, concluding that the state court's decision did not involve an unreasonable application of clearly established federal law. *Id.* at 456–57. The Fourth Circuit reversed, explaining that applying the wrong prejudice standard is an error that cannot be isolated from the state court's conclusion that the suppressed evidence would have "no impact" on the petitioner's trial. *Id.* at 460. Because the reasons could not be isolated from each other, they could not be "considered 'alternative'" under *Wetzel*. *Id.* It explained that the state court's conclusion was "inextricably intertwined" with the petitioner's *Brady* claim because the conclusion referred to and depended upon the state court's *Brady* decision. *Id.*

Six judges dissented, understanding *Wetzel* differently. The dissent explained that *Brady* requires both a materiality and favorability determination, and that either provided an independent reason for the state court to reject the petitioner's claim. *Id.* at 501. Because *Wetzel* is a "*sufficiency* inquiry, not a complete *separateness* inquiry[,]" the dissent concluded that the state court's holding that the suppressed evidence would have "no impact" on the trial was sufficient even if the state court erred in stating the legal standard and erred in its analysis of whether the suppressed evidence was favorable. *Id.* at 501–02 (emphasis in original).

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[7] Specifically, the state court applied "preponderance of the evidence" instead of the actual *Brady* prejudice standard of "reasonable probability of a different result." *Id.* at 458.

The Sixth Circuit has effectively adopted the "sufficiency inquiry" suggested by the *Long* dissent. In *Blackston v. Rapelje*, the Sixth Circuit held that, "[w]here the state court offers multiple justifications for its decision, 'each ground' must be 'examined and found to be unreasonable' before habeas relief is appropriate." 780 F.3d 340, 354 (6th Cir. 2015) (citing *Wetzel*). Because the state court advanced four theories—which overlapped—in support of its decision, the Sixth Circuit addressed each theory in turn. *Id.* And after addressing the overlapping theories, the Sixth Circuit ultimately found all four to be objectively unreasonable, and it affirmed the federal district court's conditional grant of habeas relief. *Id.* at 354–58, 362. *Blackston* assumed that *Wetzel* applied even to interrelated reasons.

Consistent with *Blackston*, the Sixth Circuit repeated this reading of *Wetzel* in *Young v. Woods*, No. 17-1690, 2018 WL 298152 (6th Cir. Jan. 5, 2018). There, the petitioner filed a federal habeas petition arguing, in part, that trial counsel was ineffective. *Id.* at *1. The Michigan Court of Appeals articulated six non-independent reasons for rejecting the petitioner's claim. *Id.* at *2; *see also People v. Young*, Nos. 310435, 311045, 2014 WL 3745186, at *7 (Mich. Ct. App. July 29, 2014) ("Considering *all* of these circumstances . . . ." (emphasis added)). On federal habeas review, the state conceded that two of the state court's reasons were belied by the record, "and reasonable jurists could find the same as to reason four." *Young*, 2018 WL 298152, at *2. Citing *Wetzel* for the proposition that "habeas relief is not warranted 'unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA[,]'" the Sixth Circuit explained that reasonable jurists could not disagree with the district court's conclusion that the

Michigan Court of Appeals' decision as to the remaining three reasons was neither contrary to, or an unreasonable application of, *Strickland*, nor based on an unreasonable determination of facts. *Id.* (emphasis in original). Thus, it denied the petitioner's application for a certificate of appealability. *Id.* at *1, 5. As with *Blackston*, the panel in *Young* assumed *Wetzel* applied, even though the state court's reasons were intertwined.

B. The Circuits are split in how they reconcile *Harrington v. Richter*, 562 U.S. 86 (2011), and *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

In *Richter*, this Court articulated the following framework:

> Under § 2254(d), a habeas court must determine what arguments or theories supported *or, as here, could have supported*, the state court's decision; then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

562 U.S. at 102 (emphasis added). This language suggests a two-step process. First, the habeas court must identify every possible "argument[] or theor[y]" that could justify the state court's denial of the petitioner's claim. *Id.* Then, it must evaluate each of these possible arguments and theories to determine whether any clear § 2254(d)'s low bar.

