No. 20-1009

In the Supreme Court of the United States

DAVID SHINN, ET AL.,
Petitioners,
v.
DAVID MARTINEZ RAMIREZ & BARRY LEE JONES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, FLORIDA, INDIANA, KENTUCKY, MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, OREGON, SOUTH CAROLINA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE

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

In addition, Texas and other Amici States are frequent litigants in cases governed by AEDPA, and thus have an independent interest in promoting its correct application. The Ninth Circuit's reliance on the Fifth Circuit's decision in *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000), illustrates Texas's interest in this case. Texas has repeatedly litigated the meaning of section 2254(e)(2) and shown that *Barrientes*'s holding is far narrower than the Ninth Circuit supposed. For these reasons, Amici States file this brief in support of Arizona's petition for writ of certiorari.

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On February 11, 2021, counsel of record for all parties received notice of amici's intention to file this brief.

SUMMARY OF ARGUMENT

I. In *Martinez v. Ryan*, this Court "narrow[ly]" answered a "precise question": "[W]hether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." 566 U.S. at 9. This Court warned in *Davila v. Davis* against "[e]xpanding the narrow exception announced in *Martinez*," because doing so "would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." 137 S. Ct. 2058, 2070 (2017) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). Notwithstanding this warning, the Ninth Circuit improperly used *Martinez*, a judicial decision creating an equitable exception to a judge-made *rule*, to sidestep AEDPA's evidentiary bar in 28 U.S.C. § 2254(e)(2), a congressionally enacted *statute*. That approach conflicts with this Court's binding precedent construing AEDPA and limiting judical power to modify statutory commands. Moreover, a fair reading of *Martinez*'s explicitly limited holding does not justify the Ninth Circuit's result below.

II. The Ninth Circuit's decisions typify the "significant systemic costs" that *Martinez* was careful to repudiate but that some federal courts have nonetheless imposed. *Davila*, 137 S. Ct. at 2068. For instance, the interplay between *Martinez* and section 2254(e)(2) has repeatedly led to burdensome, unwarranted evidentiary development within the Fifth Circuit, where the State of Texas is a frequent habeas litigant. Examples from other circuits indicate that Texas's experience is by no means unique: There is confusion nationwide among courts struggling to apply *Martinez* consistent with section 2254(e)(2). Only this Court can provide the requisite

guidance on this important, recurring question of habeas litigation.

ARGUMENT

I. The Ninth Circuit Ignored This Court's Precedent in Favor of a Novel, Judge-Made Exception to Section 2254(e)(2) of AEDPA.

In AEDPA, Congress chose to limit not only the claims that a petitioner may bring in federal habeas, 28 U.S.C. § 2254(a)-(b), but also the evidence that a petitioner may use to support those claims, *id.* § 2254(d)-(e); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Subsections (d) and (e)(2) work in tandem: the former limits evidence for claims adjudicated in state court; the latter (subject to two conditions inapplicable here) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186 (citing *Williams v. Taylor*, 529 U.S. 420, 427-29 (2000)). These restrictions apply whether a petitioner seeks to introduce new evidence through a live evidentiary hearing or written submission. *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam).

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

should nearly always have the final say, and that state-court proceedings are not just a dress rehearsal for federal habeas.

Instead of following this Court's clear directions from cases like *Pinholster*, *Williams*, and *Holland*, the Ninth Circuit expanded *Martinez*, holding that *Martinez*'s rule—that negligence by state-habeas counsel may excuse procedural default of a substantial ineffective-assistance claim—applies with equal force to section 2254(e)(2). In doing so, the Ninth Circuit converted a judicial exception to a judicial rule into a free-floating equitable exception to AEDPA's strictures—here, allowing a habeas petitioner to overcome AEDPA's bar on introducing evidence not diligently developed in state court. *Jones v. Shinn*, 943 F.3d 1211, 1222 (9th Cir. 2019). The *Ramirez* panel did the same, *Ramirez v. Ryan*, 937 F.3d 1230, 1242-44 (9th Cir. 2019); indeed, it pretended section 2254(e)(2) "did not exist at all," *Jones v. Shinn*, 971 F.3d 1133, 1134 (9th Cir. 2020) (Collins, J., dissenting from the denial of rehearing en banc).

