No. 16-6795

In the Supreme Court of the United States

CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS,
Respondent.

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

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, CONNECTICUT, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NEVADA, SOUTH CAROLINA, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The *amici* States have a compelling interest in the administration of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254, *et seq*. ("AEDPA"), which is designed in part to reduce the lengthy federal delay that too often occurs in capital cases.

The current case arises from Petitioner's attempt to raise a procedurally defaulted federal habeas claim based on ineffective assistance of trial counsel. Petitioner attempts to raise this claim pursuant to *Martinez v. Ryan*, 566 U.S. 1, 13-16 (2012), which excuses a habeas petitioner's procedural default of a "substantial" claim of ineffective assistance of trial counsel if the petitioner can demonstrate that state collateral- review counsel was ineffective for failing to raise that claim.

In particular, Petitioner requested funding pursuant to 18 U.S.C. § 3599(f) to investigate mitigation evidence that trial counsel elected not to pursue. The Fifth Circuit found that Petitioner's "gateway claim" of ineffective assistance by collateral-review counsel, as well as his underlying claim for ineffective assistance by trial counsel, were not meritorious, and denied his funding request on that basis.

Although the Fifth Circuit correctly assessed the merits, the court should have considered Petitioner's request in light of AEDPA and denied it for a much simpler reason: 28 U.S.C. § 2254(e)(2) bars the introduction of the evidence Petitioner sought to develop. Section 2254(e)(2) prohibits federal courts from considering evidence not previously presented in

state court. *See Cullen v. Pinholster*, 563 U.S. 170, 186 (2011). Because funding is available only for expenses "*reasonably necessary* for the representation of the defendant," 18 U.S.C. § 3599(f) (emphasis added), it is never available for new evidence that is precluded by Section 2254(e)(2). The cost of developing inadmissible evidence to support a defaulted claim cannot be "reasonably necessary."

While the logic of this argument is straightforward, its importance for the States lies in recognizing that Section 2254(e)(2) applies when a petitioner relies on *Martinez* to excuse the procedural default of claims alleging ineffective assistance at trial. The State of Arizona, for example, has faced 17 *Martinez* remands from the Ninth Circuit to reconsider ineffective-assistance claims previously dismissed on procedural grounds. In each of these cases, Section 2254(e)(2) should be a straightforward tool for limiting new evidence and avoiding a fact-bound struggle with the merits of a petitioner's underlying claim. But it is not. The Ninth Circuit has held that Section 2254(e)(2) does not apply to hearings inquiring into post-conviction counsel's ineffectiveness under *Martinez*, *Dickens v. Ryan*, 740 F.3d 1302, 1321–22 (9th Cir. 2014) (en banc), and at least two district courts have concluded that, if *Martinez* applies, Section 2254(e)(2) does not bar considering new evidence to resolve the ineffectiveness claim on the merits, *Jones v. Ryan*, No. 07-99000, 2017 WL 264500 (D. Ariz. Jan. 20, 2017); *Gregg v. Raemisch*, No. 16-cv-00173-CMA (D. Colo. Dec. 19, 2016).

Allowing the introduction of new evidence to assess an ineffectiveness claim brought under *Martinez*, along with possible funding to develop that evidence, will

frustrate the States' interest in finality and victims' interest in the just administration of the law, especially in light of the already inordinate delay in capital cases. Moreover, allowing the admission of new evidence to support these claims will increase the cost of litigating capital cases, putting additional strain on limited state resources.

This case provides an ideal vehicle for applying Section 2254(e)(2)'s new-evidence bar to cases governed by *Martinez*. In the process, this Court will also prohibit a misuse of Section 3599(f)'s funding provision.[1]

SUMMARY OF ARGUMENT

AEDPA provides that if a habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings, the [district court] shall not hold an evidentiary hearing on the claim." 28 U.S.C. § 2254(e)(2). Most importantly for Petitioner's case, Section 2254(e)(2) also prohibits the introduction of new evidence to resolve such claims. *See Pinholster*, 563 U.S. at 186. Thus, under AEDPA, questions regarding petitioners' ability to present new evidence—whether connected to guilt or sentencing—must first contend with Section 2254(e)(2).

Nothing in *Martinez* exempts petitioners from Section 2254(e)(2). Nor does that case establish a constitutional right to effective counsel in state collateral-review proceedings. As a result, a federal

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[1] Although this Brief focuses on 28 U.S.C. § 2254(e)(2), the *amici* States also support the jurisdictional argument presented in Part I of Respondent's merits brief.

court cannot consider new evidence regarding the failure of state collateral-review counsel to develop a petitioner's claim in state court unless the petitioner meets the exceptions contained in the provision itself. 28 U.S.C. § 2254(e)(2)(A),(B).

