No. 18-1197

In the Supreme Court of the United States

DEANNA BROOKHART, Acting Warden,
PETITIONER,

v.

ANTHONY D. LEE, SR.,
RESPONDENT.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner's petition for a writ of certiorari demonstrated that this Court should reverse the Seventh Circuit's judgment below, either summarily or after briefing and argument, because it defies the plain language of 28 U.S.C. § 2254(d)(2), and requires that reasonable state-court judgments be set aside based on state courts' refusal to conduct unwarranted evidentiary hearings. Respondent's brief in opposition argues that (1) the Seventh Circuit's decision was consistent with § 2254(d)(2); and (2) there is no circuit split. But the Seventh Circuit's decision effectively transforms AEDPA's relitigation bar into a weapon against state pleading requirements by requiring state courts to conduct evidentiary hearings on claims that are meritless as pleaded. Further, it conflicts with a holding of the Ninth Circuit, and inflicts a grave and ongoing injury to the interests of comity, federalism, and finality that animate the Antiterrorism and Effective Death Penalty Act (AEDPA). Thus, respondent's arguments should not dissuade this Court from granting certiorari and either summarily reversing or setting the case for briefing and argument.

ARGUMENT

I. The Seventh Circuit's Decision Contravenes the Plain Language of 28 U.S.C. § 2254(d)(2).

Under the Seventh Circuit's decision, when a state court assumes the truth of a prisoner's factual allegations and finds them legally insufficient to support his claim, a federal court may set that judgment aside under § 2254(d)(2) and relitigate the claim *de novo* unless the state court conducted an evidentiary hearing to see whether other, previously unidentified evidence might save the claim. This rule

is contrary to the plain language of § 2254(d)(2), which requires that the reasonableness of state-court factual determinations be judged on the state-court record alone. 28 U.S.C. § 2254(d)(2).

There is no merit to respondent's argument that the Seventh Circuit's decision is consistent with § 2254(d)(2) merely because it did not consider extrarecord evidence. Brief in Opposition (BIO) at 21–22. The Seventh Circuit did not err in applying § 2254(d)(2) by considering evidence outside the state-court record, but instead by disregarding the state-court record.

It is undisputed that the facts respondent presented to the state courts (in the form of affidavits from uncalled witnesses), taken as true, were insufficient to establish *Strickland* prejudice. *See* App. 4a (finding "convincing" district court's reasoning that state appellate court reasonably held respondent's affidavits alone to be insufficient to establish prejudice); BIO at 29 (conceding that affidavits offered only "limited detail about the witnesses['] knowledge of relevant events"). Yet the Seventh Circuit set aside the state courts' rejection of respondent's claim under § 2254(d)(2), holding that the state courts unreasonably accepted as true that respondent's witnesses would testify to the facts in their affidavits. App. 7a. The Seventh Circuit's holding was not based on any evidence in the state-court record that the witnesses would testify otherwise, but on the mere possibility that they might.[1] *See* App. 4a–5a (rejecting state courts'

[1] Although respondent suggests that he sought to

acceptance that witnesses would testify in accordance with their affidavits but conceding that "[w]e just don't know" that they would not have). Section 2254(d)(2) does not allow reasonable state-court factual determinations to be set aside based on such speculation. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 183 n.3 (2011) (describing as "strange" the "notion that a state court can be deemed to have unreasonably applied federal law to evidence it did not even know existed").

Because the Seventh Circuit did not reject the state courts' factual determination based on the state-court

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present the state courts with facts beyond those in the affidavits, BIO at 3, he does not dispute that he never told the state courts what those facts were. *See* App. 6a (Seventh Circuit's admission that respondent did not tell state courts "what the affiants would have said"). And the record belies any claim that he had no opportunity to develop such facts. In 2012, the state appellate court told him why it deemed the facts in the affidavits legally insufficient to support his claim, App. 44a–46a, yet respondent declined to submit more substantial affidavits (or explain why he could not do so, *see* 725 ILCS 5/122–2 (2014) (requiring that postconviction petitions "have attached thereto affidavits, records, or other evidence supporting its allegations or state why the same are not attached")) when he filed his counseled amended postconviction petition in 2014, App. 47a. Instead, he submitted the same affidavits that the state courts had found legally insufficient two years prior. App. 63a.

record, respondent's comparison to *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), is inapt. *Brumfield* held that the state court unreasonably found that a prisoner was not of subaverage intelligence and unquestionably lacked adaptive impairments because the state-court record supported contrary findings. *Id.* at 2277–80. By contrast, the state appellate court here took as true—or "found"—that witnesses who swore to particular facts in their affidavits would testify to those same facts if called at trial. This finding was entirely supported by the state-court record because the only evidence of the uncalled witnesses' testimony was their affidavits.