Those holdings are untenable for at least two important reasons. First, the Ninth Circuit's novel equitable exception to AEDPA conflicts with this Court's statutory-interpretation precedent. Second, no exception to section 2254(e)(2) flows from a fair reading of *Martinez*.

A. Applying an equitable rule to override section 2254(e)(2)'s statutory command conflicts with this Court's precedent.

Section 2254(e)(2) requires a habeas petitioner to diligently develop the factual bases for his claims in state court. When he does not, section 2254(e)(2) limits the evidence the petitioner may use to challenge a state criminal judgment, barring new evidence in federal court when the habeas petitioner "has failed to develop the

factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2).

Both Ramirez and Jones blame their state-habeas counsel for failing to develop their ineffective-assistance claims. *Ramirez*, 937 F.3d at 1239-40; *Jones*, 943 F.3d at 1220-21. In other words, they contend that state-habeas counsel failed diligently to develop the factual bases of their claims. But that is not enough. As this Court has held when interpreting section 2254(e)(2), Congress intended the phrase "failed to develop" to mean a "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Williams*, 529 U.S. at 432 (emphasis added); *accord Holland*, 542 U.S. at 652.

So here, state-habeas counsel's "lack of diligence" is attributable to Ramirez and Jones. As a result, section 2254(e)(2)'s opening clause bars them from developing evidence in federal court to support the procedurally defaulted claims. *See Williams*, 529 U.S. at 439-40 ("[A] diligent attorney would have done more. Counsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2)."); *see also Holland*, 542 U.S. at 653 ("[Petitioner] complains that his state postconviction counsel did not heed his pleas for assistance. Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied." (citation omitted)). *Holland* is particularly relevant, as it applied section 2254(e)(2) to bar evidence for an ineffective-assistance claim.

As explained in *Williams* and *Holland*, section 2254(e)(2) bars evidentiary development in federal court when state-habeas counsel negligently fails to develop an ineffective-assistance claim (or any other claim) in state court. Ramirez and Jones both concede that their state-

habeas counsel did just that—indeed, that is their only argument for excusing procedural default in the first place. *Cf. Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) ("[Petitioner] does not satisfy *Williams*, because his claims, by their very nature, are premised on the failure of 'the prisoner's counsel' to develop the factual basis of the claims in state court." (quoting *Williams*, 529 U.S. at 432)). For that reason, section 2254(e)(2) bars their use of this new evidence in support of their underlying claims.

The *Ramirez* panel only referred to *Williams* in passing, and it ignored *Holland* altogether. *See Ramirez*, 937 F.3d at 1245, 1246. The *Jones* panel cited neither *Williams* nor *Holland*, nor did it grapple with the effect of state-habeas counsel's lack of diligence. *Jones*, 943 F.3d at 1220-22; *see Jones*, 971 F.3d at 1140 (Collins, J., dissenting from the denial of rehearing en banc) ("*Jones* made no effort to reconcile its holding with *Holland* or [*Williams*]."). This omission is telling. Because Ramirez and Jones rely on the ineffectiveness of their state-habeas counsel, they are barred from developing evidence in federal court to support their claims. *See* 28 U.S.C. § 2254(e)(2).

The Ninth Circuit's reading of section 2254(e)(2) reverts to pre-AEDPA rules on the evidence a federal habeas court may consider in resolving claims not developed in state court. Under those rules, a petitioner's attempt to introduce new evidence was governed by the cause-and-prejudice standard from the procedural-default context. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992). But Congress, through AEDPA, pointedly eliminated that judicially developed cause-and-prejudice standard for receiving new evidence and replaced it with

section 2254(e)(2), which "raised the bar" for federal habeas petitioners. *Williams*, 529 U.S. at 433.