This Court has described the relevant first-step inquiry as requiring analysis of "hypothetical reasons" that a "state court might have given" for rejecting the claim. *Brumfield v. Cain*, 576 U.S. 305, 323 (2015). Thus, following *Richter*, some courts understood their task as "invent[ing] possible avenues the state court could have relied upon to deny. . . . relief." *Evans v. Davis*, 875 F.3d 210, 217 (5th Cir.

2017); *accord Hittson v. Chatman*, 135 S. Ct. 2126, 2127 (Ginsburg, J., with Kagan, J., concurring in denial of certiorari) (2015) (describing the Eleventh Circuit's application of *Richter* as "hypothesiz[ing] reasons"); *see also Grueninger v. Dir., Vir. Dep't of Corr.*, 813 F.3d 517, 526 (4th Cir. 2016); *Walker v. McQuiggan*, 656 F.3d 311, 318 (6th Cir. 2011); *Torres v. Bauman*, 677 F. App'x 300, 302 (6th Cir. 2017); *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1074 n.31 (11th Cir. 2022) (Pryor, J., dissenting); *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1245 (11th Cir. 2016) (Jordan, J., dissenting), *rev'd sub nom Wilson v. Sellers*, 138 S. Ct. 1188 (2018); *Hedlund v. Ryan*, 750 F.3d 793, 836 n.11 (9th Cir. 2014) (Wardlaw, J., concurring), *withdrawn and superseded*, 815 F.3d 1233 (9th Cir. 2016); *Montgomery v. Bobby*, 654 F.3d 668, 700 (6th Cir. 2011) (Clay, J., dissenting). Other courts, however, held that the *Richter* dictate applied only in cases, like *Richter* itself, where there was no reasoned state court decision. *See Tamplin v. Muniz*, 894 F.3d 1076, 1086 (9th Cir. 2018); *Dennis v. Secretary, Pennsylvania Dept. of Corr.*, 834 F.3d 263, 281 (3d Cir. 2016).

Seven years after its *Richter* opinion, this Court decided *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).[8] There, it held that when making the reasonableness determination contemplated by § 2254(d), a federal habeas court "train[s] its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims," and then "defers to *those reasons* if they are reasonable." *Wilson*, 138 S. Ct. at 1191–92 (2018) (emphasis added) (quoting

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[8] For more on the pre-*Wilson* circuit split, *see* Patrick J. Fuster, *Taming Cerberus: The Beast at AEDPA's Gates*, 84 U. Chi. L. Rev. 1325 (2017).

Hittson v. Chatman, 135 S. Ct. at 2126. Indeed, even the dissenting opinion of Justice Gorsuch emphasized, "a federal habeas court must focus its review on the final state court decision on the merits." *Wilson*, 138 S. Ct. at 1198 (Gorsuch, J., with Thomas & Alito, JJ., dissenting). This language ostensibly resolved any question about whether *Richter* applies where there is a reasoned decision.[9]

Nevertheless, the jurisdictional split persists.

In *Pye v. Warden, Georgia Diagnostic Prison*, an en banc, six-judge majority, distinguished between "reasons" and "justifications," concluding that under *Wilson*, when assessing the reasonableness of a state court's reasons for its decision, it is not required to "strictly limit [its] review to the particular justifications that the state court provided." 50 F.4th 1025, 1035–36 (11th Cir. 2022) (en banc). "Rather, in order to 'give appropriate deference to [the state court's] decision,' having determined the *reasons* for the state court's decision, we may consider any potential *justification* for those reasons." *Id.* at 1036 (emphasis in original) (internal citations omitted). Thus, the majority explained that if, for example, a state court denies a petitioner habeas relief on the ground that the petitioner was not prejudiced by his counsel's deficient performance, "[it] can, in evaluating whether that 'reason [was]

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[9] *See generally Antiterrorism and Effective Death Penalty Act—Habeas Corpus—Scope of Review of State Proceedings*—Wilson v. Sellers, 132 Harv. L. Rev. 407, 408 (2018) ("*Wilson* likely restricted *Richter*'s practice of hypothesizing bases to *Richter*'s specific procedural posture—that is, to cases where there is no reasoned opinion by any state habeas court—thus limiting the heavy and unnecessary burden this practice places on habeas practitioners."); *see also* Brian R. Means, *Federal Habeas Manual*, § 3.70 (May 2023 Update) ("With this observation [in *Wilson*], the Supreme Court apparently settled the matter: the 'fill the gaps' aspect of *Richter*—considering grounds that *could have* supported the state court's decision—does not extend beyond the unexplained rulings to reasoned state court decisions.").

