

No. 24-255

IN THE
Supreme Court of the United States

DARRYL SCOTT STINSKI,
Petitioner,

v.

SHAWN EMMONS, WARDEN,
Respondent.

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

**BRIEF OF FORMER FEDERAL JUDGES AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae are six former federal judges who have an interest in this Court granting certiorari and resolving the Circuit split implicated in the present case. *Amici* are:

- **Judge Mark Bennett** served on the U.S. District Court for the Northern District of Iowa from 1994 to 2015, including as Chief Judge from 1999 to 2006, and served on the same Court as a Magistrate Judge from 1991 to 1994 and as a Senior Judge from 2015 to 2019.
- **Judge Robert Cindrich** served on the U.S. District Court for the Western District of Pennsylvania from 1994 to 2004.
- **Judge Alex Kozinski** served on the U.S. Court of Appeals for the Ninth Circuit from 1985 to 2017, including as Chief Judge from 2007 to 2014, and on the U.S. Claims Court from 1982 to 1985.
- **Judge Beverly Martin** served on the U.S. Court of Appeals for the Eleventh Circuit from 2010 to 2021 and on the U.S. District Court for

¹ Pursuant to S. Ct. Rule 37, all parties received notice of *Amici*'s intent to file this brief at least 10 days prior to the due date of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the Northern District of Georgia from 2000 to 2010.

- **Judge Stephen Orlofsky** served on the U.S. District Court for the District of New Jersey from 1995 to 2003 and served on the same Court as a Magistrate Judge from 1976 to 1980.
- **Judge T. John Ward** served on the U.S. District Court for the Eastern District of Texas from 1999 to 2011.

Amici collectively devoted over 100 years to serving on the federal bench. As such, *Amici* had and continue to have an interest in maintaining the legitimacy of the federal judiciary. Resolving Circuit splits “furthers the legitimacy of the judiciary and reduces friction flowing from the application of different rules to similarly situated individuals based solely on their geographic location.” *United States v. Thomas*, 939 F.3d 1121, 1131 (10th Cir. 2019). The Circuit split implicated in the present case over the proper interpretation of 28 U.S.C. § 2254 also touches upon an area of heightened concern for federal judges given that “[t]here is no higher duty of a [judge], under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus.” *Harris v. Nelson*, 394 U.S. 286, 290 (1969).

SUMMARY OF ARGUMENT

This case involves what lower courts have called an “important question” that “has potentially life-and-death ramifications for habeas petitioners.” *Cave v. Secretary for Dep’t of Corr.*, 638 F.3d 739, 747 n.6 (11th Cir. 2011). That question is whether 28 U.S.C. § 2254(e)(1) applies in every case presenting a challenge under 28 U.S.C. § 2254(d)(2).

This question has split the Courts of Appeals for over twenty years. Whereas most Courts of Appeals have held that (e)(1) applies in every case presenting a challenge under (d)(2), the Ninth Circuit has held that (e)(1) only applies in cases where the habeas petitioner presents new evidence for the first time in federal court.

This Court has acknowledged the split but has yet to resolve it. *Wood v. Allen*, 558 U.S. 290 (2010). As a result, the split remains and habeas petitioners across the country face different standards based solely on geographic happenstance. A habeas petitioner outside of the Ninth Circuit needs to prove a state court’s factual determinations are incorrect by clear and convincing evidence to obtain relief, *see* 28 U.S.C. § 2254(e)(1), while a habeas petitioner in the Ninth Circuit does not.

This case provides the Court with an opportunity to resolve the Circuit split and end the disparity. For the reasons explained below, the Court should take it.

ARGUMENT

I. THERE IS AN ENTRENCHED AND RECURRING CIRCUIT SPLIT THAT WILL NOT BE RESOLVED WITHOUT THIS COURT'S INTERVENTION.

Section 2254, 28 U.S.C., contains two “competing and/or redundant provisions as to the question of how state findings of fact are to be reviewed by federal courts.” Justin Marceau, *Deference and Doubt: The Interaction of AEDPA Section 2254(d)(2) and (e)(1)*, 82 Tul. L. Rev. 385, 391-92 (2007). The first provision, subsection (d)(2), requires a habeas petitioner to show that a state court’s decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” The second provision, subsection (e)(1), states that “a determination of a factual issue made by a State court shall be presumed to be correct” and the habeas petitioner “shall have the burden of rebutting the presumption ... by clear and convincing evidence.”