In *Williams*, this Court explained that when Congress enacted AEDPA in 1996, it would have understood that any lack of diligence by state-habeas counsel would be attributable to the habeas petitioner under "well-settled principles of agency law." *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *see Davila*, 137 S. Ct. at 2065. This Court applied *Coleman*'s rule to this very context in *Keeney*, when it refused to allow new evidence based on state-habeas "counsel's negligent failure to develop the facts." 504 U.S. at 4; *see id.* at 7-11.

When Congress "raised the bar" in AEDPA, *Williams*, 529 U.S. at 433, it could not have intended a weaker rule than the one adopted in *Keeney* just a few years earlier. *Williams* thus concluded that "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence." *Id.* at 434. It follows that the statutory trigger to section 2254(e)(2)'s bar on new evidence—"the applicant has failed to develop the factual basis of a claim in State court proceedings"—uses "failed to develop" just as *Keeney*: as including "attorney error." *Keeney*, 504 U.S. at 10 n.5; *see Williams*, 529 U.S. at 433-34. So when state-habeas counsel fails to develop the factual basis for a claim, the habeas petitioner is barred from presenting new evidence on that claim in federal court.

In interpreting section 2254(e)(2), *Williams* did not make an equitable judgment; it gave effect to what "Congress intended." 529 U.S. at 433. And *Williams* concluded that section 2254(e)(2) codified the rule that state-habeas counsel's lack of diligence in developing evidence is attributed to the prisoner. *Id.* at 437, 439-40. In applying section 2254(e)(2), the Court is "interpreting and applying not a judge-made doctrine but a statutory

requirement, and therefore must honor Congress's choice." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (quotation marks omitted).

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

> No doubt, judge-made . . . doctrines, even if flatly stated at first, remain amenable to judge-made exceptions. . . . But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, foreclosing judicial discretion.

136 S. Ct. at 1857 (citation omitted).

The Ninth Circuit's reasoning, which improperly engrafted a judge-made exception onto a statute, is irreconcilable with *Ross*. Like the judge-made exception to the Prison Litigation Reform Act's exhaustion requirement at issue in *Ross*, procedural default is a "judge-made" doctrine. *See id.* Thus, "[t]he rules for when a prisoner may establish cause to excuse a procedural default are elaborated" only "in the exercise of the Court's discretion." *Martinez*, 566 U.S. at 13. But section 2254(e)(2) is a statutory provision, so it "stands on a different footing." *Ross*, 136 S. Ct. at 1857. Congress set the

rule with section 2254(e)(2), which "foreclos[es] judicial discretion" for judge-made exceptions. *Id.* Under AEDPA, a federal habeas petitioner may develop evidence only in two narrow circumstances, neither of which applies here. 28 U.S.C. § 2254(e)(2)(A)(i)-(ii).

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

The Ninth Circuit failed to reconcile its decisions with the text and history of AEDPA, which, as noted above, leave no room to exempt Ramirez and Jones from section 2254(e)(2). Instead, the Ninth Circuit relied on supposedly logical and pragmatic reasons to admit new evidence under the guise of *Martinez*. Neither the text of *Martinez* nor the principles behind it dictate that result.

1. This Court's decision in *Martinez* has nothing to do with section 2254(e)(2). No party in *Martinez* raised section 2254(e)(2), and neither *Martinez* nor its Texas-specific application, *Trevino v. Thaler*, 569 U.S. 413 (2013), accounted for it. The question presented and briefed in *Martinez* focused on whether the Court should recognize "a constitutional right to an effective attorney in [a] collateral proceeding." 566 U.S. at 5. Section 2254(e)(2)'s evidentiary rule is irrelevant to that question, as well as to the "more narrow" (but unbriefed) question that *Martinez* ultimately decided: "[W]hether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." *Id.* And *Trevino* likewise concerned only whether *Martinez* applied in Texas's postconviction-review system. 569 U.S. at 417.