reasonable,' consider additional rationales that support the state court's prejudice determination." *Id.*

Two judges dissented, proffering a different reading of *Wilson*. They explained that this Court, in *Wilson*, "without a doubt" "rejected *Richter*'s approach in cases with reasoned decisions." *Id.* at 1064. Thus, the dissent reasoned, *Wilson* "requires" federal habeas courts to look to the last reasoned state court decision, "'train its attention on the *particular reasons*—both legal and factual—why the state court rejected a state prisoner's federal claims,' and then 'defer[] to those reasons if they are reasonable.'" *Id.* (emphasis in original) (citing *Wilson*). The dissent criticized the majority for "sidestep[ping]" *Wilson*'s directive by "imagining two categories of support for a state-court decision: reasons and justifications," a distinction, the dissent explained, that does not exist in the caselaw. *Id.* at 1065–66. If the majority view is correct, the dissent posited that examining a state court's reasoning would be futile, and that federal courts would "have no need to train their attention on a state court's reasons" because federal courts could just create their own reasons for why a claim fails. *Id.* at 1066. And if this were true, "the Supreme Court would have had no reason to take [the *Wilson* case], and *Wilson* would not exist." *Id.*

The Ninth and Third Circuits' approach deference consistent with the *Pye* dissent—at least before the Ninth Circuit's decision in this case. Both before and after *Wilson*, the Ninth Circuit had limited federal habeas courts' review to the state court's specific justifications. *Kipp v. Davis*, 971 F.3d 939, 948–60 (9th Cir. 2020); *Taylor v. Maddox*, 366 F.3d 992, 1008 (9th Cir. 2004), *overruled on other*

grounds by Cullen v. Pinholster, 563 U.S. 170 (2011)). And while the Third Circuit has not cited *Wilson*, an en banc majority in *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 281 (3d Cir. 2016), explained that "*Richter* and its progeny do not support unchecked speculation by federal habeas courts in furtherance of AEDPA's goals." While federal courts "must give state court decisions 'the benefit of the doubt,' . . . federal habeas review does not entail speculating as to what other theories could have supported the state court ruling when reasoning has been provided, or buttressing a state court's scant analysis with arguments not fairly presented to it." *Id.* at 281–82. The majority criticized the dissent for "advanc[ing] an interpretation of *Richter* that far exceeds its reach" because the dissent's "approach would have the federal habeas courts 'rewrite' state court opinions . . . ." *Id.* at 281.

And so, the *Dennis* majority pointed out, the dissent relied on an argument never presented to the state court. *Id.* at 282. "No case decided by our court or the United States Supreme Court permits this approach." *Id.* It distinguished *Richter* as laying "out the analytical path for federal habeas courts confronted with a state court opinion devoid of reasoning . . . ." *Id.* In *Richter*, because the state court provided no reason, "in order to determine whether the state court had made a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or an unreasonable determination of fact, the habeas court was required to theorize based on what was presented to the state court." *Id.* But the majority explained that this "gap filling" concept is "limited" and "should be reserved for those cases in which the federal court cannot be sure of the precise basis for the state court's ruling." *Id.* The "gap filling" concept "does not permit a

federal habeas court, when faced with a reasoned determination of the state court, to fill a non-existent 'gap' by coming up with its own theory or argument, let alone one, as here, never raised to the state court." *Id.* When a state court "pens a clear, reasoned opinion," federal habeas courts "are limited to 'those arguments or theories' that actually supported, as opposed to 'could have supported,' that state court's decision." *Id.* at 283.

The Fifth Circuit has expressed uncertainty about the state of the law following *Wilson*. In *Sheppard v. Davis*, the Fifth Circuit acknowledged that it had "[t]raditionally. . . consider[ed] 'not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it *could have* relied upon.'" 967 F.3d 458, 466–67 (5th Cir. 2020) (emphasis in original). But because *Wilson* explained that "a federal court should 'train its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims and . . . give appropriate deference to that decision[,]'" the Fifth Circuit assumed without deciding that *Wilson* abrogated its earlier approach. *Id.* at 467–48 (quoting *Wilson*, 138 S. Ct. at 1191–92). *Sheppard* is not the first time the Fifth Circuit has expressed uncertainty following *Wilson*. *See Thomas v. Vannoy*, 898 F.3d 561, 568 (5th Cir. 2018) ("The continued viability of this approach after the Supreme Court's decision in *Wilson v. Sellers* is uncertain . . . .").

