No. 20-1009

In the Supreme Court of the United States

DAVID SHINN, *et al.*,

Petitioners,

v.

DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,

Respondents.

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

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INTRODUCTION

"Under the opening clause of [28 U.S.C.] § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the *prisoner's counsel*." *Williams v. Taylor*, 529 U.S. 420, 432 (2000) (emphasis added). Further, "[a]ttorney negligence … is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied." *Holland v. Jackson*, 542 U.S. 649, 653 (2004). Without directly asking this Court to overturn *Williams* and *Holland*, Respondents suggest that § 2254(e)(2)'s opening clause must be read coextensively with the equitable cause-and-prejudice avenue for excusing procedural default, and in particular must accommodate the narrow decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), which post-dated the statute by almost two decades.

In *Martinez*, this Court held that state post-conviction counsel's ineffectiveness, while not rising to a constitutional violation, can in certain circumstances serve as cause to excuse the procedural default of a trial-ineffectiveness claim. 566 U.S. at 8–18. Respondents argue that it is inconsistent with *Martinez*'s purposes to excuse a claim's procedural default based on post-conviction counsel's errors but simultaneously hold the prisoner responsible under § 2254(e)(2) for state-court record deficiencies caused by that same attorney. Their resolution for this claimed inconsistency is to suspend § 2254(e)(2)'s application any time a prisoner has shown cause to excuse a claim's procedural default. In those circumstances, they

propose, a prisoner has not "failed to develop" a claim as that language is used in § 2254(e)(2).

This position, however, is not only irreconcilable with *Williams* and *Holland*, but it also contravenes § 2254(e)(2)'s text, which does not tie the "failed to develop" question to the cause inquiry and, in fact, abolished a pre-existing cause-and-prejudice standard. It is also inconsistent with *Martinez* itself, which was strictly confined to the procedural-default context and had nothing to do with § 2254(e)(2). Section 2254(e)(2) applies equally to properly exhausted claims and to claims whose procedural defaults were excused, and there is no textual basis for drawing the distinction Respondents proffer.

As this Court held in *Williams* and *Holland*, § 2254(e)(2) prohibits federal courts from considering new evidence on a claim whose factual basis was not developed in state court because of counsel's errors. To revisit this Court's entrenched and enduring statutory construction of § 2254(e)(2) merely to accommodate a narrow equitable rule created years after the statute's enactment would amount to judicial amendment of AEDPA, raising serious separation-of-powers concerns.

ARGUMENT

I. A prisoner who has shown cause to excuse a procedural default under *Martinez* is not excused from § 2254(e)(2)'s opening clause.

The Anti-terrorism and Effective Death Penalty Act's (AEDPA's) straightforward application precludes relief for Respondents. AEDPA generally bars federal courts from holding evidentiary hearings where a prisoner "has failed to develop the factual

basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). This provision is subject to only two enumerated exceptions encompassing extraordinary circumstances, neither of which Respondents invoke here. *Id.*

Respondents agree that their claims were not developed in state court and that their respective state-court records are insufficient to warrant relief without additional factual development. They blame their post-conviction attorneys for the record deficiencies, but post-conviction counsel's errors result in a "failure to develop" under § 2254(e)(2). *Holland*, 542 U.S. at 653; *Williams*, 529 U.S. at 432. Under these circumstances, AEDPA bars evidentiary development.

Arguing otherwise, Respondents assert that they are not "at fault" for the record deficiency within § 2254(e)(2)'s meaning because they have shown cause under *Martinez* to excuse their claims' procedural defaults. Their argument ignores this Court's precedent, is inconsistent with § 2254(e)(2)'s text, and improperly elevates the *Martinez* equitable rule over § 2254(e)(2).