The decisions below also conflict with *Martinez* itself. *Martinez* created a "narrow exception" to *judge-made* procedural-default rules. 566 U.S. at 9. That exception

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

Indeed, this Court took great pains to limit its holding with unusual specificity: The judge-made rule developed in *Coleman*—that attorney negligence is chargeable to the client—"governs in *all* but the limited circumstances recognized here." *Martinez*, 566 U.S. at 16 (emphasis added). Thus, *Martinez* itself instructs that its rule does not apply to this circumstance, as *Martinez* did not cite section 2254(e)(2) or discuss the types of evidence that a federal court may consider in habeas proceedings. And by necessity, *Martinez* could not have overruled *Williams* or *Holland*. *See Martinez*, 566 U.S. at 15 (concluding that its holding raised no stare decisis concerns).

Later, this Court in *Davila* affirmed the Fifth Circuit's refusal to extend *Martinez*—notably, repudiating Ninth Circuit precedent that *had* extended *Martinez*—and confirmed that "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." 137 S. Ct. at 2070 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). *Davila* thus precludes extending *Martinez* as the Ninth Circuit did here.

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

a. The Ninth Circuit's resort to the "logic" animating *Martinez* is unavailing. It is not "illogical" "for a court to allow full evidentiary development and hearing on the *Martinez* 'claim,' but not allow consideration of that very same evidence as to the merits of the underlying trial-counsel [ineffective-assistance] claim." *Jones*, 943 F.3d at 1221 (citation omitted). Courts have steadfastly upheld section 2254(e)(2)'s evidentiary bar in similar contexts concerning untimely factual development. The Fourth, Fifth, and Sixth Circuits, for instance, have held that section 2254(e)(2) and *Pinholster* foreclose factual development in federal court when state-habeas counsel exhausts, but fails to factually develop, a claim in state-habeas proceedings. *See, e.g.*, *Gray v. Zook*, 806 F.3d 783, 789 (4th Cir. 2015); *Escamilla v. Stephens*, 749 F.3d 380, 394-95 (5th Cir. 2014); *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013). Even the Ninth Circuit has so held. *Floyd v. Filson*, 949 F.3d 1128, 1147-48 (9th Cir. 2020).

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

971 F.3d at 1142 (Collins, J., dissenting from the denial of rehearing en banc).

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

The *Jones* panel purported to avoid section 2254(e)(2) by invoking a non-controlling "conclusion" of a "four-judge plurality" from *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc) (plurality op.). *Jones*, 943 F.3d at 1221-22 (discussing *Detrich*).[2] The *Detrich* plurality reasoned that "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his [state-habeas] counsel's ineffectiveness had been in [state-habeas] proceedings." 740 F.3d at 1247. But again, that plurality's conclusion is limited to evidence developed for a cause-and-prejudice hearing (hence the reference to state-habeas counsel's effectiveness), *id.*, which is not the same as a hearing on a constitutional claim for habeas relief. The plurality's conclusion says nothing about what a district court may consider in deciding whether to grant relief on the underlying ineffective-assistance claim.

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[2] The *Ramirez* panel referenced *Detrich* once, though it neglected to mention that *Detrich* was a plurality opinion. *Ramirez*, 937 F.3d at 1248.

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

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

"comity, finality, and federalism," *Davila*, 137 S. Ct. at 2064—from the change to equitable rules occasioned by *Martinez*.

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

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

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

Sasser, meanwhile, reached its conclusion through faulty analysis and without briefing on this issue. *Sasser* merely cited state-habeas counsel's alleged negligence and *Williams*'s rule that section 2254(e)(2) "does not preclude district courts from holding an evidentiary hearing if the petitioner 'was unable to develop his claim in state court despite diligent effort.'" 735 F.3d at 853-54 (quoting *Williams*, 529 U.S. at 437). But again, *Williams* makes clear that lack of diligence by "the prisoner *or* the prisoner's counsel" triggers section 2254(e)(2)'s evidentiary bar. 529 U.S. at 432 (emphasis added). *Sasser* never addressed this inconsistency, let alone resolved it.