II. This Court's intervention is necessary to resolve important open questions about how to apply habeas deference.

It is no secret that federal habeas doctrine has been in a state of realignment over the last few years. *See, e.g.*, *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021) (overruling *Teague v. Lane*, 489 U.S. 288 (1989) "watershed" exception to retroactivity rule). But this realignment does not contemplate ignoring the plain text of the AEDPA, and indeed, the realignment has focused on strengthening federal courts' commitment to AEDPA's text. *See, e.g.*, *Shinn v. Ramirez*, 596 U.S. 366, 384–85 (2022) (explaining 28 U.S.C. § 2254(e)(2) applies even in case affected by *Martinez v. Ryan*, 566 U.S. 1 (2012)); *id.* at 384 ("Congress foreclosed respondents' proposed expansion of *Martinez* when it passed AEDPA."); *Brown v Davenport*, 596 U.S. 118, 141 (2022) (applying 28 U.S.C. § 2254(d) to state court harmless error determination because "[u]nder [AEDPA's] terms, we assess the reasonableness of the 'last state-court adjudication on the merits of' the petitioner's claim.").

This Court's intervention is necessary here to again assert the primacy of congressional text, namely 28 U.S.C. § 2254(d), which requires evaluating the reasonableness of a state court's actual decision and not, as some lower courts have supposed, imagining plausible bases that could support a state court's resolution. AEDPA requires no less. To determine whether a "decision" is "contrary to" or "involve[s] an unreasonable application of" clearly established federal law, one must look at the decision. 28 U.S.C. § 2254(d)(1). So, too, with determining a "decision" "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

There is another, less obvious but important, reason for this Court to intervene. The absence of clarity within AEDPA's deference doctrine has become a particular focal point of disagreement even within the courts of appeals, leading to unusually charged exchanges between majority and dissenting views of cases. *See, e.g.*, *Cassano v. Shoop*, 10 F.4th 695, 696 (6th Cir. 2021) (Griffin, J., dissenting from denial for reh'rg en banc) (noting how Sixth Circuit has "'acquired a taste for disregarding' the Antiterrorism and Effective Death Penalty Act of 1996"); *Taylor v. Jordan*, 10 F.4th 625, 642 (6th Cir. 2021) (Moore, J., dissenting) (referring to majority opinion as "topsy-turvy travesty"); *Ford v. Peery*, 9 F.4th 1086 n.1 (9th Cir. 2021) (Van Dyke, J., dissenting from denial of reh'rg en banc) (regarding examples where Ninth Circuit misapplied AEDPA deference: "[M]y diligent law clerk did prepare a very nice string-cite spanning multiple pages. But including it felt awkward—like trying to shame a career offender with his rap sheet."); *cf. Pye*, 50 F.4th at 1058–59 (J. Pryor, J., dissenting) ("But what happened during Alice's time through the looking glass was a dream. This, case, unfortunately, is not."); *with id.* at 1056 ("today's dissent—which like so (so, so, so) many before it, is framed around an extended allusion to Lewis Carroll's Alice-based novels . . . . What the dissent lacks in originality, it more than makes up for in spice."). Additional clarity construing 28 U.S.C. § 2254(d) will reduce opportunities for this kind of disagreement.

III. This case is an ideal vehicle because it provides a unique opportunity for this Court to clarify and reconcile its deference decisions.

This case presents an excellent vehicle to clarify the role of a state court's actual reasoning in a federal court's 28 U.S.C. § 2254(d) deference analysis. Indeed, the differences between the two Ninth Circuit decisions in this very case reflect the different circuit approaches to the questions presented.