A. State post-conviction counsel's negligence triggers § 2254(e)(2)'s restrictions.

This Court has recognized for decades that state post-conviction counsel's errors that result in a "failure to develop" a claim for § 2254(e)(2)'s purposes activate § 2254(e)(2)'s bar. *See Holland*, 542 U.S. at 653; *Williams*, 529 U.S. at 432. Respondents ignore *Holland* completely and contort *Williams* to create an evolving and subjective fault-based definition of "failed to develop" that changes to

accommodate this Court's equitable decisions. Their arguments are unavailing.

1. This Court in *Williams* correctly interpreted § 2254(e)(2), and that decision is dispositive here.

In *Williams*, this Court concluded that § 2254(e)(2)'s phrase, "failed to develop," means "lack of diligence, or some greater fault, attributable to the prisoner or the *prisoner's counsel*." *Williams*, 529 U.S. at 432 (emphasis added). To reach this conclusion, this Court construed § 2254(e)(2)'s use of the verb "to fail" according to its dictionary definition at the time of enactment. *Id.* at 431–32; *see generally Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (law's ordinary meaning at the time of enactment governs interpretation). Based on this definition, this Court rejected the no-fault interpretation of § 2254(e)(2)'s "failed-to-develop" clause proposed by Virginia, in favor of a fault-based standard. *Williams*, 529 U.S. at 431–32, 434–37.

To determine the contours of that fault-based standard, this Court observed that Congress adopted § 2254(e)(2)'s phrase "failed-to-develop" from *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 4–5 (1992), which addressed whether a prisoner had "failed to develop" the state-court record under pre-AEDPA standards. *Williams*, 529 U.S. at 433. This Court concluded that Congress, while abandoning *Keeney*'s remedies for a factual default, codified in § 2254(e)(2)'s opening clause *Keeney*'s test for determining when such a default occurs. *Williams*, 529 U.S. at 433–34.

That test, in turn, recognized that post-conviction counsel's errors resulted in a "failure to develop" a claim. *See Keeney*, 504 U.S. at 4 (prisoner failed to

develop claim where state-court record's deficiency was based on "the negligence of postconviction counsel"). This recognition is consistent with agency principles imputing counsel's errors to a prisoner in a proceeding where there is no constitutional right to counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (no constitutional right to counsel in state post-conviction proceedings)). Because an attorney acts as a prisoner's agent, the prisoner bears the risk of the attorney's negligence. *Coleman*, 501 U.S. at 753.

Accordingly, *Keeney*'s definition of "failed to develop," which Congress incorporated in § 2254(e)(2), imputed counsel's errors to a prisoner. *See Williams*, 529 U.S. 433–34 ("[T]here is no basis in the text of § 2254(e)(2) to believe Congress used 'fail' in a different sense than the Court did in *Keeney*."). That understanding became part of § 2254(e)(2). *See id.* ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary."). And this Court has since bound prisoners to their post-conviction attorneys' errors for § 2254(e)(2)'s purposes. *See Holland*, 542 U.S. at 653; *Williams*, 529 U.S. at 437–40. *Williams* and *Holland* compel the same result here.

2. Respondents' interpretation is inconsistent with § 2254(e)(2)'s text, which has not changed since *Williams*, and with AEDPA's general structure.

Congress has not has not amended § 2254(e)(2) in the decades since this Court construed it in *Williams*. *Williams* thus carries significant force as precedent. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 447 (2015) ("*[S]tare decisis* carries enhanced force when a decision … interprets a statute" because "Congress can correct any mistake it sees."). In fact, Respondents identify no specific error in *Williams*' analysis of § 2254(e)(2)'s text.

Moreover, while Respondents accuse Arizona of making "atextual" arguments, it is *their* interpretation of § 2254(e)(2) that lacks textual support. Nothing in § 2254(e)(2)'s opening clause limits a "failure to develop" to a prisoner's personal errors, disclaims applicability of ordinary agency principles (which, as discussed above, were part of the pre-existing test Congress incorporated from *Keeney*), or otherwise creates an exception for post-conviction counsel's ineffectiveness.