Respondent argues that petitioner misreads the Seventh Circuit's decision as driven by speculation about extrarecord evidence, pointing to the statement that the state appellate court's error lay in "assuming that the language of the five affidavits would have been the totality of the witnesses' testimony." App. 7a; *see* BIO at 19. But this statement confirms, rather than rebuts, petitioner's reading of the Seventh Circuit's decision: to say that a court assumed that witnesses would not testify to facts beyond those in their affidavits is no different from saying that the court declined to speculate as to whether the witnesses would testify to such facts.

The state courts here were tasked with determining whether respondent's factual allegations, taken as true, entitled him to relief and therefore warranted an evidentiary hearing.[2] *See*

[2] Although respondent suggests in passing that this state-law standard is preempted by some

People v. Domagala, 987 N.E.2d 767, 775 (Ill. 2013); App. 58a–59a. The state courts reasonably declined to consider factual allegations that respondent *did not make*—that is, to consider unknown "facts" that respondent did not allege and that the witnesses did not provide in their affidavits.

Respondent's argument that the state courts erred in taking the affidavits as evidence of the witnesses' testimony similarly misapprehends the nature of the state courts' task. Respondent insists that the affidavits could not be taken as evidence of the witnesses' testimony because they were not intended as proffers, but merely to "indicate that the witnesses had relevant information," BIO at 20, with "limited detail about the witnesses['] knowledge of relevant events," *id.* 29. But it is not enough under Illinois law to merely "indicate" that a witness may provide generally "relevant information"; one must allege specific facts that, if true, would entitle one to relief. *Domagala*, 987 N.E.2d at 775; App. 58a–59a. Federal courts require the same, denying claims where the factual allegations and any supporting affidavits, taken as true, are legally insufficient. *See* Pet. at 11–13.

Respondent's and the Seventh Circuit's requirement that state courts conduct evidentiary hearings upon prisoners' request, rather than upon

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unspecified federal rule requiring that state courts conduct evidentiary hearings on inadequately supported claims, BIO at 25, he neither identifies, nor did the Seventh Circuit rely on, such a rule.

the prisoners' satisfaction of state pleading requirements, finds no support in § 2254(d)(2) and turns AEDPA's relitigation bar into a vehicle to evade state pleading requirements. *See infra* Part III.

II. The Circuit Courts Are Split Over Whether a State Court Makes an Unreasonable Determination of Fact Under 28 U.S.C. § 2254(d)(2) by Accepting a Prisoner's Allegations as True.

In *Gulbrandson v. Ryan*, 738 F.3d 976 (9th Cir. 2013), the Ninth Circuit recognized that "[a] state court need not hold an evidentiary hearing when it would not afford relief even assuming the defendant's allegations were true." *Id.* at 991. Here, the Seventh Circuit held that a state court's decision may be set aside because the state court declined to hold an evidentiary hearing after it determined that respondent was not entitled to relief, even if his allegations were true. App. 7a. The two decisions are in direct conflict. *See* Pet. at 14-15.

Respondent argues there is no conflict because the two circuit courts "applied the same law," arriving at different outcomes only "because the facts were different." BIO at 29. Not so. Respondent identifies the purported factual difference as the sufficiency of the affidavits: the affidavit taken as true in *Gulbrandson* was detailed, whereas the affidavits taken as true here were vague, providing only "limited detail about the witnesses['] knowledge of relevant events." *Ibid.* But neither the Seventh nor the Ninth Circuit purported to apply a rule providing that the less evidence a prisoner gives to show that a

state-court evidentiary hearing is warranted, the greater his entitlement to such hearing. As respondent's attempt to factually distinguish *Gulbrandson* shows, the Seventh Circuit's decision creates a perverse incentive for prisoners to present state courts with sparse or vague factual support for their claims as a means of getting an evidentiary hearing.

Nor does *Pappas v. Miller*, 750 F. App'x 556 (9th Cir. 2018) (unpublished), establish that the Seventh and Ninth Circuits both require state courts to conduct evidentiary hearings on claims that are legally insufficient under the evidence in the state-court record. *Pappas* is inapposite because the state court there did not accept a prisoner's factual allegations as true. Rather, in *Pappas*, a state court denied a claim on the baseless belief that a fact essential to the claim was simply unknowable, and not that it was never alleged to exist. *See id.* at 559–60 (holding in context of juror bias claim that state court's "erroneous assumption" that a juror's membership in Mothers Against Drunk Driving was undiscoverable—even though that organization had provided juror membership information earlier in the case—was an unreasonable determination of fact under § 2254(d)(2)). *Pappas* therefore does not reconcile the split between the Seventh and Ninth Circuits over whether a state court makes an unreasonable factual determination under § 2254(d)(2) by accepting a prisoner's factual allegations as true rather than holding an evidentiary hearing to discover other, unalleged facts.