The Courts of Appeals have been split on the relationship between these two provisions for over two decades. *Lambert v. Blackwell*, 387 F.3d 210, 236 n.19 (3d Cir. 2004). In 2010, this Court granted certiorari to resolve the split but ultimately decided the case on other grounds. *Wood*, 558 U.S. at 300. In the years since, many litigants have filed petitions for certiorari asking this Court to clarify the relationship

between the two provisions,² but the Court denied certiorari each time. As a result, the Courts of Appeals remain split.

On one side of the split is the Eleventh Circuit, which applies (e)(1) in every case presenting a (d)(2) challenge.³ Under this approach, a federal habeas court begins by applying (e)(1) and presuming that a state court’s factual determinations are correct. *Pye v. Warden*, 50 F.4th 1025, 1035 (11th Cir. 2022). If the habeas petitioner cannot overcome this presumption by clear and convincing evidence, then the petitioner necessarily cannot satisfy (d)(2). *Id.*; *see also Hayes v. Secretary, Florida Dep’t of Corr.*, 10 F.4th 1203, 1225 (11th Cir. 2021) (Newsom, J., concurring) (“A petitioner’s failure to carry his burden under subsection (e)(1) necessarily means that he can’t carry his burden under subsection (d)(2).”).

But if the petitioner does overcome (e)(1)’s presumption, then the court must proceed to apply (d)(2) and determine whether the state court’s factual

² For a few representative examples of these petitions, see *Pye v. Emmons*, No. 23-31; *Werner v. Stephens*, No. 15-986; *Hoffman v. Cain*, No. 14-567; *Howes v. Walker*, No. 11-1011.

³ As Petitioner explains in his petition, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits also apply (e)(1) in some fashion in every case presenting a (d)(2) challenge, *see* Pet. 15-20, although precedent within the Third Circuit is not entirely uniform as noted by the district court in the present case. *See* App. 54a (“[T]he Ninth and Third Circuit Courts of Appeal[s] appear to take a different approach.”). Because this case comes out of the Eleventh Circuit, this brief will focus on that Circuit’s approach.

determinations, which have already been shown to be incorrect, are unreasonable and whether the state court's decision is "based on" them. *Pye*, 50 F.4th at 1035. According to the Eleventh Circuit, "[e]ven if the state court made a clearly erroneous factual determination, that doesn't necessarily mean the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

On the other side of the split is the Ninth Circuit, which has held that (e)(1) does *not* apply to cases involving a challenge under (d)(2) when the challenge is "based entirely on the state record." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). Under this approach, a federal habeas court simply applies (d)(2) and determines whether the state court's factual determinations are unreasonable. *Id.*

A petitioner can demonstrate a state court's factual determinations are unreasonable in a number of ways. "If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an unreasonable determination of the facts." *Id.* at 1001. If the petitioner shows that the state court's factual determinations are unreasonable, then the petitioner is entitled to relief and (e)(1) never comes into play. That provision only applies if the petitioner introduces "extrinsic evidence, *i.e.*, evidence presented for the first time in federal court." *Id.* at 1000.

To illustrate the difference between these two approaches, consider the following hypothetical from a leading law review article on the relationship between (d)(2) and (e)(1):

Jim Doe is convicted of first degree murder ... [T]he conviction hinged on testimony from an expert. ...

After being sentenced to death and having his sentence and conviction affirmed by the state supreme court, Jim learns that the same expert that testified against him has fabricated ... evidence in other capital trials. Seeking to have his conviction overturned on the basis that the evidence supporting his conviction may have been fabricated, Jim files an application for habeas corpus relief in state court.