Here, although the Fifth Circuit correctly denied Petitioner's funding request under 18 U.S.C. § 3599(f) because his claims lacked merit, it should have first addressed the limitations imposed in 28 U.S.C. § 2254(e)(2). If evidence complies with the latter provision, meaning that it was presented in state court, then additional funding is likely unnecessary under Section 3599(f). Conversely, it cannot be "reasonably necessary" to expend resources developing evidence that was not presented in state court and therefore cannot be considered under AEDPA. Because the interaction between these two statutory provisions obviates any need to consider the merits of a petitioner's claims, the Fifth Circuit should have denied Petitioner's funding request on that basis, rather than delving into the merits. If this Court decides that the Fifth Circuit's denial of funding is an appealable decision, the Court should affirm that decision based upon Section 2254(e)(2).

The practical importance of applying Section 2254(e)(2) when a petitioner invokes *Martinez* to excuse a defaulted ineffective-assistance-of-trial-counsel claim extends beyond the question of funding. In Arizona, for example, 17 capital cases are pending in district court on remand from the Ninth Circuit to reconsider procedurally defaulted ineffectiveness claims in light of *Martinez*. Hearings have been ordered in two of these cases and requested in nearly all of the others. The

delay in adjudicating capital cases in the federal system is already inordinate. Allowing the admission of new evidence in these cases will not only cause additional delay by lengthening the briefing period, but it will also unduly lengthen and complicate the hearing process in cases for which a hearing is granted.

ARGUMENT

Petitioner filed a petition for writ of habeas corpus asserting that his trial counsel was ineffective under *Wiggins v. Smith*, 539 U.S. 510 (2003), for failing to investigate and present certain mitigating evidence. Because he did not raise this claim in state court, he is attempting to rely upon the equitable exception to the procedural default doctrine created by *Martinez* and expanded in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

In furtherance of his claim, Petitioner sought funding for an investigation under 18 U.S.C. § 3599(f). Section 3599(f) allows the court to provide funding "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence . . . ." *Id.*

The Fifth Circuit concluded that Petitioner's *Martinez* gateway claim (ineffective assistance of state collateral-review counsel), as well as his underlying *Wiggins* claim, were not meritorious. The court denied his funding request on that basis. In doing so, the Fifth Circuit ignored AEDPA and made the issue more complicated than it needed to be. Instead, the Fifth Circuit should have applied the limitation on evidentiary development in 28 U.S.C. § 2254(e)(2). This oversight is significant because the latter

provision averts the need to consider a claim's merits. Instead, it provides a clear rule that avoids lengthy dispute and inevitable appeal.

One of AEDPA's core purposes is to avoid delays in capital cases. Applying Section 2254(e)(2)'s ban on new evidence to claims invoking *Martinez* is consistent with that purpose and will save the States significant resources in fighting over the merits of every gateway claim for which a petitioner seeks investigative funding.

A. If the Fifth Circuit's Denial of Funding Is an Appealable Decision, This Court Should Affirm Based on 28 U.S.C. § 2254(e)(2).

AEDPA limits a petitioner's ability to obtain an evidentiary hearing in federal court on claims that were not raised in state court. If a habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings the [district court] shall not hold an evidentiary hearing on the claim." 28 U.S.C. § 2254(e)(2). The effect of this rule is to "restrict[] 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; *see also Holland v. Jackson*, 542 U.S. 649, 653 (2004).

And the "restrict[ion]" is sweeping. AEDPA provides just two exceptions to the rule. The first is for claims that rely on "a new rule of constitutional law made retroactive to cases on collateral review, that was previously unavailable." 28 U.S.C. § 2254(e)(2)(A)(i). The second is for claims based on "a factual predicate that could not have been previously discovered through

the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). For either exception, "the facts underlying the claim" must be so compelling as to "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Neither of these exceptions applies here. Moreover, their express enumeration in the statute, preceded by the requirement that the district court "shall not" hold an evidentiary hearing "unless" one of the exceptions applies, militates against judicial development of new exceptions. *See, e.g., POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) (applying *expressio unius* canon).

Absent an exception, Section 2254(e)(2) holds petitioners responsible for the tactical decisions of their trial counsel. In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court interpreted the phrase "failed to develop" in Section 2254(e)(2) as imposing a duty of diligence on the petitioner: "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id*. at 435. Significant for the present case, *Williams* made no distinction between a petitioner's lack of diligence and that of his state collateral-review counsel. A claim is barred under Section 2254(e)(2) if courts find "a lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Id*. at 432 (emphasis added); *see also Holland*, 542 U.S. at 653 ("Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied.").

Martinez does not overturn, or even conflict with, precedent faithfully applying AEDPA's ban on new evidence. *Martinez* contains no exception to Section 2254(e)(2), nor did it establish a constitutional right to effective counsel in state collateral-review proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991). Thus, under AEDPA, if a post-conviction attorney fails to develop a petitioner's claim of ineffective state-court trial counsel, a federal court cannot "consider," *Pinholster*, 563 U.S. at 186, new evidence regarding that claim unless the petitioner qualifies for one of the statutory exceptions.

