No. 17-1390

In the Supreme Court of the United States

TIMOTHY FILSON, WARDEN, *et al.*,
Petitioners,

v.

PAUL L. BROWNING,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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Although Browning has provided a long list of possible reasons why this Court should deny the petition,[1] he cannot escape the central error raised by Nevada's petition: that the Ninth Circuit majority below articulated an incorrect standard of review and then committed the cardinal sins that this Court has repeatedly identified in reversing cases reviewed under AEDPA: (1) relying on circuit precedent instead of clearly established Supreme Court precedent, and (2) conducting independent fact-finding, rather than truly assessing the reasonableness of Nevada Supreme Court's decision resolving Browning's claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 644 (1984). Browning's best efforts to portray these errors as not impacting the outcome of this case are not convincing and ultimately only emphasize the points that make this case worthy of this Court's attention.

When considering the Ninth Circuit's reliance on its own precedent and its own view of the facts of this case, it is obvious that this case fits squarely within Justice Robert Jackson's concerns about federal overreach in the federal habeas arena when he wrote his famous line about the infallibility of this Court in *Brown v. Allen*, 344 U.S. 443 (1953). *See* Pet. at 1-3.

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[1] Much of what Browning raises throughout the opposition as reasons for denying the petition are factual and legal matters that were never resolved below. But this is "a court of review, not first review…." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Browning's contentions about these issues that were not resolved below are not reasons to deny the petition. These issues could be properly addressed on remand should this Court grant the petition and reverse the Ninth Circuit's legal error.

As Justice Jackson's concerns came to fruition, Congress intervened by passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which created a framework for federal habeas review that prohibits granting of federal habeas relief where reasonable minds can disagree about the correctness of a state court decision. *See*, *e.g.*, *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) ("Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold."). This is one of those cases where reasonable minds can differ on the outcome, meaning federal habeas relief is unavailable.

This Court still has the last word, but its silence in this case will leave in place yet another *published* Ninth Circuit opinion that fails to heed this Court's settled law on the strict application of AEDPA. The petition should be granted, and the judgment reversed.

1. The Ninth Circuit articulated an incorrect standard of review.

The Ninth Circuit panel majority identified a standard of review, part of which this Court has squarely rejected. Pet. at 12-13. Browning concedes the point but insists that the error doesn't make a difference in this case because (1) the court did not indicate that it was actually applying the incorrect part of the standard, and (2) this Court does not review statements in opinions. Opp. at 12-13. While those two points fundamentally contradict each other—Browning wants the Court to look at the lower court's statements but then suggests that the Court should ignore what the lower court said—Browning is wrong

about whether the majority's articulation of an incorrect standard of review matters in this case.

Given Browning's acknowledgment that the majority opinion relied on Ninth Circuit precedent when applying relevant constitutional standards, the question of whether a state court's "failure to extend" a clearly established principle is a proper basis for granting habeas relief is squarely implicated in this case. Notwithstanding Browning's attempt to downplay the majority's citations to Ninth Circuit precedent, the majority clearly turned to circuit precedent to "sharpen" relevant constitutional principles when addressing Browning's claims for relief.

In federal habeas cases reviewing state court decisions, a federal court's use of circuit precedent to extend or further refine legal principles established by this Court's holdings is no different than that court expressly stating that the state court failed to properly extend legal principles established by this Court's holdings into a new context. Both circumstances involve the federal court extending a legal principle beyond what has been clearly established by this Court to undermine a state court judgment, which lower courts may not do under AEDPA. *White v. Woodall*, 134 S. Ct. 1697 (2014).

And even assuming the majority was not actually applying the part of the standard this Court rejected, the majority's reliance on circuit precedent and its independent review of the facts are reason enough to grant review and reverse in this case.

2. The Ninth Circuit turned to circuit precedent in defining the materiality prong of *Brady* and the deficient performance prong of *Strickland*.

Browning acknowledges that the majority opinion cited Ninth Circuit precedent in addressing Browning's claims for relief. Opp. at 14-17. While arguing that the majority did not rely on circuit precedent for any improper purposes, he provides quotes from the majority opinion proving that the majority did exactly what Browning admits would be a "serious" problem in light of this Court's decision in *Lopez v. Smith*, 135 S. Ct. 1 (2014). Opp. at 14-17.