Recognizing that he has a difficult reelection coming up, and afraid that he will be labeled as soft on crime, the state court judge summarily denies Jim's habeas corpus petition. Indeed, to speed the execution along, the judge does not even hold an evidentiary hearing. But even without the benefit of a hearing, *the judge makes specific findings of fact that the expert ... provided reliable and scientifically sound testimony*. In support of his findings of fact, the judge states on the

record that he reviewed the trial transcript and the related exhibits. Notably, however, the judge admits that he did not read all of the relevant testimony, but just enough to “get a feel,” and, moreover, the judge admits that he was unable to locate all of the relevant exhibits.

Marceau, *supra*, at 391-92 (emphasis added).

Under the Eleventh Circuit’s approach, Jim would *not* be entitled to relief. The federal court would apply (e)(1) and presume that the state court’s determination that the expert provided reliable testimony is correct. Because the state court did not give Jim a chance to present evidence, there is no evidence in the record that the expert’s testimony was *not* reliable—much less clear and convincing evidence. Thus, Jim cannot overcome (e)(1)’s presumption of correctness, which necessarily means he also cannot satisfy (d)(2). *Pye*, 50 F.4th at 1035.

By contrast, Jim *would* be entitled to relief under the Ninth Circuit’s approach. Jim can satisfy (d)(2) by showing that the state court’s factual determination was unreasonable because the court made it “without holding a hearing and giving [Jim] an opportunity to present evidence,” *Taylor*, 366 F.3d at 1001. The fact that Jim cannot show by clear and convincing evidence the factual determination was incorrect is irrelevant because (e)(1) does not apply.

This entrenched Circuit split is now more than twenty years old, and it shows no signs of resolving itself. The Eleventh Circuit expressly rejected the Ninth Circuit’s approach in the present case. App. 19a. And the Ninth Circuit has made clear that it will continue to follow its approach until this Court instructs it to do otherwise. *Kipp v. Davis*, 971 F.3d 939, 953 n.12 (9th Cir. 2020). Thus, absent intervention from this Court, the Circuits will remain in conflict.

“[W]here cases present issues over which the [lower] courts have divided, this Court has a special obligation to intercede and provide some definitive resolution of the issues.” *Metheny v. Hamby*, 488 U.S. 913, 915 (1988) (White, J., dissenting from denial of certiorari). This case presents such an issue. Therefore, the Court has a special obligation to intercede and resolve it.

II. THE SPLIT CAUSES INCONSISTENT TREATMENT OF STATE COURTS AND HABEAS PETITIONERS.

It is important for the Court to resolve the Circuit split described above. One of the two sides of the split must be wrong. If the Eleventh Circuit is wrong, then habeas petitioners are being denied relief to which they are entitled. If the Ninth Circuit is wrong, then state courts are not receiving the deference that Congress intended. Both results are unacceptable.

A. If the Eleventh Circuit is wrong, then habeas petitioners are being denied relief to which they are entitled.

If the Eleventh Circuit’s approach is wrong, then it is imperative that this Court grant certiorari and say so. Otherwise, courts in the Eleventh Circuit will continue to wrongfully deny habeas petitioners in relief.

Because of the Circuit split, habeas petitioners in the Eleventh Circuit must satisfy both (d)(2) and (e)(1) to obtain relief, while identical habeas petitioners in the Ninth Circuit must satisfy only (d)(2). This is an important distinction. Satisfying (d)(2) alone is already quite difficult. Courts have described that provision as “a daunting standard—one that will be satisfied in relatively few cases.” *Taylor*, 366 F.3d at 1000. Adding (e)(1) onto this daunting standard “erect[s] an insurmountable barrier” that precludes “any effective federal review.” *Ayala v. Wong*, 730 F.3d 831, 867 (9th Cir. 2013). That is because, as discussed below, requiring a petitioner to satisfy (e)(1) effectively takes away one of the two methods petitioners can use to satisfy (d)(2).