This bar on "consider[ing] new evidence," *id.*, must necessarily influence a court's approach to funding requests under 18 U.S.C. § 3599(f). If a petitioner is barred from presenting evidence in federal habeas proceedings, then the development of that evidence cannot be "reasonably necessary" for his representation. 18 U.S.C. § 3599(f). Moreover, AEDPA was already in place when Congress enacted the funding provision. *See* Pub. L. 109-177, § 222(a) (Mar. 6, 2006). This Court "assume[s] that our elected representatives . . . know the law" and intend for subsequent enactments to operate within the framework of existing law. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 697-98 (1979). The interaction between Sections 2254(e)(2) and 3599(f) should be the end of requests like the one at issue in this appeal.

The Fifth Circuit's alternative approach, with its focus on the merits of the underlying *Wiggins* claim, needlessly prolongs the issue and invites further appeals to this Court. Indeed, if this Court were to affirm the Fifth Circuit's merits-based approach, it

would signal that Section 2254(e)(2) is inapplicable to claims of ineffective assistance brought under *Martinez*. As discussed below, that implication would devour state resources and further prolong capital litigation in contravention of AEDPA's stated purpose.

If this Court finds that a denial of funding under 18 U.S.C. § 3599(f) is an appealable decision, it should affirm based upon AEDPA alone rather than upon the Fifth Circuit's merits-based approach.

B. The Dignity and Finality of State Criminal Proceedings Demands that *Martinez* Not Become a Trap Door for Escaping AEDPA's Ban on New Evidence.

Clarifying that *Martinez* does not exempt a procedurally defaulted ineffective-assistance claim from Section 2254(e)(2) serves the goals of federalism and respect for state judiciaries. States have a "weighty interest[] in ensuring the finality of [their] convictions and sentences." *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). As this Court affirmed just last Term, federal habeas corpus jurisprudence raises special concerns regarding the sanctity of state-court proceedings:

> Federal habeas review of state convictions entails significant costs, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority. It frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. It degrades the prominence of the trial, and it disturbs the State's significant interest in repose for concluded litigation [and]

> denies society the right to punish some admitted offenders.

Davila v. Davis, 137 S. Ct. 2058, 2070 (2017) (internal citations and quotation marks omitted).

Since this Court decided *Martinez*, the question whether a habeas petitioner's state collateral-review counsel was ineffective under *Strickland v. Washington*, 466 U.S. 688 (1984)—in order to excuse the procedural default of a claim of ineffective assistance at trial—has become a central battleground in habeas corpus litigation. At the time of that decision, it was unclear what effect *Martinez* would have on the finality of state convictions. The dissenting justices predicted that "in *all* capital cases from this date on," persons facing capital sentences would raise ineffective-assistance claims, causing "the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system." *Martinez*, 566 U.S. at 23 (Scalia, J., dissenting).

So far, that prediction appears regrettably accurate. Amicus State of Arizona has seen 17 capital cases remanded by the Ninth Circuit pursuant to *Martinez*. Almost all of them involve decades-old convictions for homicides committed even longer ago. *See Detrich v. Ryan*, No. 08–99001 (Conviction Date: 11/02/90); *Doerr v. Ryan*, No. 09–99026 (Conviction Date: 04/15/96); *Gallegos v. Ryan*, No. 08–99029 (Conviction Date: 03/14/91); *Greene v. Ryan*, No. 10–99008 (Conviction Date: 03/15/96); *Hooper v. Ryan*, No. 08–99024 (Conviction Date: 12/24/82); *Jones (Danny) v. Ryan*, No. 07–99000 (Conviction Date: 01/11/07); *Jones (Barry) v.*

Ryan, No. 08–99033 (Conviction Date: 04/14/95); *Kayer v. Schriro*, No. 09–99027 (Conviction Date: 03/26/97); *Lee (Chad) v. Schriro*, No. 09–99002 (Conviction Dates: 03/24/94, 08/29/94); *Lee (Darrel) v. Ryan*, No. 10–99022 (Conviction Date: 11/17/92); *Martinez v. Ryan*, No. 08–99009 (Conviction Date: 09/26/97); *Reinhardt v. Ryan*, No. 10–99000 (Conviction Date: 02/22/96); *Salazar v. Ryan*, No. 08–99023 (Conviction Date: 12/14/87); *Schackart v. Ryan*, No. 09–99009 (Conviction Date: 03/16/85); *Smith v. Ryan*, No. 10–99002); *Spears v. Ryan*, No. 09–99025 (Conviction Date: 12/09/92); and *Walden v. Ryan*, No. 08–99012 (Conviction Date: 07/31/92).