b. Supposed pragmatic reasons for ignoring section 2254(e)(2)'s plain text are equally misguided. The Ninth Circuit embraced speculation that *Martinez* would be a "dead letter" if state-habeas counsel's negligence under *Martinez* also triggers section 2254(e)(2)'s bar on evidence. Not so. Actual applications of *Martinez*

demonstrate these principles working in tandem. *See, e.g.*, *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 933, 937-44 (3d Cir. 2019) (excusing procedural default under *Martinez* and granting relief on ineffective-assistance claim "[b]ecause, on the face of the [trial-court] record, trial counsel's assistance was manifestly ineffective"); *see also Preston v. Superintendent Graterford SCI*, 902 F.3d 365, 368 n.1, 376-78 (3d Cir. 2018) (excusing procedural default under *Martinez* by relying solely on the state-court record). Indeed, there are many record-based ineffective-assistance claims for which *Martinez* will still do work if courts remain faithful to the text of section 2254(e)(2). *See Davila*, 137 S. Ct. at 2067-68. Clear examples could include when counsel requests an incorrect jury instruction, or per se ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984).

Moreover, evidence developed in state court for other purposes, such as to support a different claim or overcome a state procedural bar, can be considered in federal court to support a *Martinez*-excused ineffective-assistance claim consistent with section 2254(e)(2). *See, e.g.*, *Apelt v. Ryan*, 878 F.3d 800, 825-34 (9th Cir. 2017) (considering evidence presented in state court and rejected on state-law procedural grounds in conjunction with a claim excused by *Martinez*). *Trevino* itself was an example of this principle in action. Before that case reached this Court, Trevino discovered evidence which could support claims that he did not raise in initial state-habeas proceedings. 569 U.S. at 419. The district court stayed federal-habeas proceedings so Trevino could exhaust state remedies. *Id.* at 419-20. When Trevino returned to federal court, his ineffective-assistance claim and the evidence supporting it were incorporated in the state-court

record and cognizable in federal-habeas proceedings (provided cause and prejudice existed to overcome procedural default). *See id.* at 420-21. That result is consistent with a faithful reading of section 2254(e)(2).

II. As Illustrated by Examples from Within the Fifth Circuit and Confirmed by Cases Nationwide, Courts Applying Section 2254(e)(2) Repeatedly Face Confusion That Only This Court Can Resolve.

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

Unfortunately, *Martinez* has thrown the lower courts' application of AEDPA into disarray. The State of Texas provides several examples from within the Fifth Circuit. But examples from other circuits confirm that Texas's experience is hardly unique. The Court should grant certiorari to resolve this important, recurring issue with significant ramifications for comity and federalism in the administration of state criminal justice.

A. The State of Texas has repeatedly litigated the question presented in cases within the Fifth Circuit. When this Court vacated and remanded to the Fifth Circuit in *Ayestas v. Davis*, for instance, the Court passed on answering this precise question to allow the Fifth Circuit to decide the issue first. 138 S. Ct. 1080, 1095 (2018) ("We decline to decide in the first instance whether [the State's] reading of § 2254(e)(2) is correct. Petitioner

agrees that the argument remains open for the Fifth Circuit to consider on remand."). On remand, however, the Fifth Circuit denied relief on other grounds without addressing the State's argument under section 2254(e)(2). *Ayestas v. Davis*, 933 F.3d 384 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1107 (2020).

The Fifth Circuit has passed on numerous other opportunities to resolve this issue. In *Canales*, for example, the Fifth Circuit noted the open evidentiary question presented by *Martinez* but allowed the district court to decide on remand whether to consider such evidence under section 2254(e)(2). *Canales*, 765 F.3d at 571 n.2. In a subsequent appeal, however, the Fifth Circuit merely assumed that it could consider the petitioner's new evidence and denied relief on the merits. *Canales v. Davis*, 966 F.3d 409, 412 (5th Cir. 2020), *petition for cert. filed*, (U.S. Jan. 28, 2021) (No. 20-7065). The Fifth Circuit has similarly turned to the merits of ineffective-assistance claims to avoid the section 2254(e)(2) issue on at least five other occasions. *See, e.g.*, *Ochoa v. Davis*, 750 F. App'x 365, 367-68 & n.2 (5th Cir. 2018) (per curiam), *cert. denied*, 140 S. Ct. 161 (2019) (acknowledging the tension between an affidavit produced in federal court and section 2254(e)(2) "[w]ithout deciding the propriety of considering the affidavit"); *Murphy v. Davis*, 901 F.3d 578, 590-91 & n.5 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1263 (2019) ("As we conclude the district court did not abuse its discretion in denying an evidentiary hearing, we do not consider whether it would be barred from doing so by [section 2254(e)(2)]."); *Trevino v. Davis*, 861 F.3d 545, 550-51 (5th Cir. 2017); *Norman*, 817 F.3d at 234; *Newbury v. Stephens*, 756 F.3d 850, 874 (5th Cir. 2014) (per curiam).