Nor does the statute give preferential treatment to trial-ineffectiveness claims (the only type of claim affected by *Martinez*) or distinguish between claims based on their posture. For example, the statute does not prescribe a different "failure-to-develop" standard when a prisoner excuses procedural default than it does when a prisoner travels a different road to merits review, nor does it link the "failure-to-develop" question to the cause inquiry for excusing procedural default. Rather, § 2254(e)(2) bars an

evidentiary hearing on a claim for relief whenever a prisoner has "failed to develop" that claim's factual basis in state court and cannot satisfy a statutory exception.

Respondents' interpretation is also inconsistent with AEDPA's overall structure. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("[T]he basic structure of federal habeas jurisdiction" is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions."). AEDPA does not entitle a prisoner to intensive review of claims. Rather, it erects a series of barriers to relief, one of which is § 2254(e)(2), in order to reserve the writ for extraordinary errors. *See* 28 U.S.C. § 2254(b) (exhaustion requirement); § 2254(d) (near-bar on habeas relief for claims adjudicated on the merits in state court). Linking (without textual support) the "failure-to-develop" standard to the separate cause inquiry would strip § 2254(e)(2)'s robust bar of much of its force. This is especially so for trial-ineffectiveness claims whose defaults are excused under *Martinez*, given that cause is established by the very conduct this Court held in *Holland* and *Williams* to be a "failure to develop" for purposes of § 2254(e)(2).

Moreover, Respondents' construction would create tension between § 2254(e)(2) and 28 U.S.C. § 2254(i), which states, "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." This statute evidences Congress' intent for state collateral-review counsel's ineffectiveness to play no

role in determining whether to grant habeas relief.[1] By reading into § 2254(e)(2) an unwritten exception for post-conviction counsel's mistakes, Respondents seek to use the very condition Congress has stated *does not warrant* habeas relief to make it easier for them *to obtain* habeas relief.

3. Respondents misread *Williams*.

At various points in *Williams*, this Court used the language "at fault" to describe when a prisoner has failed to develop his claim. *See Williams*, 529 U.S. at 432, 433, 435. Respondents (at 31–41) seize on this language, proposing that a prisoner who has escaped procedural default under *Martinez* is never "at fault" for any resulting record deficiencies for § 2254(e)(2)'s purposes. But Respondents ignore *Williams*' actual holding, which defines a "failure to develop" as a lack of state-court diligence, or greater fault, attributable to a prisoner *or counsel*. 529 U.S. at 432–33. They also fail entirely to account for *Holland*, which unambiguously charges attorney negligence to a prisoner under § 2254(e)(2). 542 U.S. at 653.

Respondents also misapply this Court's "at fault" language to promote an evolving, fluctuating definition of "failed to develop" that changes with the tide of this Court's decisions—even those decisions involving unrelated equitable doctrines. This Court

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[1] This Court has concluded that § 2254(i) does not prevent post-conviction counsel's ineffectiveness from serving as cause to excuse a procedural default. *See Martinez*, 566 U.S. at 17. Setting aside the substantial questions about this reasoning's correctness, *see* Am. Br. Mitchell & Mortara, Respondents here seek to use post-conviction counsel's ineffectiveness for a very different purpose: to excuse compliance with a binding provision of AEDPA.

did not mean "at fault" to connote an open-ended standard. Rather, it tied the concept of "fault" to actions by a prisoner *or his attorney*, as opposed to a third party. *See Williams*, 529 U.S. at 432 ("[A] person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance."). For example, this Court found that a prisoner was not "at fault" for failing to raise one of his claims because third parties had concealed relevant information from counsel. *Id.* at 440–44. In that circumstance, "fault" lay with the third parties, and there was no "failure to develop" that triggered § 2254(e)(2)'s restrictions.[2] *Id.*

In contrast, the prisoner *was* "at fault" for failing to develop a different claim, because his attorney was on notice of its supporting evidence and "a diligent attorney would have done more" to investigate. *Williams*, 529 U.S. at 437–40. Likewise, in *Holland*, this Court rejected the prisoner's argument that he did not fail to develop his claim because his post-conviction attorneys ignored his requests for help, reaffirming that § 2254(e)(2) charged such negligence

