

No. 14-567

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IN THE  
**Supreme Court of the United States**

JESSIE HOFFMAN,  
*Petitioner,*  
v.

BURL CAIN, WARDEN, LOUISIANA  
STATE PENITENTIARY,  
*Respondent.*

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

**BRIEF FOR AMICUS CURIAE  
THE CONSTITUTION PROJECT  
IN SUPPORT OF PETITIONER**

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**BRIEF FOR AMICUS CURIAE  
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**INTEREST OF AMICI CURIAE**

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education.<sup>1</sup> The Project's essential mission is to promote constitutional dialogue. It creates biparti-

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties were timely notified of amicus' intent to file this brief more than ten days in advance and have consented to its filing.

san committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government.

The Constitution Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. In 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Initiative does not take a position on the death penalty itself, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness.

In 2014, the Committee issued a report making recommendations seeking to guarantee that meaningful post-conviction review is available, particularly through the federal courts, to correct constitutional errors. *See* The Constitution Project, *Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment* ("Irreversible Error") at 23-34 (2014) ([www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-](http://www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-)

Error\_FINAL.pdf). Amicus has filed this brief out of concern that the Fifth Circuit’s decision in this case, if allowed to stand, would effectively eliminate meaningful review of state court factual determinations, by subjecting them to an extraordinary and unwarranted level of deference.

### **SUMMARY OF THE ARGUMENT**

This Court has recognized that deference to state court decisions under the Antiterrorism and Effective Death Penalty Act (“AEDPA”) must not result in abdication of meaningful federal review. While AEDPA confirms that state courts are the principal forum for adjudicating constitutional challenges to state convictions, meaningful federal review remains essential to ensuring thorough and fair adjudication of federal constitutional rights. Retaining meaningful federal review enhances, rather than undercuts, AEDPA’s goal. The prospect of such review helps ensure that state courts fairly and thoroughly adjudicate constitutional issues in the first place. Given the significant potential for unjust punishments, including the ultimate punishment of death, courts should not interpret AEDPA so as to elevate the level of deference beyond what the statute expressly provides, and turn deference into judicial abdication.

The Fifth Circuit’s decision in this case does just that. The court incorrectly interpreted 28 U.S.C. §§ 2254(d)(2) and (e)(1) by holding that the “presumption of correctness” in subsection (e)(1) applies to a state court’s factual findings, even where a federal court’s review is based solely on the state court record. This erroneous interpretation perpetuates a split among the circuits as to the relationship of these provisions and improperly grants state court

decisions a nearly insurmountable level of deference. If not reversed, this decision will preclude meaningful federal review of state court factual determinations, and effectively render Section 2254(d)(2) a dead letter in the vast majority of cases.

The Fifth Circuit's interpretation incorrectly imports the burden of proof contained in Section 2254(e)(1), which was intended to apply to the introduction of extrinsic evidence, into review conducted under Section 2254(d)(2), which by its terms excludes new evidence from its scope. When read in the context of its surrounding provisions, Section 2254(e)(1) should apply only when new evidence has been introduced into federal court through an evidentiary hearing. First, the companion provision to Section 2254(e)(1)—Section 2254(e)(2)—explicitly addresses the availability of evidentiary hearings, whereas Section 2254(d)(2) explicitly excludes new evidence from its review. Second, the “clear and convincing evidence” standard of Section 2254(e)(1) is a burden of proof used by a factfinder to assess new evidence, whereas the “reasonableness” standard of Section 2254(d)(2) is a standard of review used by a reviewing court to assess the propriety of a state court's decision based on the evidence before the state court. Where, as here, review is conducted on the state court record, only the standard of subsection (d)(2) applies.