First, the *Wetzel* split. Under the *Long v. Hooks* approach, a federal court is not required to consider alternate grounds if they are intertwined. The Ninth Circuit's 2017 opinion effectively adopts this rule by acknowledging that "the malingering determination" could have "constitute[d] an 'independent basis' for the intellectual disability determination, thus rendering it reasonable under AEDPA" or "lay stereotypes and nonclinical factors" could have "infect[ed] the state court's entire analysis, thus rendering it unreasonable." App. 88. Thus, though the 2017 opinion did not decide whether the grounds were alternative or intertwined, it recognized the approach later adopted by the Fourth Circuit in *Long*, and effectively asked whether the errors "cannot be isolated from one another so as to be considered 'alternative.'" *Long*, 972 F.3d at 460. Under the *Blackston v. Rapelje* approach, a federal court looks to alternate grounds regardless of if they are intertwined and without asking if an error on one ground affects the others. 780 F.3d at 354. The 2023 Ninth Circuit opinion effectively adopted this rule, by looking to the Nevada Supreme Court's reasoning, without asking whether the pre-18 error infected the entire analysis. Thus, the contrasting prior opinions reflect that this case is a good vehicle for resolving the circuit split.

Next, the *Richter*/*Wilson* split. Here, too, the two panel opinions are instructive. Consistent with *Wilson*'s command that a federal court "review[] the specific reasons given by the state court," the 2017 opinion acknowledged the possibility that errors in the Nevada Supreme Court opinion infected its analysis with unreasonableness. 138 S. Ct. at 1192; *see also* App. 88–89. In failing to weigh the effect of the errors, and instead relying on purported alternate reasons, the 2023 opinion effectively re-wrote the Nevada Supreme Court opinion; the 2023 opinion then found this re-written opinion to be reasonable. This approach is fundamentally inconsistent with *Wilson* because instead of reviewing the Nevada Supreme Court's actual reasoning, the Ninth Circuit reimagined it. Rather, the Ninth Circuit's approach is consistent with the Eleventh Circuit's, because the Ninth Circuit considered "additional rationales that support the state court's . . . determination." *Pye*, 50 F.4th at 1036. If the state court's "specific reasons" no longer matter, federal courts may proffer any theory that "could have supported" the state court decision. *Richter*, 562 U.S. at 102. This is precisely what *Wilson* forbid, but precisely what the Ninth Circuit's 2023 decision did here.

IV. The decision below is wrong.

"When Congress supplies a constitutionally valid rule of decision, federal courts must follow it. In AEDPA, Congress announced such a rule." *Brown v. Davenport*, 596 U.S. 118 (2022) (construing 28 U.S.C. § 2254(d)). The rule found in 28 U.S.C. § 2254(d) is "demanding but not insatiable," "[d]eference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). Indeed, AEDPA protects against

"extreme malfunctions in the state criminal justice systems." *Shinn*, 596 U.S. at 377 (quoting *Richter*, 562 U.S. at 102). Thus, under the "constitutionally valid rule" of AEDPA, where an extreme malfunction occurs, a federal court may review the merits of a claim. *See Brown*, 596 U.S. at 127, *Shinn*, 596 U.S. at 377.

Such a malfunction has happened here. The Nevada Supreme Court misunderstood Prong 3 of an intellectual disability assessment to *require* that only pre-18 evidence be considered. App. 119 n.8; App. 135; App. 135 n.17; App. 137; App. 140 n.20. This is an extreme misreading of the clinical guidelines governing assessment of intellectual disability. Indeed, the U.S. District Court, the Ninth Circuit, and amici below all agreed looking only to pre-18 evidence was wrong. *See* App. 87 n.10; App. 64.[10] If deference requires looking to the actual reasoning of the Nevada Supreme Court, then the Nevada Supreme Court's opinion resulted in an unreasonable determination of facts under 28 U.S.C. § 2254(d)(2); *see also Brumfield v. Cain*, 576 U.S. 305, 313 (2015).

The Ninth Circuit was only able to avoid this conclusion by failing to consider whether the age of onset error infected the rest of the Nevada Supreme Court's analysis. *See* App. 35. It did. All of the Nevada Supreme Court's conclusions are infected by this error. *See* App. 131–35, 135–37, 140 n.20. Thus, though the Nevada Supreme Court affirmed the denial of significant subaverage intellectual functioning, it did so believing that *none* of the intelligence tests mattered. And,

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[10] *See also* Br. of *Amici Curiae* American Association on Intellectual Developmental Disabilities, The Arc, and the Coelho Center in Support of Petitioner-Appellant's Petition for Rehr'g and Suggestion for Rehr'g En Banc, *Ybarra v. Gittere*, No. 20-99012, Docket No. 46 (9th Cir. Aug. 29, 2023).

though the Nevada Supreme Court affirmed the denial of adaptive behavior deficits, it did so believing that *none* of the post-18 evidence was relevant. Under the Nevada Supreme Court's logic, only those with a pre-18 diagnosis of intellectual disability would *ever* be eligible for relief under *Atkins*. This is objectively unreasonable beyond debate.