Browning initially turns to the majority's citations to *United States v. Bagley*, 473 U.S. 667 (1985), and *Maxwell v. Roe*, 628 F.3d 486, 510 (9th Cir. 2010), to argue that the majority did not rely on *Maxwell* for any impermissible purpose. Opp. at 14-15. In *Bagley*, this Court acknowledged that the possibility of a reward that is contingent on government satisfaction may strengthen incentives for a witness to testify falsely. 473 U.S. at 683. But this Court then remanded for consideration of whether the undisclosed benefits were material. *Id*. In contrast, the language Browning quotes from the majority opinion relying on *Maxwell* indicates that the undisclosed benefits were material simply because they would have "cast a shadow on the informant's credibility." Opp. at 14. This is not a standard from this Court; it is the Ninth Circuit's standard derived by extending a holding from this Court. While *Bagley* indicates that undisclosed benefits may, but will not always, be material, the Ninth Circuit's citation of *Maxwell* supports that the

undisclosed benefits are *always* material simply because they undermine a witness's credibility. The panel majority below did not cite *Maxwell* for no reason. It did so because it needed *Maxwell*'s extension of *Bagley* to reach the outcome below. That was improper.[2]

Browning also dismisses the majority's reliance on *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017). But Browning quotes language from *Weeden* where the Ninth Circuit was opining on its view of the parameters of the deficient performance prong of *Strickland*, which the majority utilized in an attempt to distinguish this case from *Harrington v. Richter*, 562 U.S. 86 (2011). Opp. at 16.

In *Harrington*, this Court acknowledged that the Ninth Circuit failed to adhere to the deference *Strickland* requires a reviewing court to give defense counsel's performance. 562 U.S. at 106. While the Ninth Circuit faulted trial counsel for not retaining a blood evidence expert, this Court reiterated that the ineffective assistance of counsel standard "permits counsel to 'make a reasonable decision that makes *particular investigations unnecessary*.'" *Id*. (quoting *Strickland*, 466 U.S. at 691) (emphasis added).

But the language Browning and the majority opinion quote from *Weeden* indicates the opposite. Rather than ask whether counsel made a reasonable

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[2] The majority's improper reliance on *Maxwell* is compounded by its decision to engage in an independent factual analysis of the record, rather than conducting a proper AEDPA analysis: asking whether the Nevada Supreme Court could reasonably conclude that the undisclosed evidence was not material.

decision in not pursuing a specific line of investigation—as this Court did in *Harrington*, and the Nevada Supreme Court did in reviewing Browning's challenge to his attorney's performance—the majority looked to *Weeden* to sharpen its view on how to apply the deficient performance prong of *Strickland* by suggesting counsel's decision-making is only reasonable when it is driven by counsel's investigation. That is precisely the sort of reliance on circuit precedent that this Court prohibited in *Lopez*, and is directly contrary to what this Court said in *Strickland* and *Harrington*.

The Ninth Circuit did rely on its own precedent in granting habeas relief. And it did so in a way that is in direct conflict with this Court's repeated reminders that circuit precedent is not clearly established federal law as defined by *this Court*. *See*, *e.g.*, *Lopez*, 135 S. Ct. at 4 (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013)) ("But Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'").

3. The Ninth Circuit improperly engaged in an independent factual analysis of the record.

The majority's recitation of an improper standard of review and reliance on circuit precedent to define relevant constitutional principles is reason enough to grant the petition. But Browning also does not dispute that the majority engaged in an independent factual analysis of the record. Instead, he cites the majority opinion as support for the proposition that such an independent analysis is "unavoidable." Opp. at 21. But this lack of deference to the state court's factual findings is not unavoidable. And this Court should

make that clear in this case, since the Ninth Circuit is bound to repeat the error it made in this published opinion.

Rather than adhering to the limited scope of federal habeas review, including 28 U.S.C. § 2254(e)(1)'s presumption on the correctness of state court factual determinations, the panel engaged in its own factual analysis of the record to assess a highly fact-dependent question. And this error impacts both grounds upon which the majority granted relief because the majority incorporated its factual determinations from the *Brady* analysis into its prejudice analysis under *Strickland*. App. 60-62.

Browning sanctions this as "unavoidable" without citing any authority for support. Opp. at 21. That is because there is no authority to support that proposition. The application of a general rule when resolving a fact-dependent, case specific issue is entitled to *more* deference under AEDPA, not *less*. *See*, *e.g.*, *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcome in case-by-case determinations."). And the error is even more egregious here, in light of the majority's footnote sweeping aside Judge Callahan's warning that the majority's independent factual analysis was improper. App. at 42 n.12.

CONCLUSION

Time and again, this Court has had to remind lower courts of their limited role in federal habeas review. This case presents a particularly egregious misapplication of AEDPA's deferential standard, repeating again the two cardinal sins this Court has identified in reversing cases under AEDPA. The majority below improperly relied on circuit precedent to define relevant constitutional principles and engaged in its own review of the factual record, rather than reviewing the reasonableness of the state court judgment. This Court should grant the petition and reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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