Hearings are pending in two of these cases. A third case was also awaiting hearing, but, as if to illustrate the radical delay now built into capital litigation, the petitioner died before his *Martinez* hearing could occur. *Lopez v. Ryan*, No. 09–00928. His crime was committed in 1989.

Making matters even worse, lower courts have held that Section 2254(e)(2) *does not* bar new evidence, either to determine whether cause exists under *Martinez* or to resolve the merits of the defaulted trial-ineffectiveness claim. The District of Colorado, for example, recently held that "an applicant making a *Martinez* argument is not asserting a 'claim' for relief" and therefore need not comply with Section 2254(e)(2). *Gregg v. Raemisch*, No. 16-cv-00173-CMA, slip op. at 43-44 (D. Colo. Dec. 19, 2016). The District of Arizona similarly reasoned that "a petitioner who has shown 'cause' to excuse the failure to bring a claim in state court . . . has also by definition shown 'cause' to excuse the failure to develop that same claim within the

meaning of § 2254(e)(2)." *Jones*, 2017 WL 264500, at *19 (D. Ariz. Jan. 20, 2017).

Likewise, the Ninth Circuit has held that, where *Martinez* is involved, Section 2254(e)(2) does not limit the introduction of new evidence to resolve the question of post-conviction counsel's ineffectiveness (which necessarily involves consideration of the underlying trial-ineffectiveness claim) as a basis for finding cause to set aside a procedural default. *Dickens v. Ryan*, 740 F.3d 1302, 1321–22 (9th Cir. 2014) (en banc); *see also Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) (plurality). The *Dickens* court reasoned that because the question whether cause exists is an equitable inquiry, it therefore lies outside Section 2254(e)(2)'s ambit.

The reasoning in *Gregg*, *Jones, Dickens*, and *Detrich* is contrary to this Court's jurisprudence. *Jones*, for example, contradicts this Court's holding in *Williams* that, unlike AEDPA's exhaustion requirement in 28 U.S.C. § 2254(b)(1)(A), a petitioner cannot excuse his failure to develop claims in state court—*i.e.*, the requirement imposed by Section 2254(e)(2)—by proving cause and prejudice or a miscarriage of justice. *Williams*, 529 U.S. at 433. *Williams* explained that "in requiring that prisoners who have not been diligent satisfy § 2254(e)(2)'s provisions *rather than show cause and prejudice*, and in eliminating a freestanding "miscarriage of justice" exception, Congress raised the bar *Keeney* [*v. Tamayo-Reyes*, 504 U.S. 1 (1992)] imposed on prisoners who were not diligent in state-court proceedings." *Id.* (emphasis added). Thus, even accepting the *Jones* court's reasoning that a *Martinez*

petitioner has shown cause, that assumption is not enough to bypass Section 2254(e)(2).

The *Dickens* rationale fares no better. It would create an equitable exception capable of swallowing an entire statute. This proposal upsets not only the relationship between the state and federal governments but the constitutional balance between branches of the federal government as well. *See City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 315 (1981) (this Court cannot "'judicially decree[] what accords with 'common sense and the public weal' when Congress has addressed the problem") (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978)). Crafting an equitable exception that drains Section 2254(e)(2) of its force in the context of *Martinez* is a judicial usurpation of Congress's authority to make laws. It also runs contrary to the Court's longstanding principle that "Federal 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." *Williams*, 529 U.S. at 437.

The effect of *Martinez* is already onerous, and a failure to apply Section 2254(e)(2) will only compound the problem. In Arizona's experience, 17 *Martinez* remands have produced more than 60 claims for resolution by the district court. The delay since conviction in these cases ranges from 19 years to a staggering 34 years. If Section 2254(e)(2) does not apply and petitioners are allowed to develop and introduce new evidence in these cases, the delays will only increase and more petitioners will, as a practical matter, convert their capital sentences into lifelong incarcerations. Moreover, unless a capital habeas

petitioner is certain that he has a winning claim, the potential for a new phase of factual development is strong incentive to hold some claims in reserve for the sole purpose of delay.

Evidentiary proceedings in capital cases consume a tremendous amount of state resources, including expert-witness fees that far exceed the burden this Court envisioned in *Martinez* itself. That burden is front and center in the present case, which arises in connection with the funding provision in 18 U.S.C. § 3599(f). The resources currently consumed in responding to claims brought under *Martinez* will pale in comparison to the burden States will face if petitioners are eligible for government funding to develop their long-defaulted theories of ineffectiveness.

This Court should affirm AEDPA's applicability to *Martinez* gateway claims and head off the developing body of law that would reach the opposite conclusion at the cost of considerable delay.

CONCLUSION

This Court should affirm the Fifth Circuit's denial of Petitioner's funding request based upon 28 U.S.C. § 2254(e)(2)'s bar to the introduction of new evidence.

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