No. 18-8341

IN THE

Supreme Court of the United States

LOUIE M. SCHEXNAYDER, JR.,
Petitioner,

v.

DARREL VANNOY, WARDEN,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is the National Association of Criminal Defense Lawyers (NACDL).[1]

NACDL is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL advances its mission in several ways, including through amicus filings in this Court and other courts throughout the country.

NACDL is filing this brief because this case demonstrates the need for more searching federal habeas review where there is substantial evidence that the state post-conviction court was *not* a fair and impartial forum for the adjudication of prisoners' federal constitutional rights.

SUMMARY OF ARGUMENT

This case presents an important question that has divided the Circuits: May a federal habeas petitioner challenge state post-conviction procedures that violate Due Process? In this case, the District Court du-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or entity other than amicus and amicus's counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel for *amicus* received Petitioner's consent to file this brief by letter. Respondent's consent to the filing of amicus briefs is filed with the Clerk.

tifully applied the Fifth Circuit's "no state habeas infirmities rule," which bars courts in that circuit from even *considering* whether a state post-conviction procedure is so fundamentally flawed that it violates the procedural guarantees of Due Process. Applied here, the "no state habeas infirmities" rule required the District Court to defer to the decision of the Louisiana Fifth Circuit Court of Appeal, *despite* the substantial evidence that the jurists on that court had a "probability of actual bias," that is, "a possible temptation . . . not to hold the balance nice, clear and true." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009). This case therefore highlights the need for more searching, and less deferential, federal habeas review in such circumstances.

A minority of Circuits—the First and Seventh—have rejected the *per se* "no state habeas infirmities rule," and would allow federal habeas petitioners, in a proper case, to bring Due Process challenges to state post-conviction procedures that are "fundamentally inadequate to vindicate the substantive rights provided." *Tevlin* v. *Spencer*, 621 F.3d 59, 70 (1st Cir. 2010) (quoting and applying *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009), to question of whether state's post-conviction procedures violated Due Process).

The minority's view is the better one. This Court has made clear in a number of opinions that states' post-conviction procedures are now "the principal forum for asserting constitutional challenges to state convictions." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). The fundamental premise and presumption of these decisions, and of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), is that state post-conviction courts are fair, impartial, and adequate forums for detecting, correcting, and deter-

ring violations of federal rights. Where, as here, that presumption is rebutted, Due Process and the Suspension Clause demand that federal courts step in as a "backstop" to ensure that federal constitutional rights are vindicated. No AEDPA deference should apply where, as here, the state post-conviction procedure was so fundamentally flawed as to violate Due Process.

ARGUMENT

I. AEDPA DEFERENCE SHOULD NOT APPLY TO DECISIONS OF STATE-COURT JURISTS WHO LABOR UNDER A PROBABILITY OF ACTUAL BIAS

A. Due Process Requires a Judge Free from the "Probability of Actual Bias"

This Court has long held that Due Process entitles every litigant to an impartial decisionmaker free from the "probability of actual bias," that is, from any "possible temptation to the average judge . . . to lead him not to hold the balance nice, clear, and true . . . ." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009) (reversing decision of Supreme Court of Appeals of West Virginia, because litigant's substantial campaign contributions to one state justice created an "unconstitutional" "probability of actual bias") (quoting *Tumey* v. *State of Ohio*, 273 U.S. 510, 532 (1927)).

The Due Process guarantee of impartiality is important not just to the litigants whose rights are at stake, but also to the public. This Court has repeatedly emphasized the constitutional importance of the public "appearance of justice." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828 (1986) (vacating 5-4 decision of the Supreme Court of Alabama, where decid-

ing vote was cast by justice who should have recused himself, because vacatur served the "appearance of justice"); *In re Murchison*, 349 U.S. 133, 136 (1955) (judge may not preside over criminal contempt trial, arising from proceeding over which he presided, because "justice must satisfy the appearance of justice" (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)).