Even in cases where the State ultimately prevails on the merits, allowing federal courts to consider "newly proffered evidence would effect a complete end run around the state court system" that AEDPA is supposed to prevent. *Ibarra*, 738 F. App'x at 818-19 & n.4 (citing 28 U.S.C. § 2254(e)(2)). Avoiding section 2254(e)(2) by affirming the denial of habeas relief on the merits also presents a recurring obstacle to resolving the question presented. The cases below present ideal vehicles to resolve that question because the judgments cannot be sustained without addressing section 2254(e)(2).

Martinez has also caused tension within the Fifth Circuit as to whether federal district courts can (or must) hold evidentiary hearings on cause and prejudice in the first place. On the one hand, the Fifth Circuit has held that petitioners are not entitled to cause-and-prejudice hearings under *Martinez*. *Segundo*, 831 F.3d at 351. But a different Fifth Circuit panel held in conjunction with granting a certificate of appealability that the district court abused its discretion by not holding such a hearing and ordered further evidentiary development. *Washington v. Davis*, 715 F. App'x 380, 385-86 (5th Cir. 2017) (per curiam). Thus, in *Washington*, the State's interests in finality and the administration of justice have been frustrated for over three years as evidentiary development proceeds in district court.

Because of this lack of clarity, the State has been subjected to numerous evidentiary hearings in federal district courts across Texas. Some district courts believed they had discretion to allow evidentiary development, but chose not to do so.[3] Others allowed the development

[3] *See, e.g.*, *Ramey v. Davis*, 314 F. Supp. 3d 785, 803 n.9 (S.D. Tex. 2018); *Murphy v. Davis*, No. 3:10-CV-163-N, 2017 WL 291171, at *28 (N.D. Tex. Jan. 23, 2017); *Ochoa v. Davis*, No. 3:09-CV-2277-

of new evidence to establish "cause" and "prejudice" under *Martinez*, but never decided whether they could consider that evidence for the underlying merits.[4] Another considered the evidence for both purposes, as in *Jones* and *Ramirez*.[5] The State of Texas currently has at least three cases pending before the Fifth Circuit that present this issue. *See Green v. Davis*, 479 F. Supp. 3d 442, 507-10 (S.D. Tex. 2020), *appeal filed sub nom. Lumpkin v. Green*, No. 20-70021 (5th Cir. 2020); *Ramey v. Davis*, 942 F.3d 241, 254-57 (5th Cir. 2019) (granting COA in part); *Balentine*, 2018 WL 2298987, at *1, *appeal filed sub nom. Balentine v. Lumpkin*, No. 18-70035 (5th Cir. 2018).

* * *

Unless the Court resolves the meaning of section 2254(e)(2), states will continue to bear not only the tangible costs of evidentiary development, but also the loss of the benefits of "comity, finality, and federalism" that AEDPA was meant to provide, *Davila*, 137 S. Ct. at 2070.

K, 2016 WL 5122107, at *26 (N.D. Tex. Sept. 21, 2016). Some considered new documentary evidence, even though this Court has held that section 2254(e)(2) prevents consideration of both. *See Holland*, 542 U.S. at 653 (the restrictions of section 2254(e)(2) "apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing").