This Court and lower courts have recognized two different methods habeas petitioners can use to satisfy (d)(2). *See* Brian Means, *Federal Habeas Manual* § 3:84 (collecting cases). First, a habeas petitioner can show that a state court’s factual determinations are *substantively* unreasonable by showing all “reasonable minds” would agree the factual determinations are incorrect. *See Brumfield v.*

Cain, 576 U.S. 305, 314 (2015). Second, a petitioner can show that a state court’s factual determinations are *procedurally* unreasonable by demonstrating any of the following:

- The state court’s factual determinations are a product of a defective fact-finding process. *Lambert*, 387 F.3d at 239; *Taylor*, 366 F.3d at 1001 (“[If] a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an ‘unreasonable determination’ of the facts.”); *Smith v. Aldridge*, 904 F.3d 874, 882 (10th Cir. 2018).
- The state court had before it, yet ignored, highly relevant evidence. *King v. Emmons*, 144 S. Ct. 2501, 2504 (2024) (Jackson, J., dissenting from the denial of certiorari) (“[T]his Court has not hesitated to find [(d)(2)’s] standard satisfied when a state court’s factfinding process disregards information that is highly relevant to a court’s factual determination.”); *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003).
- The state court’s factual determinations are “unsupported by sufficient evidence.” *Taylor*, 366 F.3d at 999.
- The state court “plainly misapprehend[ed] ... the record in making [its] findings, and the misapprehension goes to a material factual issue that is central to petitioner’s claim.” *Id.*

at 1001; *Alexander v. Cockrell*, 294 F.3d 626, 631 (5th Cir. 2002).

- The state court made its factual determinations “under a misapprehension as to the correct legal standard.” *Taylor*, 366 F.3d at 1001. “[W]here the state court’s legal error infects the fact-finding process, the resulting factual determination will be unreasonable.” *Id.*; *Uttecht v. Brown*, 551 U.S. 1, 40 (2007) (Stevens, J., dissenting).

These ways of satisfying (d)(2) by proving a state court’s factual determinations are procedurally unreasonable are effectively unavailable to habeas petitioners in the Eleventh Circuit because such petitioners must also satisfy (e)(1). Although procedural deficiencies can be used to show factual determinations are unreasonable, they cannot be used to show that factual determinations are incorrect. “[T]o presume facts correct means a court cannot allow a habeas applicant to evade § 2254(e)(1) by attacking the process employed by the state factfinder rather than the actual factfindings.” *Miller-El*, 537 U.S. at 358 (Thomas, J., dissenting). Thus, even if petitioners in the Eleventh Circuit could satisfy (d)(2) by showing the state court’s factual determinations are procedurally unreasonable, it ultimately does not matter unless they can also show that the factual determinations are substantively incorrect by clear and convincing evidence.

To illustrate this point, take the hypothetical involving Jim Doe discussed above. *Supra* 7-8. In the

Ninth Circuit, Jim would be able to obtain relief because he can satisfy (d)(2) by showing that the state court's determination that the expert provided reliable testimony was procedurally unreasonable for several reasons, including that the state court made its determination "without holding a hearing and giving [Jim] an opportunity to present evidence." *Taylor*, 366 F.3d at 1001. Whether Jim can show by clear and convincing evidence the factual determination was actually incorrect is immaterial because (e)(1) does not apply.

By contrast, Jim would *not* be able to obtain relief in the Eleventh Circuit. The Eleventh Circuit would apply (e)(1) and require him to prove by clear and convincing evidence that the state court's factual determination was incorrect. Because the state court did not hold an evidentiary hearing, there is no evidence in the record whatsoever—much less clear and convincing evidence—showing that the expert's testimony was not reliable. Thus, Jim cannot satisfy (e)(1). As a result, he necessarily also cannot satisfy (d)(2) even though he can show the state court's factual determinations are unreasonable.

There are many habeas petitioners like Jim who can show that a state court's factual determinations are unreasonable but cannot show that they are incorrect by clear and convincing evidence.⁴ Such petitioners can obtain relief under the

⁴ See, e.g., *Hurles v. Ryan*, 752 F.3d 768, 791 (9th Cir. 2014); *Milke v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013); *Williams v. Woodford*, 859 F. Supp. 2d 1154, 1159 (E.D. Cal. 2012).