B. Petitioner's State Post-Conviction Appeals Were Tainted By the Probability of Actual Bias

Here, the record contains substantial evidence of the "probability of actual bias" by the Louisiana Fifth Circuit Court of Appeal. *Caperton*, 556 U.S. at 886. In 2008, the press denounced that court's outrageous practice, lasting from 1994 to 2007, of denying all *pro se* writ applications without a judge ever reviewing them. Pet. 230a-35a. This "illegal and immoral practice" (in the words of the *Times-Picayune*, Pet. 231a) came to light when the administrative clerk, assigned the task of denying all these applications, revealed the truth in a suicide note. Pet. 230a. According to the clerk's note, "*not one* criminal writ application filed by an inmate *pro se* has been reviewed by a Judge on the Court . . . ." Pet. 202a (emphasis in original). According to the press, three judges of the Louisiana Fifth Circuit allowed their names to be placed on the clerk's orders: Chief Judge Edward A. Dufresne, Jr., Judge Marion Edwards, and Judge Walter Rothschild. Pet. 229a.

The press reported that this sham earned significant money for the Louisiana Fifth Circuit. For each of the 2,500 writ applications denied by the administrative clerk, the Louisiana Fifth Circuit charged local government $300—a total of $750,000. *Id.* "When

you can read not a single word and still charge about $75,000 [*sic*], you have a good racket going." *Id.*

During this period, Petitioner filed eleven *pro se* writ applications in the Louisiana Fifth Circuit, seeking review of various trial-court orders denying post-conviction relief. Pet. 87a. All his writ applications were denied. Pet. 88a-102a. No one—not even Respondent—suggests that any deference is owed to those denials, issued by the administrative clerk who was under orders to find a reason for denying each and every *pro se* writ application.

After the clerk's suicide note was reported in 2008, hundreds of prisoners—including Petitioner—filed new writ applications directly with the Louisiana Supreme Court, "complaining that" their "earlier applications . . . had received inadequate review" by the Louisiana Fifth Circuit. *State* v. *Cordero*, 2008-1717 (La. 10/3/08), 993 So. 2d 203, 206 (reprinting the *en banc* "resolution" of the Louisiana Fifth Circuit Court, which summarized these applications). At this time, the Times-Picayune reported that a prisoner had "filed a complaint with the State Judiciary Commission, which is the Supreme Court's investigative arm," and that Chief Judge Dufresne had "confirmed that the Judiciary Commission is involved." Pet. 232a; see also Pet. 230a ("Dufresne said the state Judiciary Commission is looking into the matter.")

In response to the flood of renewed writ applications, the Louisiana Fifth Circuit sent an *en banc* "resolution" to the Louisiana Supreme Court, asking for all the renewed *pro se* writ applications to be remanded to the Louisiana Fifth Circuit for reconsideration by five of the very same judges who had acquiesced in the procedure of denying all *pro se* writ applications without any judicial review. *Id.* This "resolution" was "distributed" and "moved" by Louisiana

Fifth Circuit Chief Judge Dufresne, and was "seconded" by Judge Frederica Wicker. *Id.* at 205.

The Louisiana Supreme Court accepted the Louisiana Fifth Circuit's proposal, and remanded all the writ petitions in a brief *per curiam* order. *Id.* at 204. Justice John L. Weimer dissented from that order, writing: "to avoid any appearance of impropriety, I would either randomly allot these cases to the *other* courts of appeal or appoint three ad hoc judges to consider these matters." *Id.* at 214 (emphasis added).

In 2011, a three-judge panel of the Louisiana Fifth Circuit issued a new opinion after "reviewing" Petitioner's earlier writ applications that had been denied by the administrative clerk. Pet. 87a. Again, the court denied all of Petitioner's writ applications. Pet. 88a-105a. Moreover, every *other* Louisiana Fifth Circuit panel, that reviewed all the other *Cordero* remands, appears to have reached the same result: no relief. Pet. 165a (Petitioner's counsel below "could not locate a single case re-reviewed pursuant to *Cordero* that received any substantive relief").