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[2] Respondents (at 36–37) cite this Court's remark that the same analysis that showed lack of fault also showed cause for any procedural default. *Williams*, 529 U.S. at 444. This Court's remark was confined to the facts of that specific claim and was not a broad pronouncement that § 2254(e)(2)'s opening clause was inextricably linked to the cause inquiry. And Respondents' reliance (at 37) on *Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000), is not persuasive because that case misreads the relevant portion of *Williams* as creating an inextricable link. *See* JA 393 (Collins, J., dissenting). And as the Amici States note (at 18), *Barrientes* predated *Martinez*, and the Fifth Circuit has since regarded the interaction between *Martinez* and § 2254(e)(2) as an open question.

to the prisoner. *Holland*, 542 U.S. at 653. *Williams'* use of "at fault" terminology thus does not support Respondents' position—it supports Arizona's.

B. This Court's modification of an equitable rule can neither supplant an existing statute nor alter its meaning.

Section 2254(e)(2) and procedural default are separate and independent bars to habeas relief. Section 2254(e)(2) is a statute that limits court authority to hear new evidence on a claim, while procedural default is an equitable doctrine adopted by this Court to restrict merits review for prisoners who do not follow state-court procedures. *See Martinez*, 566 U.S. at 9–10. Contrary to Respondents' viewpoint, a statute cannot be contorted contrary to its plain language to accommodate a subsequent, equitable Court decision on an unrelated legal principle.

Respondents ask this Court to reinterpret § 2254(e)(2) to align it with the cause-and-prejudice doctrine and, in particular, to incorporate the *Martinez* excuse for procedural default. But Respondents offer no response to Arizona's argument that a court-created equitable rule must yield to a statute. Any effort to reinterpret § 2254(e)(2)'s meaning merely to accommodate *Martinez* would amount to judicial amendment of AEDPA, raising serious separation-of-powers concerns. *See Ross v. Blake*, 578 U.S. 632, __, 136 S. Ct. 1850, 1857 (2016) (courts may modify equitable doctrines at will, but can modify statutes only if Congress permits that outcome).

This is particularly true where the writ's availability to state prisoners is largely a matter of

Congressional grace. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (Court has "long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," and "that judgments about the proper scope of the writ are normally for Congress to make") (quotations omitted). This Court has created equitable rules, such as procedural default, to fill gaps in the habeas statutes where Congress has not acted.[3] *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("In the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies."). But where Congress has explicitly restricted court authority, as it has with § 2254(e)(2), that restriction binds this Court regardless of separate equitable doctrines this Court has adopted. *Ross*, 136 S. Ct. at 1857.

Departing from these principles is particularly harmful here because Congress deliberately abolished in the factual-development context the very cause-and-prejudice standard applied to excuse procedural default. *See Williams*, 529 U.S. at 433–34. Although Respondents deny (at 31–32) seeking to resurrect that exception and judicially engraft it onto the statute, that is exactly what they propose when

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[3] Moreover, when this Court has filled these gaps, it has sought to further the goals of the habeas statutes. *See Brecht*, 507 U.S. at 633. Procedural default, for example, furthers § 2254(b)'s exhaustion requirement. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) ("The procedural default doctrine … advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine.") (quotations and citations omitted). The decisions below expand the availability of habeas relief and do not further any goal of AEDPA. *See* § I(C), *infra*. Rather, as explained above, they are contrary to those goals.

they argue that the *Martinez* avenue for showing cause is silently incorporated in § 2254(e)(2)'s definition of "failed to develop."[4] If that argument is accepted, the end result would be to restore—and in fact to expand[5]—the abolished exception.