Of particular importance: the Ninth Circuit treated Ybarra's pre-18 argument as though it *only* applied to the 1981 IQ test. But the problem with the Nevada Supreme Court's reasoning was that its pre-18 rule meant that the Nevada Supreme Court treated Ybarra's IQ score of 60 as having "little value" because that test occurred longer after Ybarra turned 18. App. 122, App. 135 ("the 1981 IQ test, *as with all of Ybarra's IQ tests*, was administered well after he turned 18 years of age"). Thus, the Ninth Circuit overstates the Nevada Supreme Court opinion in finding that it "affirmed the trial court's finding that, even accounting for the Flynn Effect, Ybarra's 1981 IQ score was still not below 75—which Ybarra concedes is required to show significantly subaverage intellectual functioning." App. 32. The Nevada Supreme Court *never* held that the 1981 score disproved Ybarra's significant subaverage intellectual functioning, as the Ninth Circuit suggests. *See* App. 131–35. It affirmed the lower court's Flynn adjustment, but when it came to reconciling the various IQ scores in the case, the Nevada Supreme Court concluded none of them mattered because they were all from after Ybarra turned 18. App. 135.

Later, the Ninth Circuit explained, "even if Ybarra is correct that the Nevada Supreme Court gave little weight to both (1) the 1981 IQ test and (2) the TOMM test, the Prong 1 finding is still not unreasonable" because "[t]he Nevada Supreme

Court affirmed the trial court's finding that Dr. Schmidt's testimony was not credible." App. 35. This is wrong. Dr. Schmidt testified that he received an IQ score of 60; the Nevada Supreme Court disregarded this test not on the basis of a credibility finding but on the basis that, as a post-18 IQ test, it was of "little value." App. 135.

Similarly, the Ninth Circuit credited the Nevada Supreme Court's reliance on a "wealth of other evidence" of malingering because the trial court "also 'considered the TOMM results.'" App. 35–36. But, here too, the Ninth Circuit re-wrote the Nevada Supreme Court opinion. The Nevada Supreme Court used the "wealth of other evidence" to mean any issue with the TOMM could be set aside. And, the Ninth Circuit's reliance on the TOMM is wrong: the Nevada Supreme Court was explicit that the TOMM was of "little value" because it was administered after Ybarra turned 18. App. 137. This is a particularly egregious error in the Ninth Circuit's opinion: The Nevada Supreme Court used the "wealth of other evidence" to ignore issues related to the TOMM; the Ninth Circuit used the TOMM to ignore issues related to the "wealth of other evidence." This maneuver effectively means no court has fairly evaluated errors related to either.

These errors are bigger than this single case. The Ninth Circuit, under the cloak of AEDPA deference re-wrote the Nevada Supreme Court's opinion to effectively prevent consideration of Ybarra's constitutional claim. In doing so, no court—not the state trial court, not the Nevada Supreme Court, not the U.S. District Court, and not the Ninth Circuit—has fairly considered whether Robert Ybarra has intellectual disability. If § 2254(d) mandates reimagining state court

opinions into reasonableness, even "extreme malfunctions" by state courts will go unremedied.

CONCLUSION

> AEDPA does not render state judgments unassailable, but strikes a balance between respecting state-court judgments and preserving the necessary and vital role federal courts play in guarding against extreme malfunctions in the state criminal justice systems. Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty. Absent that role, what this Court regularly calls "the Great Writ" hardly would be worthy of the label.

Shinn, 596 U.S. at 407 (Sotomayor, J., with Breyer & Kagan, JJ., dissenting).

Ybarra respectfully requests that this Court grant this petition for writ of certiorari to ensure that the balance, "both complex and crude," of Congress's text is preserved and that "the Great Writ" retains its worthy label.

Dated this 9th day of February, 2024.

Respectfully submitted,

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