The three judges on Petitioner's 2011 panel were aware that if they granted any relief to Petitioner, they would thereby concede that their court's 13-year practice, of denying *all pro se* writ applications without any judicial review, had caused real harm to (at least) this one prisoner.[2] That concession, in turn,

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[2] The Louisiana Fifth Circuit's *en banc* proposal, adopted by the Louisiana Supreme Court, named five specific judges to consider these writ applications. *Cordero*, 993 So. 2d, at 206. However, for reasons that do not appear in the record, none of those five named judges signed the 2011 order denying Petitioner's consolidated writ applications. Instead, the order was signed by the Hon. Jude G. Gravois, Hon. Robert J. Klees, and Hon. Jerome M. Winsberg. Pet. 105a. None of these three judges appears to have served on the Louisiana Fifth Circuit during the

would have subjected the judges' colleagues and their court to further reputational harm, to civil lawsuits, and possibly even to criminal prosecution. Louisiana law, when punishing judicial misconduct, takes into account whether that misconduct has caused harm. *In re Williams*, 2011-2243 (La. 1/24/12), 85 So. 3d 5, 13.

The Louisiana Fifth Circuit panel therefore had a "probability of actual bias" against granting Petitioner any relief. *Caperton*, 556 U.S. at 886.

C. The Federal District Court Accorded AEDPA Deference Despite the Probability of Actual Bias

In according AEDPA deference to the compromised Louisiana Fifth Circuit, the District Court held that "the applicable standard of review" was governed by the federal Fifth Circuit's "no state habeas infirmities" rule. Pet. 15a, 17a (citing *Kinsel* v. *Cain*, 647 F.3d 265, 273 (5th Cir. 2011)). Under that rule, the federal Fifth Circuit refuses to consider constitutional

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period of time that the administrative clerk was denying all *pro se* writ applications. However, these three judges served on the same collegial court, and in the same courthouse, as two of the judges who had, according to the administrative clerk, allowed their names to be placed on the clerk's unreviewed orders: Judges Edwards and Rothschild. *See, e.g.*, *Hernandez* v. *Hernandez*, 11-526 (La. App. 5 Cir. 12/28/11), 83 So. 3d 168, 169 (Gravois, J., joined by Edwards, J., with Rothschild, J., dissenting). Moreover, another two judges who signed the 2008 *en banc* resolution—Judges Wicker and Chehardy—remain on the Louisiana Fifth Circuit today working alongside Judge Gravois. Louisiana Sec'y of State, *Elected Officials* (last visited Apr. 4, 2019), https://voterportal.sos.la.gov/ElectedOfficials. Therefore, the three judges on Petitioner's 2011 panel were subject to an institutional bias to protect their court and their colleagues from the additional harm that would result if any *Cordero* remand resulted in (belated) relief for the prisoner.

challenges to state post-conviction proceedings, even when those proceedings lead to results that are "beyond regrettable" and mean that "a possibly innocent man will not receive a new trial in the face of the preposterously unreliable testimony of the victim and sole eyewitness to the crime for which he was convicted." *Kinsel*, 647 F.3d at 273 (denying habeas relief in another petition arising from a decision of the Louisiana Fifth Circuit, rendered in 2007). According to the federal Fifth Circuit's "no state habeas infirmities" rule, federal courts' "hands are tied by the AEDPA," and any attacks on the Louisiana Fifth Circuit's post-conviction procedures are "barred." *Id.* In other words, the District Court concluded, based on binding Fifth Circuit precedent, that federal courts must accord AEDPA deference *even if* a state post-conviction court is laboring under a probability of actual bias.