This, in turn, would make § 2254(e)(2) inapplicable to procedurally defaulted claims that proceed to merits review through a showing of cause and prejudice or a fundamental miscarriage of justice. And it would render meaningless Congress' decision to "raise[] the bar" for excusing a lack of state-court factual development, thereby encouraging forum-shopping and providing a disincentive for prisoners to raise their claims in state court as Congress intended. *Williams*, 529 U.S. at 433.

To ensure that AEDPA is not further undermined going forward, the respective roles of *Martinez* and § 2254(e)(2) should be clarified and lower courts should be directed to strictly adhere to those delineations. Section 2254(e)(2) will in many cases bar evidentiary development on a claim not presented in state court, and the state-court records in those cases will often contain insufficient evidence for habeas relief. In these circumstances, courts

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[4] Regardless what Respondents profess, the Ninth Circuit in *Jones* did engraft such an exception, "explicitly hold[ing]" that "*Martinez*'s procedural-default exception applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court." JA 334.

[5] At the time Congress abolished the cause-and-prejudice standard through § 2254(e)(2), *Martinez*'s exception to *Coleman* had not been recognized and post-conviction counsel's ineffectiveness could not provide cause to excuse a procedural default. *See Coleman*, 501 U.S. at 752–53.

should be encouraged to address the dispositive statutory question first, rather than to devote significant resources to developing evidence on the *Martinez* question, which may prove futile. *See* JA 391–92 (Collins, J., dissenting).[6]

Finally, if § 2254(e)(2), as construed in *Williams*, is inconsistent with *Martinez* specifically, or the cause-and-prejudice rule in general, then that "is the unmistakable consequence of Congress's asymmetrical intervention in this area of the law." JA 392 (Collins, J., dissenting). It does not justify judicially rewriting the statute. And if the conflict cannot be reconciled, *Martinez* must be revisited, as the statute is paramount.

C. Applying § 2254(e)(2) as construed in *Williams* furthers AEDPA's goals.

Respondents next advance a series of policy arguments (at 41–51) suggesting that enforcing § 2254(e)(2) when *Martinez* applies would contravene AEDPA and undermine the Sixth Amendment. These arguments are easily dismissed.

1. Section 2254(e)(2) plays a key role in advancing AEDPA's goals.

Because "[f]ederal habeas review of state convictions … intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority," *Richter*, 562 U.S. at 103, Congress enacted AEDPA to limit the writ's availability to

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[6] This procedure would also address Respondents' concern (at 56–57) about asking federal courts to disregard already-created evidence. There is no need to create any evidence on the *Martinez* issue if the claim for relief is destined to fail because of § 2254(e)(2).

state prisoners. *See Felker*, 518 U.S. at 662 ("Our authority to grant habeas relief to state prisoners is limited by § 2254."). AEDPA's restrictions "reflect[] the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102–03.

Under AEDPA, prisoners face a number of barriers to evidentiary development, regardless how their habeas claims are postured. When a state court adjudicates a prisoner's claim, the prisoner may not present new evidence in federal court without first surmounting § 2254(d)'s barriers. *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (review under § 2254(d)(1) is limited to state-court record); *see also* 28 U.S.C. § 2254(d)(2) (authorizing habeas relief if state-court decision was unreasonable "in light of the facts presented" in state court).

Section 2254(e)(2) fills the gaps left by § 2254(d). It specifically applies when § 2254(d) does not independently bar relief and where, as here, the prisoner has not raised his or her claim in in state court. *See Pinholster*, 563 U.S. at 186. Section 2254(e)(2)'s "focus … is not on preserving the opportunity for hearings, but rather on *limiting* the discretion of federal district courts in holding hearings." *Id.* at 185 n.8 (quotations and citation omitted). Together, § 2254(d) and (e)(2) "carr[y] 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." *Id.* at 185 (quotations and alterations omitted).