This interpretation is faithful to this Court's directives. It ensures that deference to state court factual determinations is not impermissibly converted into abdication of federal habeas review, and it preserves independent meanings for subsections (d)(2) and (e)(1). The Fifth Circuit's interpretation does just the opposite. Subsection

(d)(2)'s "reasonableness" review and subsection (e)(1)'s "clear and convincing evidence" burden of proof each pose high hurdles standing alone. When combined, they will be insurmountable in the vast majority of cases. As in this case, under the Fifth Circuit's rule the vast majority of cases will be decided based on Section 2254(e)(1)—effectively writing Section 2254(d)(2) out of the statute.

This case, moreover, is an excellent vehicle to resolve the persistent circuit conflict. The Fifth Circuit was able to deny the writ only by improperly excluding evidence from consideration under Section 2254(d)(2) based on its erroneous interpretation of Section 2254(e)(1). That interpretation therefore has a dispositive difference in this case.

Accordingly, the Court should grant the petition to resolve the conflict in the circuits and correct the Fifth Circuit's erroneous interpretation.

## ARGUMENT

### I. MEANINGFUL FEDERAL HABEAS REVIEW IS NECESSARY TO ENSURE THAT FEDERAL CONSTITUTIONAL RIGHTS CONTINUE TO BE VINDICATED IN STATE COURT.

Despite AEDPA's deference to state court decisions, this Court has recognized that such deference cannot be so unbounded as to effectively preclude meaningful federal review. As the Court has made clear, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The ruling below, however, improperly turns deference into abdication.

The authority retained by federal courts to review state court determinations through writs of habeas corpus is critical to ensuring the fair and thorough adjudication of federal constitutional rights, and to preventing the imposition of undeserved punishment. The track record of state courts prior to AEDPA's passage indicates why preservation of meaningful federal review is critical. Before AEDPA, federal courts routinely reversed state court convictions based on a finding of constitutional error. *See Irreversible Error, supra*, at 31. Just in capital cases, between 1976 and 1991 federal courts found reversible error in 42% of all federally-reviewed state judgments. *Id.* Had AEDPA existed during this time period, it is likely that relief would have been precluded in a substantial majority of these cases. *Id.* at 32. Thus, while federal courts must now defer to state court rulings under AEDPA, the real and significant potential for unjust punishments resulting from erroneous state court rulings—including the ultimate punishment of death—counsels against interpreting AEDPA to increase the level of deference beyond what the statute expressly provides.

AEDPA was meant to make state courts the principal fora for asserting constitutional challenges to state convictions. *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011). But ensuring that federal courts conduct meaningful review enhances, rather than undercuts, the primacy of state courts in adjudicating constitutional challenges. First, meaningful federal review deters constitutional violations from being committed or condoned by state courts in the first instance. *See Irreversible Error, supra*, at 32 (“[T]he presence of potential federal review is a significant impetus for improving state \* \* \* review

processes.”) (quoting Hon. Christine M. Durham, Justice, Utah Supreme Court). With the prospect of meaningful federal review, a state court is more likely to engage in a thorough review of the constitutional claim in order to ensure that its review and decision will be the “main event,” rather than a “tryout on the road for what will later be the determinative federal habeas hearing.” *Id.*; see *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Second, the prospect of federal habeas review ensures that federal constitutional rights will be adjudicated fairly, and in a forum free of local influences that may unduly impact the decisions of elected state judges responsible for adjudicating constitutional rights. See *Irreversible Error*, *supra*, at 33 (recognizing the “problems in the state courts where overburdened, elected judges are responsible for maintaining a system to satisfy the needs and immediate desires of the public”) (quoting Hon. Rosemary Barkett, Justice, Florida Supreme Court and Judge, U.S. Court of Appeals for the Eleventh Circuit). The prospect of meaningful federal review provides an impetus for state courts to ensure that their proceedings are not tainted by local prejudices or otherwise.