[4] *See, e.g.*, *Balentine v. Davis*, No. 2:03-CV-39-J-BB, 2017 WL 9470540, at *4-16 (N.D. Tex. Sept. 29, 2017), *report and recommendation adopted*, No. 2:03-CV-039-D, 2018 WL 2298987, at *1 (N.D. Tex. May 21, 2018); *Carpenter v. Davis*, No. 3:02-CV-1145-B-BK, 2017 WL 2021415, at *2-3 (N.D. Tex. May 12, 2017); *Braziel v. Stephens*, No. 3:09-CV-1591-M, 2015 WL 3454115, at *8-10 (N.D. Tex. May 28, 2015); *Garcia v. Stephens*, No. 3:06-CV-2185-M, 2015 WL 13856623, at *5-11 (N.D. Tex. May 28, 2015).

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

Because the State of Texas has ultimately prevailed on other grounds in the section 2254(e)(2) cases the Fifth Circuit has decided, the State has been left without a proper vehicle to challenge the propriety of evidentiary development under AEDPA. The cases below, however, squarely present this issue and are ideal vehicles to hold that *Martinez* does not modify section 2254(e)(2).

B. This issue has perplexed courts nationwide. As noted above, the Eighth Circuit in *Sasser* was the first court to hold, like the *Jones* panel, that *Martinez* allows further factual development on a procedurally defaulted claim despite section 2254(e)(2). 735 F.3d at 853-54. But even the Eighth Circuit has since "note[d] the tension in the case law" that *Sasser* created—that state-habeas "counsel's ineffectiveness permits an applicant to *avoid* the requirements of § 2254(e)(2)." *Thomas v. Payne*, 960 F.3d 465, 473 n.7 (8th Cir. 2020).

Other courts have allowed evidentiary development without referencing section 2254(e)(2)'s evidentiary bar. For instance, the Seventh Circuit in *Brown v. Brown* held that *Martinez* applied in Indiana, then remanded for an evidentiary hearing on whether state-habeas counsel was deficient, without ever acknowledging or grappling with section 2254(e)(2)'s evidentiary bar. 847 F.3d 502, 513-14, 517 (7th Cir. 2017). Or consider the Fourth Circuit's decision in *Sigmon v. Stirling*, where the majority considered new documentary evidence presented in federal court without mentioning section 2254(e)(2). 956 F.3d 183, 198 (4th Cir. 2020), *cert. denied*, 2021 WL 78320 (2021).

The Eleventh Circuit has also struggled with this issue. One panel allowed federal evidentiary development in conjunction with *Martinez* without mentioning section 2254(e)(2). *See Sullivan v. Sec'y, Fla.*

Dep't of Corr., 837 F.3d 1195, 1204-07 (11th Cir. 2016). But more recently, a different panel held that a district court's discretion to allow evidentiary development about a *Martinez* claim is limited by section 2254(e)(2). *See Lucas v. Fla. Dep't of Corr.*, __ F. App'x __, 2021 WL 71625, at *5 (11th Cir. Jan. 8, 2021) (per curiam) ("Section 2254(e)(2) prohibits a district court from holding an evidentiary hearing if a petitioner fails to develop the factual basis for a claim in state court proceedings," irrespective of *Martinez*). *Lucas* stands in stark contrast with the cases described above that suggest (or require) evidentiary development notwithstanding section 2254(e)(2). Only this Court can resolve the tension among these cases.

* * *

Federal courts are disregarding AEDPA's bar on evidentiary development based on *Martinez*. This has led to perverse incentives to forego state-court review. *See Dickens v. Ryan*, 740 F.3d 1302, 1328 (9th Cir. 2014) (en banc) (Callahan, J., dissenting) ("Why wouldn't a defendant hold back or forego developing one claim in his first postconviction petition in the hope that he may earn another round of postconviction proceedings by raising it for the first time in his federal habeas petition?"). The Court should grant certiorari to reassert section 2254(e)(2)'s primacy over the judge-made rule of *Martinez*, and reinforce AEDPA's concern for comity, finality, and federalism.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2021

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