In light of this unambiguous statutory framework, Respondents' argument (at 42–43) that Arizona's position contravenes AEDPA holds no water. The procedural-default doctrine, and its cause-and-prejudice exception, are not part of AEDPA, and AEDPA's provisions should not be read atextually to accommodate them. Further, excluding (as Respondents would) a large swath of prisoners from the category of those who have "failed to develop" their claims in state court would lead to more, not fewer, federal evidentiary hearings. *See Pinholster*, 563 U.S. at 185 n.8. Conversely, continuing to apply § 2254(e)(2) as it has been applied since *Williams* would further AEDPA's goals of limiting both federal evidentiary hearings and habeas relief.

Equally unpersuasive is Respondents' position (at 42–43) that relaxing § 2254(e)(2) in the *Martinez* context is necessary to guard against extreme malfunctions in the state-court systems. *See Richter*, 562 U.S. at 102–03. This Court "will not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy," *Burt v. Titlow*, 571 U.S. 12, 20 (2013) (quotations omitted), and this Court has never concluded that procedurally defaulting a claim—even a potentially meritorious one—constitutes an extreme malfunction.

In any event, § 2254(e)(2) already contains built-in exceptions designed to capture cases in which extreme malfunctions occur. *See* § 2254(e)(2)(A) & (B) (permitting evidentiary hearings notwithstanding failure to develop claim if claim rests on newly discovered facts or a new, retroactively applicable rule of constitutional law and shows actual innocence). Post-conviction

counsel's ineffectiveness is not an exception, and AEDPA's separate provision barring habeas relief based on that ground signifies that Congress did not view such ineffective assistance as an extreme malfunction. *See* 28 U.S.C. § 2254(i).

Finally, applying § 2254(e)(2) according to its historical meaning does not result in an untenable "catch-22" in which a prisoner will be deprived of judicial review of his ineffective-assistance claims. AEDPA is intended to incentivize prisoners, and their attorneys, to exercise state-court diligence. Aligning § 2254(e)(2)'s "failure-to-develop" inquiry with the cause inquiry, where Congress specifically declined to do so, would incentivize prisoners to take the opposite approach—particularly where *Martinez* is concerned. Conversely, enforcing § 2254(e)(2) as written and as interpreted in *Williams* will further AEDPA's goal of channeling prisoners' claims to the preferred state-court forums. *See Richter*, 562 U.S. at 103. And as stated above, § 2254(e)(2) contains safety valves to allow factual development under extraordinary circumstances.

2. Because AEDPA does not prioritize any particular constitutional rights, this Court should not recognize a Sixth-Amendment-specific exemption to § 2254(e)(2).

AEDPA does not elevate one constitutional right over another or otherwise distinguish between types of constitutional violations. Instead, AEDPA applies a uniform set of rules to severely limit review of *all* purported constitutional violations. *See* 28 U.S.C. §§ 2254(d); 2254(e)(2).

Respondents, however (at 44–47), rely on this Court's discussion in *Martinez* concerning the importance of effective representation to suggest that special rules apply to § 2254(e)(2) when a prisoner has shown cause to excuse a procedural default under *Martinez*. *See Martinez*, 566 U.S. at 12 (observing that right to effective assistance "is a bedrock principle in our justice system" and the "foundation for our adversary system"). This Court was free to, and did in *Martinez*, modify its equitable rules to reflect the right to counsel's importance. But it is quite a different story to judicially amend a statute that specifies no hierarchy of rights and that provides no special treatment for Sixth Amendment claims. *See Ross*, 136 S. Ct. at 1857.

3. Modifying the "failure-to-develop" standard would encourage gamesmanship and impose significant burdens on states.

In *Martinez*, this Court observed that its exception to *Coleman* "ought not to put a significant strain on state resources." 566 U.S. at 15–16. Later, in *Davila*, this Court recognized that the *Martinez* exception was "grounded … in part on the belief that its narrow exception was unlikely to impose significant systemic costs," and it refused a proposed *Martinez* expansion in part based on the expansion's projected consumption of resources and its impact on federalism. 137 S. Ct. at 2068–70.