Thus, while state courts are the primary venue for adjudicating constitutional challenges to state convictions, they were never intended to be made the *sole* forum. Yet the Fifth Circuit’s holding in this case effectively does just that. Pet. App. 17a-21a. Where a claim has been adjudicated on the merits in state court, Section 2254(d)(2) provides that a writ of habeas corpus will issue if the state court decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State

court proceeding.” 28 U.S.C. § 2254(d)(1). This “highly deferential standard,” *Bell v. Cone*, 543 U.S. 447, 455 (2005), is already “difficult to meet.” *Harrington*, 131 S. Ct. at 786; *see also Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) (“[Section 2254(d)(2)] is a daunting standard—one that will be satisfied in relatively few cases.”). And there is no dispute that the deferential standard of Section 2254(d)(2) applies to this case.

But the Fifth Circuit added yet another level of deference based on its interpretation of a separate provision—Section 2254(e)—holding that even when review is based entirely on the state court record any fact found by the state court will be considered correct unless the habeas petitioner “rebut[s] the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). As explained below, that interpretation is wrong, because Section 2254(e) was never intended to apply where review is based solely on the state court record. *See infra* at 10-16. Instead, Section 2254(d)(2) governs. Section 2254(e)(1) applies when a petitioner attempts to attack a state court finding based on new evidence introduced for the first time on habeas review.

By creating a double layer of deference never intended by Congress, the Fifth Circuit has effectively precluded meaningful review of state court factual findings under Section 2254(d)(2). Under the Fifth Circuit’s interpretation, if a petitioner cannot identify clear and convincing evidence in the state court record that contradicts a state court’s factual findings, those findings will be deemed “correct” under Section 2254(e)(1) because the presumption of correctness is not overcome. It will then be effectively impossible, in the vast

majority of cases, for a habeas petitioner to argue that the state court's decision was based on an "unreasonable determination of the facts" under Section 2254(d)(2), because the facts would already be deemed correct before that review is even conducted. Indeed, the Fifth Circuit in this case never even applied Section 2254(d)(2) to the factual findings that it determined petitioner had not rebutted by clear and convincing evidence. *See* Pet. 26-27; Pet. App. 18a-21a. Section 2254(d)(2)'s only function, according to the court, is to deny habeas relief where a petitioner can show that predicate factual findings are belied by clear and convincing evidence yet cannot also show that the state court's overall determination was unreasonable in light of all the facts. *See* Pet. App. 17a-18a.

This double-deference rule abdicates the important reviewing role retained by federal courts after AEDPA. Where a petitioner can show that a state court decision is based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), Section 2254(d) mandates that the writ be granted. *See* 28 U.S.C. § 2254(d). The Fifth Circuit's rule, however, insulates factual findings from review under that provision, by denying relief based on Section 2254(e)(1) without even considering whether a state court's factual determination was unreasonable. This interpretation contravenes the statute, goes far beyond acceptable deference and ventures into the forbidden realm of abdication. *See Miller-El*, 537 U.S. at 340. Particularly given the clear conflict in the circuits, *see infra* at 10 & n.2, the Court should grant certiorari to ensure that Section 2254(d)(2) review is not an empty exercise.

## II. THE FIFTH CIRCUIT'S ERRONEOUS RULING PERPETUATES A CIRCUIT SPLIT ON THE INTERPRETATION OF SECTIONS 2254(d)(2) AND (e)(1).

As shown in the petition, and as recognized by the Fifth Circuit itself, the relationship between Sections 2254(d)(2) and (e)(1) has been a persistent source of disagreement among the federal circuits.<sup>2</sup> This Court granted certiorari in *Wood v. Allen*, 558 U.S. 290 (2010), to resolve this conflict, but ultimately decided the case on other grounds. *See id.* at 300. The Fifth Circuit's decision in this case further perpetuates this split, while reinforcing an erroneous interpretation of these provisions that renders it more difficult for habeas petitioners in the Fifth Circuit to challenge a state court's factual determinations than those in other circuits. The Court should grant certiorari to resolve this irreconcilable division among the circuits and confirm that Section 2254(d)(2), rather than Section 2254(e)(1), governs when review of a state court merits adjudication is based on the existing state court record.