III. The Seventh Circuit's Decision Inflicts a Grave and Ongoing Injury to Comity, Federalism, and Finality.

The Seventh Circuit's decision pressures state courts in Illinois, Indiana, and Wisconsin to ignore their respective state laws allowing prisoners' claims dependent on extrarecord evidence to be denied without evidentiary hearings when the prisoners' allegations about such evidence, taken as true, reveal the claims to be meritless. *See Domagala*, 987 N.E.2d at 775; *State v. Allen*, 682 N.W.2d 433, 437 (Wis. 2004) (trial court may deny claim in postconviction motion without evidentiary hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief"); *Hough v. State*, 690 N.E.2d 267, 273 (Ind. 1997) (post-conviction court may deny ineffective-assistance claim without evidentiary hearing if, accepting defendant's factual allegations as true, his claim is meritless). To preserve the presumptive validity of their adjudications of federal claims under § 2254(d), state courts must disregard their States' pleading requirements and conduct evidentiary hearings to satisfy the curiosity of a future federal court sitting in habeas review.

Respondent asserts that the case for granting certiorari is "especially un-compelling" because the Seventh Circuit's decision is not final, BIO at 18, but the nonfinality of the decision here does not weigh against granting certiorari. The insult to comity, federalism, and finality inflicted by the Seventh

Circuit's decision is ongoing. As respondent notes, BIO at 1, discovery is proceeding in the district court and an evidentiary hearing is scheduled for September 2019, over twenty years after respondent's conviction became final, *see* App. 42a; BIO at 1. Thus, the affront to comity and finality concerns does not end with the Seventh Circuit's decision setting aside a reasonable state-court judgment in defiance of AEDPA; it is repeated with the district court's consideration of evidence that it is barred from considering under § 2254(d), and in the district court's *de novo* review of respondent's claim under § 2254(a), even if only to deny it. The insult will be further repeated as other district courts, bound by the Seventh Circuit's decision, set aside similarly reasonable state-court judgments based on the state courts' refusal to grant unwarranted evidentiary hearings and allow petitioners to relitigate their claims. Reasonable state-court judgments cannot be set aside merely because federal courts are dissatisfied with the limits of the state-court record, especially where those limits arise from the petitioner's own litigation choices regarding how to present his claim in state court. *See supra* at pp. 2–3 n.1.

Indeed, the Court granted certiorari in identical circumstances in *Schriro v. Landrigan*, 550 U.S. 465 (2007). There, as here, the district court denied habeas relief without an evidentiary hearing and the circuit court reversed and remanded for an evidentiary hearing on the petitioner's ineffective-assistance-of-counsel claim. *Id.* at 468–69. This Court granted certiorari even though the circuit court's

decision was not final, *id.* at 473, to resolve the issue of whether the habeas petitioner was entitled to an evidentiary hearing, *see id.* at 480. The Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts," *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (*per curiam*), and the Court has taken a special interest in the proper application of § 2254(d) and in giving effect to that statute's emphasis on "comity, finality, and federalism," *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

Review of the Seventh Circuit's decision here, like review of the circuit court's decision in *Schriro*, is consistent with this Court's recognition that review of nonfinal decisions is "appropriate" where those decisions "involve[] an issue 'fundamental to the further conduct of the case.'" *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)). The Seventh Circuit's decision entitles state prisoners to *de novo* federal review of claims adjudicated on the merits in state court under a novel interpretation of § 2254(d)(2). The question of whether a state court's judgment may be upset in this manner "is 'independent of, and unaffected by' what may transpire" in an evidentiary hearing in the district court, and the outcome of that hearing cannot moot the legal issue. *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963) (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 126 (1945)) (citation omitted).

* * *

The Seventh Circuit's decision set aside a reasonable state-court judgment because the state courts considered only the record before them rather than speculating about the existence and impact of unalleged evidence. Because this decision is impossible to reconcile with AEDPA, this Court should grant certiorari and either summarily reverse the judgment below or, in the alternative, set the case for full briefing and argument. *Cf. Mazurek*, 520 U.S. at 975 (granting certiorari and summarily reversing nonfinal appellate court judgment where decision was clearly erroneous, produced immediate consequences for one State, and threatened similar consequences to other States).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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