In the capital-case context (where many battles over *Martinez* are fought), this Court has long recognized the incentive for gamesmanship and bad-faith litigation. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (recognizing incentive of capital

defendants to file frivolous civil challenges to methods of execution); *Rhines v. Weber*, 544 U.S. 269, 278 (2005) (recognizing incentive of capital defendants to delay cases). The *Jones* case provides a concrete example of these tactics: Jones' post-conviction attorney testified to having attended trainings advising counsel to intentionally make mistakes to obtain subsequent reversals. R.T. 11/1/17, at 70–71. The type of gamesmanship Arizona fears is thus substantiated by the *Jones* record.

Moreover, connecting the § 2254(e)(2) inquiry to the cause inquiry, particularly with respect to *Martinez* claims, would create an incentive for forum-shopping. While Respondents deny this motivation (at 49–50), they cannot dispute that the Ninth Circuit's expansive reading of *Martinez* has already converted procedural default from a doctrine designed to protect federalism interests into a tool for prisoners to use to achieve *de novo* review. *See* Pet. Br. 35–37 & n.9. Tying the cause inquiry to § 2254(e)(2) would increase this incentive and place prisoners in a favorable position when they present ineffective-assistance claims for the first time in federal court. After all, this tactic would permit them to take advantage of *Martinez*, to evade the limitations attendant to review of a state-court merits decision, *see* 28 U.S.C. § 2254(d), and to evade § 2254(e)(2)'s strictures.

With respect to the burden on states, *see* Resp. Br. at 47–50, Arizona chronicled in its petition (at 29–30) the number of cases remanded from the Ninth Circuit under *Martinez* for which prisoners sought evidentiary development. Arizona also described in its petition (at 30–31) the issue's ongoing impact on

capital cases on their first review in district court, as well as its impact on other Ninth Circuit jurisdictions. Likewise, the Amici States illustrated the degree of the problem on a nationwide basis, in both their cert-stage (at 17–20) and merits-stage (at 20–27) briefs. And contrary to Respondents' belief, the states endure significant hardship any time they have to respond to a hearing request or address proffered new evidence, regardless whether a hearing is ultimately granted.

4. Arizona's efforts to enforce AEDPA are not "reckless."

Finally, Respondents (at 50–51) proclaim Arizona's position "reckless" and opine that the cases below illustrate the negative impact of applying § 2254(e)(2). In particular, Jones professes to be innocent, and opines that, were it not for the federal evidentiary hearing in this case, his "innocence" would never have been proven. But the evidence the district court cited to grant relief consisted primarily of disputed expert testimony, not affirmative evidence of innocence. JA 155–286. The court's decision to credit Jones' experts over Arizona's, *see id.*, does not translate into a finding of innocence, particularly where the court had already found that materially the same evidence did not show a fundamental miscarriage of justice. JA 27–58.

Further, a prisoner claiming innocence, like Jones, has remedies in state court. Arizona, for example, permits inmates to raise actual-innocence claims at any time, without threat of untimeliness or preclusion.[7] *See* Ariz. R. Crim. P. 32.1(h); Ariz. R.

[7] Jones has not taken advantage of this opportunity in state court.

Crim. P. 32.2(b). The vast majority of states have similar rules allowing prisoners, to varying degrees, to raise actual-innocence claims post-conviction. *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to A Constitutional Right of Actual Innocence: Is There A Need for A State Constitutional Right in New York in the Aftermath of Cpl S 440.10(1)(G-1)?*, 76 Alb. L. Rev. 1453, 1477 (2013) (collecting state statutes). The states therefore largely provide an additional safeguard to identify and redress genuine claims of innocence. And as discussed above, § 2254(e)(2) also contains an exception for prisoners with newly discovered evidence showing their actual innocence.

Arizona's position is even less "reckless" with respect to Ramirez. Ramirez challenges only his death sentence, and he does so on the basis of his counsel's failure to present certain mitigating evidence. A claim like this does not implicate concerns of death-penalty innocence because it does not involve the death-qualifying aggravating factors. *See Sawyer v. Whitley*, 506 U.S. 333, 336 (1992) (to show actual innocence in death-penalty context, prisoner must establish that no reasonable juror would have found him eligible for the death penalty). *Accord* Ariz. R. Crim. P. 32.1(h).