The Fifth Circuit incorrectly interpreted the statute. In its view, a federal court must apply **both** Section 2254(d)(2) and Section 2254(e)(1) deference to a habeas petitioner's challenge to a state court's

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<sup>2</sup> *See* Pet. 23-26; *Wood v. Allen*, 542 F.3d 1281, 1285 (11th Cir. 2008); *Murray v. Schriro*, 745 F.3d 984, 999-1001 (9th Cir. 2014); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004); *Collier v. Norris*, 485 F.3d 415, 423 (8th Cir. 2007); *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008); *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011); *Fields v. Thaler*, 588 F.3d 270, 273 (5th Cir. 2009); *Lenz v. Washington*, 444 F.3d 295, 300-01 (4th Cir. 2006); *Lambert v. Blackwell*, 387 F.3d 210, 234-36 (3d Cir. 2004).

factual findings, even when that challenge is based solely on the record that was before the state court. Pet. App. 17a-18a. Under that interpretation, a habeas petitioner cannot successfully challenge the factual grounds for a state court’s decision unless the petitioner **both** (1) proves particular factual findings incorrect by clear and convincing evidence, and (2) demonstrates that—even if particular factual findings **were** incorrect—the state court’s decision was based on an unreasonable determination of all facts taken together. *See id.*<sup>3</sup>

This interpretation improperly shrouds a state court’s factual determinations in a double layer of deference. This Court has recognized that the deferential standards in subsections (d)(2) and (e)(1) present independent inquiries with independent meanings and “[i]t [is] incorrect \* \* \* to merge the independent requirements” of these two provisions. *Miller-El*, 537 U.S. at 341-42. As a consequence, “AEDPA does not require a petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence.” *Id.* at 341.

Whereas the Fifth Circuit’s interpretation effectively allows Section 2254(e)(1) to trump Section 2254(d)(2), these two “independent requirements,” *id.* at 341, should remain independent. Section 2254(d)(2) expressly governs cases where a habeas petitioner challenges a state court merits adjudication based on “the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). In those circumstances, the writ must be granted if the petitioner can demonstrate that this decision “was

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<sup>3</sup> *See also Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011); *Fields v. Thaler*, 588 F.3d 270, 273, 278-80 (5th Cir. 2009).

based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* By contrast, Section 2254(e)(1) applies to the different, and more limited, circumstances where a habeas petitioner attempts to challenge a state court factual finding based, at least in part, on new evidence submitted for the first time on habeas review. *See Taylor*, 366 F.3d at 1000; *Murray v. Schriro*, 745 F.3d 984, 999-1001 (9th Cir. 2014). Accordingly, where, as here, a petitioner’s challenge to a state court’s factual finding is based entirely on the record that was before the state court, only Section 2254(d)(2) deference applies.

This interpretation is supported by the well-established principle that statutory provisions must be interpreted in light of their surrounding provisions.<sup>4</sup> Section 2254(e)(1) does not exist in a vacuum but rather must be read in light of its companion provision, Section 2254(e)(2). Subsection (e)(2) specifies circumstances when a federal court considering a habeas petition may “hold an evidentiary hearing.” 28 U.S.C. § 2254(e)(2); *see also Williams v. Taylor*, 529 U.S. 420, 429-37 (2000) (except in limited circumstances, statute bars evidentiary hearing where habeas petitioner’s own lack of diligence caused factual basis of a claim to be undeveloped). Apart from this specific circumstance, a federal habeas court retains discretion to grant an evidentiary hearing, even after AEDPA. *See Schriro*

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<sup>4</sup> *See Lopez v. Gonzales*, 549 U.S. 47, 56 (2006) (“[O]ur interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them[.]”); *Jones v. United States*, 527 U.S. 373, 389 (1999) (“Statutory language must be read in context and a phrase gathers meaning from the words around it.”) (internal quotation marks omitted).

v. *Landrigan*, 550 U.S. 465, 473 (2007) (“[The] basic rule [that a district court has discretion to grant an evidentiary hearing] has not changed.”); *see also* Rules Governing Section 2254 Cases in the United States District Courts 8(a) (Feb. 1, 2010) (mandating that district courts determine whether an evidentiary hearing is warranted).