Ninth Circuit's approach but cannot obtain relief under the Eleventh Circuit's approach. Thus, if the Eleventh Circuit's approach is wrong, then these petitioners are being denied relief to which they are entitled.

B. If the Ninth Circuit is wrong, then state courts are not receiving proper deference.

If the Ninth Circuit is wrong, then it is also imperative that this Court grant certiorari and say so. Otherwise, the Ninth Circuit will continue to ignore (e)(1) in cases where it ostensibly should be applied, and state courts will not receive the level of deference that Congress intended.

Subsection (e)(1) “reflects Congress’s respect for principles of federalism, recognizing that a decision to set aside state court factual findings intrudes on the state’s interest in administering its criminal law.” *Sharpe v. Bell*, 593 F.3d 372, 379 (4th Cir. 2010). The provision also “reflects Congress’s view that there is no reason for a do-over in federal court when it comes to facts already resolved by state tribunals.” *Id.*; see also *Miller-El*, 537 U.S. at 358 (Thomas, J., dissenting).

Presently, the Ninth Circuit is not applying (e)(1) in certain cases presenting a (d)(2) challenge. If the Ninth Circuit's approach is wrong, then the factual determinations of state courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington are not receiving the deference Congress intended. The Ninth Circuit is

effectively allowing “do-overs in federal court” and intruding on the state’s interest in administering its criminal law against Congress’s wishes.

III. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT BY ADOPTING THE NINTH CIRCUIT’S APPROACH.

The Court should resolve the split by adopting the Ninth Circuit’s approach. As explained more fully below, the Eleventh Circuit’s approach renders (d)(2) superfluous. Conversely, the Ninth Circuit’s approach gives both (d)(2) and (e)(1) a role to play in a coherent and workable framework.

A. The Eleventh Circuit’s approach conflicts with the text of Section 2254 and makes (d)(2) superfluous.

Under the Eleventh Circuit’s approach, a petitioner satisfying (e)(1) is a necessary prerequisite to the petitioner satisfying (d)(2). If a habeas petitioner cannot show that a state court’s factual determinations are incorrect by clear and convincing evidence, then the petitioner necessarily cannot show that those factual determinations are unreasonable. *See Pye*, 50 F.4th at 1035; *Hayes*, 10 F.4th at 1225 (Newsom, J., concurring). This approach is flawed for at least three reasons.

First, the approach makes (d)(2) superfluous. Although the Eleventh Circuit believes a petitioner can satisfy (e)(1) without satisfying (d)(2), *see Pye*, 50 F.4th at 1035, there does not appear to be a petitioner in any Circuit that has ever done so. Moreover, this Court has recognized that (e)(1) is “the arguably more

deferential standard.” *Wood*, 558 U.S. at 301. Thus, there is no scenario where a federal court would determine that a petitioner has satisfied the more deferential standard of (e)(1) but not (d)(2). Factual determinations that have been shown to be incorrect by clear and convincing evidence can never be reasonable because “a determination of fact that lies against the clear weight of the evidence is, by definition, ... unreasonable.” *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008).

Consequently, under the Eleventh Circuit’s approach, subsection (d)(2) is never determinative. The only question a federal court must ask is whether (e)(1) has been satisfied. The answer to this question will tell the federal court whether (d)(2) has also been satisfied.

Second, the Eleventh Circuit’s approach is inconsistent with the structure of § 2254. Subsections (d)(2) and (e)(1) are contained in separate subsections of that statute. “[I]t would be illogical for Congress to divide the review procedure for a single review between two separate subsections of the statute.” Marceau, *supra*, at 433. Nevertheless, the Eleventh Circuit’s approach takes (d)(2) and (e)(1) and combines them into a single review procedure.

Third, the Eleventh Circuit’s approach fails to recognize that (d)(2) and (e)(1) use different language. Whereas subsection (d)(2) uses the word “unreasonable,” subsection (e)(1) uses the word “correct.” As explained earlier in this brief, *supra* 10-12, there are many ways to show that a factual

determination is unreasonable without showing that the factual determination is incorrect. By making satisfaction of (e)(1) a necessary prerequisite to satisfying (d)(2), the Eleventh Circuit's approach effectively rewrites the text of (d)(2) from stating "a decision based on an unreasonable determinations of the facts" to stating "a decision based on [a very incorrect] determination of the facts."