Moreover, Ramirez's state-court record is robust compared to Jones'. *See* JA 454–84. The new federal evidence Ramirez proffered to the district court was minimal—most of the evidence on which he relied was taken from the state-court record and developed at an evidentiary hearing on intellectual disability. *Id.* The district court found this evidence insufficient to warrant relief. *Id.* In remanding for an evidentiary hearing, the Ninth Circuit necessarily

agreed–otherwise, it would have granted relief on the existing record. The court instead opined that Ramirez had not been given sufficient opportunity to prove his claim through additional evidence, and thus awarded him a second bite at the proverbial apple, without even mentioning § 2254(e)(2). JA 521.

Finally, further diminishing any alleged "recklessness" is the fact that truly egregious claims of trial ineffectiveness will often be apparent from the record. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (deficient performance requires a showing that counsel's errors were so severe that counsel did not function as the counsel guaranteed by the Sixth Amendment). For example, if trial counsel failed to object to a defective reasonable-doubt instruction, thereby lowering the State's burden of proof, and all state-court counsel somehow missed it, that error would be apparent from and reviewable on the state-court record without additional factual development. In other words, truly extreme malfunctions will readily present themselves from the record.

II. Section 2254(e)(2) applies to all new evidence, regardless of form.

Respondents next assert (at 51–57) that § 2254(e)(2) does not bar a court from considering evidence developed for cause-and-prejudice purposes in a subsequent merits review.[8] *Holland* quickly

[8] This allegation is directed at the *Jones* case only. However, Respondents misapprehend the sequence of events there. The district court conducted a hearing that addressed both post-conviction counsel's performance and the defaulted claim's merits, and then disposed of the cause issue and the merits in a

disposes of this argument. There, this Court held that § 2254(e)(2)'s restrictions "apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing." 542 U.S. at 653 (citing *Cargle v. Mullin*, 317 F.3d 1196, 1209 (10th Cir. 2003)). That is exactly what a prisoner seeks to accomplish when he or she proffers on merits review a pre-existing hearing record developed in federal court for cause-and-prejudice purposes. The procedure is no different than, for example, offering new affidavits or other documentary evidence in lieu of live testimony.

To hold otherwise would permit prisoners to sidestep § 2254(e)(2)'s provisions by offering evidence through a non-live-hearing format. *See Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir. 2001) ("Regardless of the procedural device … [the prisoner] is asking that a federal court evaluate the merits of factual matters never presented to the state courts."). This, in turn, would defeat § 2254(e)(2)'s very purpose: to channel claims to state court and to limit federal consideration of evidence a state court never had the opportunity to consider. *See Richter*, 562 U.S. at 103.

III. Arizona has not waived its argument in Ramirez's case.

Finally, Respondents argue (at 57–63) that Arizona has waived its § 2254(e)(2) argument in Ramirez's case because it did not object to the district court considering Ramirez's evidentiary proffer to resolve his *Martinez* motion. But the scope of Arizona's argument in Ramirez's case is not

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single ruling. JA 155-286. The court did not incorporate pre-existing evidence into its merits review.

ambiguous. Arizona's objection is not to what the district court did, but to what the Ninth Circuit did. The Ninth Circuit did not disturb the district court's finding that Ramirez's claim failed even considering his evidentiary proffer. Rather, it awarded Ramirez *another* chance to prove his claim, this time through a full-blown evidentiary hearing, without regard to § 2254(e)(2). JA 521. It is this ruling that Arizona challenges. And as Judge Collins observed, Arizona timely objected to it in a petition for rehearing. JA 396 n.4. There was no waiver.

CONCLUSION

This Court should reverse the judgments of the Ninth Circuit.

October 13, 2021

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