Given the subject matter of subsection (e)(2)—evidentiary hearings—subsection (e)(1) is most naturally read as applying to the same subject-matter: subsection (e)(1) applies when a federal habeas court exercises its discretion to hold an evidentiary hearing in circumstances not falling within the purview of subsection (e)(2). In such cases, subsection (e)(1) instructs the court on the burden of proof that the petitioner must bear to overturn a state court factual finding based on new evidence—the factual finding is presumed correct and “[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *see Taylor*, 366 F.3d at 1000.

This interpretation is further compelled by Section 2254(e)(1)’s language providing for a burden of proof by clear and convincing evidence. The “clear and convincing evidence” standard is traditionally, if not exclusively, applied to guide a factfinder considering evidence for the first time. It is a **burden of proof** by which facts are determined based on an evaluation of evidence, not a standard of review upon which a prior decision is judged. *See, e.g., Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2242 (2011) (issued patent is presumed valid and invalidity must be proved by clear and convincing evidence); *In re E.B.*, 184 Cal. App. 4th 568, 578 (Cal. Ct. App. 2010)

(“The clear and convincing standard was adopted to guide the trial court; it is not a standard for appellate review.”). By contrast, Section 2254(d)(2) establishes a **standard of review**, akin to those that govern appellate courts, by which state court factual findings are judged based on the record that was before the state court. Thus, Section 2254(e)(1)’s presumption of correctness and burden of proof should apply only when a habeas petitioner seeks to add to the corpus of facts through a federal evidentiary hearing. Section 2254(d)(2), by contrast, applies when a federal court is reviewing a state court determination based on the state court record.

This interpretation gives effect to this Court’s directive that subsections (d)(2) and (e)(1) retain independent meanings. *Miller-El*, 537 U.S. at 341-42. Subsection (e)(1) operates where new evidence is introduced in federal court, and subsection (d)(2) applies where review is based on “evidence presented in the State court proceeding.” *See* 28 U.S.C. § 2254(d)(2). Federal courts must still accord a great deal of deference to state court factual determinations that are analyzed under Section 2254(d)(2). *See supra* at 8. But the barrier is not so high that it effectively precludes meaningful federal habeas review of a state court’s factual determinations.

The Fifth Circuit’s holding confuses this structure: it introduces the standard of deference in subsection (e)(1), which is designed to govern the admissibility and consideration of extrinsic evidence, into subsection (d)(2), which is explicitly designed to **exclude** extrinsic evidence from the scope of its review. *See* 28 U.S.C. § 2254(d)(2) (restricting factual review to “the evidence presented in the State court proceeding”). Moreover, while the Fifth

Circuit’s interpretation pays homage to the need for deference, it stacks deference-upon-deference in a manner that would effectively convert the important reviewing role retained by federal courts into a free pass for state court factual determinations. *See supra* at 8-10.

The Fifth Circuit’s interpretation is even more untenable in light of *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *Pinholster* has been understood by circuit courts—including the Fifth Circuit—to entirely preclude new evidence from ever being introduced with respect to a claim subject to habeas review under Section 2254(d), *i.e.*, a claim that was adjudicated on the merits in state court.<sup>5</sup> If, as the Fifth Circuit has held, the presumption of correctness from Section 2254(e)(1) applies even where a petitioner’s challenge is based solely on the state court record, under *Pinholster* the petitioner will be limited to rebutting the state court’s factual determinations using the state record alone—even if new evidence could disprove the state court’s factual findings by clear and convincing evidence. Thus, a petitioner will be subjected to the onerous burden of having to rebut a factual finding by clear and convincing evidence under Section 2254(e)(1), but