B. The Ninth Circuit's approach is supported by the text of Section 2254 and makes both (d)(2) and (e)(1) effective.

In contrast to the Eleventh Circuit's approach, the Ninth Circuit's approach reconciles subsections (d)(2) and (e)(1) in a way that gives each a role to play in a coherent and workable framework.

Under the Ninth Circuit's approach, subsections (d)(2) and (e)(1) apply in two different contexts. The former applies in cases where a petitioner challenges a state court's factual determinations "based entirely on the state record." *Taylor*, 366 F.3d at 999. The latter applies in cases where the petitioner challenges a state court's factual determinations based on "evidence presented for the first time in federal court." *Id.* at 1000.

This approach is supported by the texts of (d)(2) and (e)(1) as well as the text of another subsection of § 2254, the pre-amendment version of § 2254, and this Court's caselaw.

1. Three parts of (d)(2)'s text support the Ninth Circuit's position that (d)(2) applies in cases where the petitioner challenges the state court's factual determinations based entirely on the state record.

First, the text of (d)(2) expressly limits a federal court to considering only "the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Second, the text of (d)(2) refers, in the past tense, to a state-court adjudication that "resulted" in a decision that "was based" on an unreasonable determination of the facts. "This backward-looking language requires an examination of the state-court decision at the time it was made." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). "It follows that the record under review is limited to the record in existence at that same time, *i.e.*, the record before the state court." *Id.*

Third, the text of (d)(2) requires a federal court to determine whether a state court's factual determinations are "unreasonable." The reasonableness of a state court's decision is dependent on the evidence that was before the state court when it made its decision. Any evidence that was not before the state court is irrelevant for purposes determining whether the state court's decision was reasonable. *Id.* at 183 n.3.

2. Similarly, five parts of the text of (e)(1) support the Ninth Circuit's position that (e)(1) applies in cases where the petitioner challenges the state

court's factual determinations based on evidence presented for the first time in federal court.

First, the text of (e)(1) is located in the same subsection as (e)(2). Subsection (e)(2) is the only provision in § 2254 that expressly relates to evidentiary hearings. 28 U.S.C. § 2254(e)(2). “[T]he placement of (e)(1) within the same subsection of the statute as the provision dealing with evidentiary hearings, ... strongly suggest that (e)(1) anticipates the use of extrinsic evidence.” Marceau, *supra*, at 394 n.37.

Second, the text of (e)(1) places an evidentiary “burden on the petitioner to produce supplemental evidence of a ‘clear and convincing’ character.” *Breighner v. Chesney*, 301 F. Supp. 2d 354, 365 (M.D. Pa. 2004). And the text of (e)(1) does not say that a petitioner is limited to using only the evidence presented in the state court proceeding to carry this burden. The absence of such a limitation shows that (e)(2) contemplates a habeas petitioner producing supplemental evidence to carry his burden under (e)(1).

Third, whereas the text of (d)(2) is concerned with the *reasonableness* of a state court's factual determinations, the text of (e)(1) is concerned with *correctness* of those determinations. Although it is not possible to use evidence that was not before the state court to prove that the state court's factual determinations are unreasonable, *see Pinholster*, 563 U.S. at 183, it is possible to use such evidence to prove that the factual determinations are incorrect.

Fourth, whereas the text of (d)(2) contains a phrase that limits a federal court’s review to “the evidence presented in the State court proceeding,” the text of (e)(1) does not contain such a phrase. “The inclusion of this phrase in § 2254(d)(2)—coupled with its omission from [§ 2254(e)(1)]—provides strong reason to think that Congress did not intend for the [§ 2254(e)(1)] analysis to be limited categorically to the evidence presented in the State court proceeding.” *Pinholster*, 563 U.S. at 212 (Sotomayor, J., dissenting). Rather, Congress intended for a federal court to be able to consider the supplemental evidence that (e)(1) contemplates a petitioner will produce to satisfy his evidentiary burden.