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<sup>5</sup> *See Blue v. Thaler*, 665 F.3d 647, 655-56 (5th Cir. 2011) (“*Pinholster* prohibits a federal court from using evidence that is introduced for the first time at a federal-court evidentiary hearing as the basis for concluding that a state court’s adjudication is not entitled to deference under § 2254(d).”); *see also Murray v. Schriro*, 745 F.3d 984, 999-1000 (9th Cir. 2014) (“*Pinholster* eliminated the relevance of ‘extrinsic’ challenges when we are reviewing state-court decisions under AEDPA, however, because it held that petitioners may introduce new evidence in federal court only for claims that we review *de novo*.”).

without being able to introduce the extrinsic evidence that could carry that burden and that is expressly contemplated as being within the scope of Section 2254(e).

Particularly given the circumscribed scope for evidentiary hearings in habeas proceedings after *Pinholster*, the factfinding standard of Section 2254(e)(1) should not be imported into the standard of review provided by Section 2254(d)(2). Where, as here, review is conducted on the basis of “the evidence presented in the State court proceeding,” Section 2254(d)(2) provides that the writ will issue when a state court merits determination is based on an “unreasonable determination of the facts” in light of that evidence. Section 2254(e)(1), by contrast, provides the applicable burden of proof when a factfinder is considering extrinsic evidence in those cases not governed by Section 2254(d)(2). This interpretation harmonizes both provisions. The Fifth Circuit’s rule, by contrast, effectively allows Section 2254(e)(1) to trump Section 2254(d)(2).

Given the stark disagreement within the circuits on this question, the Court should grant certiorari to resolve the conflict, correct the Fifth Circuit’s erroneous interpretation, and confirm that AEDPA deference does not mean abdication of the critical role played by federal courts in habeas review.

### **III. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT.**

This case is also an excellent vehicle to resolve the circuit split on the interpretation of Sections 2254(d)(2) and (e)(1). Unlike *Wood v. Allen*, 558 U.S. 290 (2010), this is a case where the outcome

will depend on which of the conflicting interpretations of the provisions is applied.

Review under subsection (e)(1) is more demanding than that under (d)(2). *Accord Wood*, 558 U.S. at 301 (Subsection (e)(1) is “arguably more deferential” to state courts than subsection (d)(2)). Under subsection (e)(1), a petitioner must affirmatively **prove** by clear and convincing evidence that every challenged factual finding is incorrect. If the petitioner cannot do so, a federal court must treat each challenged fact as “correct” for purposes of its review under subsection (d)(2). *See* 28 U.S.C. § 2254(e)(1). Accordingly, because of the difficulty of overcoming subsection (e)(1)’s burden of proof, under the Fifth Circuit’s rule the vast majority of state factual findings will be deemed “correct” before review under subsection (d)(2) ever occurs.

Under that rule, it will therefore be effectively impossible, in the vast majority of cases, for a habeas petitioner to show that a state court’s decision was based on an “unreasonable determination of the facts” under Section § 2254(d)(2), because the federal court would be commanded under subsection (e)(1) to treat all factual findings as correct. This is particularly true in light of *Pinholster*, which has been held to preclude any reliance on extrinsic evidence in circumstances covered by Section 2254(d)(2). *See supra* at 15 & n.5.

But if review is conducted under subsection (d)(2) without first subjecting all factual findings to the inapposite gauntlet of subsection (e)(1), the outcome may well be different. As even the Fifth Circuit recognized, subsection (d)(2) analyzes the factual underpinnings of the state court’s decision “as a whole” rather than each particular factual finding in

isolation. Pet. App. 17a-18a. Thus, under a proper interpretation of the statute, to grant relief under subsection (d)(2) a federal court need not find that the state court was clearly incorrect as to any of its factual findings. Rather, the federal court need only find that the state court decision is based on an “unreasonable” determination of the facts, considering all evidence that was before that court. While this standard of review is still highly deferential, it will make a dispositive difference in cases where a petitioner can demonstrate that the state court reached an unreasonable determination of the facts even though the petitioner cannot disprove the court’s factual findings by clear and convincing evidence.

This is such a case. As shown in the petition, if the Fifth Circuit had not focused on each of the state court’s factual findings in isolation, and cloaked each with a determination of validity under Section 2254(e)(1), the state court’s decision would not have withstood scrutiny under Section 2254(d)(2). *See* Pet. 26-31.

Petitioner challenged the state court’s determination that there was no deficient performance by counsel in investigating mitigating factors. The Fifth Circuit upheld the state court’s decision based solely on the conclusion that petitioner had not pointed to clear and convincing evidence overcoming the presumption of correctness as to three out of four of the challenged factual findings underlying the decision. Pet. App. 18a-21a. For example, the court upheld the state court’s finding that an expert had concluded that petitioner did not suffer from psychosis or mental deficiencies, by cloaking the finding in a presumption of correctness under

Section 2254(e)(1) and then concluding that the presumption was not rebutted by clear and convincing evidence in the record. *Id.* at 20a.

If, however, review were properly conducted under Section 2254(d)(2) without regard to Section 2254(e)(1), the outcome would have been different. Even if there was not clear and convincing evidence in the state court record rebutting the state court's predicate factual findings, petitioner nevertheless demonstrated that the state court's decision was based on an "unreasonable" determination of the facts in light of *all* evidence "presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). This included the pretrial report of petitioner's expert that petitioner "suffered from 'paranoid ideation [that] may reach the level of psychotic delusions'" and that "other substantive data" was needed to draw definitive conclusions. Pet. 28.

The Fifth Circuit disregarded this evidence once it concluded that a presumption of correctness had not been overcome pursuant to Section 2254(e)(1). And the court did so even though it recognized that another factual finding (that trial counsel had interviewed relevant witnesses) *was* clearly erroneous. Pet. App. 19a-20a. But if the expert evidence regarding petitioner's paranoid ideations and the need for further analysis were considered together with the state court's erroneous finding regarding the interviews (as well as the other evidence raised by petitioner), it becomes apparent that the state court's decision was based on an "unreasonable" determination of the facts. It was plainly unreasonable for the state court to conclude that there was no deficient performance by trial counsel in investigating mitigating factors where (1)

an expert evaluation put trial counsel on notice that petitioner did suffer from paranoid ideation possibly reaching the level of psychotic delusions and that more substantive data was needed to confirm a diagnosis, and (2) trial counsel utterly failed to make contact with several of petitioner's relatives who could have supplied mitigating evidence.

The Fifth Circuit was able to reach a contrary conclusion only by first disregarding relevant evidence after improperly subjecting it to an analysis under Section 2254(e)(1). Had the court adopted a proper interpretation of the statute, the outcome of this case would have been different. And at a bare minimum, certiorari is warranted to correct the Fifth Circuit's interpretation so that the district court can, in the first instance, conduct a rigorous analysis of all of the evidence under the proper legal standard.

Moreover, in considering the significance of preserving meaningful federal review—and the manner in which the Fifth Circuit's ruling undermines this review—this Court should not lose sight of what is at stake in this case. “[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.” *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). In its finality, death is “qualitatively different from a sentence of imprisonment, however long,” creating a “corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Thus, concerns surrounding excessive deference to state court determinations are only enhanced where that deference has been applied, as it was here, in a capital case. This Court should therefore grant

certiorari to resolve a clear circuit split and correct the Fifth Circuit's erroneous decision on an important question of law that had a dispositive impact in this case.

**CONCLUSION**

For the foregoing reasons, and those in the petition, the Court should grant the petition and reverse the judgment below.

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