Finally, whereas the text of (d)(2) uses backward-looking language, the text of (e)(1) uses forward-looking language. The text of (e)(1) refers to a state court’s factual determinations that “shall be” presumed correct and a habeas petitioner that “shall have” the burden of rebutting this presumption. This forward-looking language requires an examination of the state-court factual determinations at the time that the petitioner is attempting to rebut those determinations. It follows that the record under review is open to the record in existence at that same time, which would include any new evidence that the petitioner may have presented for the first time in federal court.

3. The Ninth Circuit’s approach also finds support in the text of § 2254(f), the pre-amendment version of § 2254, and this Court’s caselaw.

a. The Ninth Circuit’s approach finds support in § 2254(f). That provision states that if a petitioner “challenges the sufficiency of the evidence adduced in [the] State court proceeding to support the State court’s determination of a factual issue,” then the petitioner (or the State if the petitioner is unable) “shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination.” 28 U.S.C. § 2254(f). If the petitioner or the State “cannot provide such pertinent part of the record, *then the court shall determine ... what weight shall be given to the State court’s factual determination.*” *Id.* (emphasis added).

The Ninth Circuit’s approach gives effect to the emphasized language. Under the Ninth Circuit’s approach, subsection (e)(1) simply does not apply and so a federal court is not required to presume the state court’s factual determinations are correct. Thus, if both the petitioner and the State cannot provide the pertinent part of the record, then the federal court is free to “determine ... what weight shall be given to the State court’s factual determinations” as subsection (f) contemplates.

By contrast, the Eleventh Circuit’s approach makes the emphasized language inoperative. Under the Eleventh Circuit’s approach, subsection (e)(1) applies in every case and therefore the federal court is required to presume that the state court’s factual determinations are correct until the petitioner provides clear and convincing evidence to the contrary. Thus, a federal court is not able to “determine ... what weight shall be given to the State

court's factual determinations" as subsection (f) contemplates.

b. The Ninth Circuit's approach also finds support in the pre-amendment version of § 2254. As succinctly explained by one lower court:

[T]he previous version of the statute encompassed two parts. The first part permitted the court to overturn a factual finding if it was not "fairly supported" by the record of the state court proceedings. Like subsection (d)(2) of the current statute, this provision did not speak of a "clear and convincing" burden on the petitioner ... In contrast, the second part ... of the pre-amendment statute, like current subsection (e)(1), addressed primarily new evidentiary hearings and placed an affirmative burden on the petitioner to produce "convincing" evidence in support of his or her position. The close similarity between the previous version and the current statute suggests that no change in the allocation of burdens was intended. Thus, as in the previous version, the requirement to produce "clear and convincing evidence" should not apply to claims brought under subsection (d)(2).

Breighner, 301 F. Supp. 2d at 366-67 (some internal quotations and citations omitted).

c. Finally, the Ninth Circuit’s approach also finds support in this Court’s caselaw. In *Miller-El*, this Court explained that it is improper for courts “to merge the independent requirements of §§ 2254(d)(2) and (e)(1).” *Miller-El*, 537 U.S. at 341.

The Ninth Circuit’s approach adheres to this command by keeping the requirements of (d)(2) and (e)(1) independent. Under the Ninth Circuit’s approach, a petitioner being able to satisfy one of these provisions does not depend on the petitioner being able to satisfy the other.

In contrast, under the Eleventh Circuit’s approach, a habeas petitioner’s “failure to carry his burden under subsection (e)(1) necessarily means that he can’t carry his burden under subsection (d)(2).” *Hayes*, 10 F.4th at 1225 (Newsom, J., concurring). Thus, the requirements of (d)(2) and (e)(1) are not independent. Rather, satisfaction of (d)(2) is dependent on satisfaction of (e)(1).

CONCLUSION

This case offers the Court an opportunity to resolve uncertainty over the deference owed to state courts in habeas proceedings. The Court deemed the issue worthy of review fifteen years ago in *Wood v. Allen*, and it is no less worthy now. Thus, for the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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