II. LOWER COURTS ARE SPLIT OVER WHETHER FEDERAL HABEAS PETITIONERS MAY CHALLENGE STATE POST-CONVICTION PROCEDURES THAT VIOLATE DUE PROCESS

Only two Circuits—the First and the Seventh—will consider a federal habeas petitioner's Due Process challenge to the state's post-conviction procedures. The Seventh Circuit holds that where "state collateral review violates some independent constitutional right," then that violation can "form the basis for federal habeas corpus relief." *Flores-Ramirez* v. *Foster*, 811 F.3d 861, 866 (7th Cir. 2016) (quoting *Montgomery* v. *Meloy*, 90 F.3d 1200, 1206 (7th Cir. 1996)); *Dickerson* v. *Walsh*, 750 F.2d 150, 150-53 (1st Cir. 1984) (adjudicating federal habeas petitioner's Equal Protection challenge to state's post-conviction procedures, and holding that "a state" does not have "the license to administer its laws in an unconstitutional

fashion"). More recently, the First Circuit has adopted the test set forth in this Court's *Osborne* decision: "Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69; see *Tevlin* v. *Spencer*, 621 F.3d 59, 70 (1st Cir. 2010) (adjudicating whether federal habeas petitioner had shown that state's post-conviction discovery procedures were "fundamentally inadequate" to ensure Due Process, and quoting and applying *Osborne*, 557 U.S. at 69).

The minority view is the correct one. This Court has made clear that federal habeas review is available to correct state post-conviction procedures that violate fundamental constitutional rights. *Lane* v. *Brown*, 372 U.S. 477, 485 (1963) (affirming conditional grant of federal habeas to correct Equal Protection violation in state post-conviction procedures, namely, state's requirement that petitioner pay for a copy of his post-conviction hearing transcript); see also *Smith* v. *Bennett*, 365 U.S. 708, 713-14 (1961) (holding, on direct review, that state may not condition availability of state post-conviction relief on payment of filing fee).

The majority of circuits, however, agree with the federal Fifth Circuit's "no state habeas infirmities rule" that was applied in this case, and have shut their doors to federal habeas petitioners' attempts to challenge unconstitutional state post-conviction procedures. In addition to the Fifth Circuit, the Second, Fourth, Tenth, and Eleventh Circuits also hold that a petitioner's due-process constitutional challenge to state post-conviction procedures is "not cognizable" under the federal habeas statute. *Word* v. *Lord*, 648 F.3d 129, 132 (2d Cir. 2011) (noting split and collecting cases); *Lawrence* v. *Branker*, 517 F.3d 700, 717

(4th Cir. 2008); *United States* v. *Dago*, 441 F.3d 1238, 1248 (10th Cir. 2006) ("[D]ue process challenges to post-conviction procedures fail to state constitutional claims cognizable in a federal habeas proceeding."); *Spradley* v. *Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987).

III. THE QUESTION PRESENTED IS IMPORTANT BECAUSE STATE COURTS ARE THE "PRIMARY"—AND, IN ALMOST EVERY CASE, THE ONLY—"FORUMS" FOR VINDICATING PRISONERS' FEDERAL CONSTITUTIONAL RIGHTS

The Due Process guarantee of an impartial and fundamentally fair hearing is especially important in state post-conviction proceedings. That is because federal courts only very rarely correct, on federal habeas review, any errors by state courts. As a legal and a practical matter, the task of correcting and deterring constitutional violations in state criminal trials is now, for all practical purposes, left to the states.

This Court has made clear in a series of decisions that, under AEDPA, state post-conviction proceedings are "the principal forum for asserting constitutional challenges to state convictions." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011) (holding that AEDPA deference applies even to one-line, unreasoned decisions of state courts). Even where a federal habeas court develops additional evidence through an evidentiary hearing, that new evidence is not to be considered in determining whether the state court's decision "involved an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1); *Cullen* v. *Pinholster*, 563 U.S. 170, 184–85 (2011) ("evidence introduced in federal court has no bearing on § 2254(d)(1) review"). In short, AEDPA deference means that "a federal habeas court should sustain a

state court summary decision denying relief if [the arguments and record before the state court] reveal a basis to do so reasonably consistent with this Court's holdings." *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1204 (2018) (Gorsuch, J., dissenting). All of this deference depends on the presumption that state courts will provide the fundamentally fair hearing that Due Process requires.

Empirical data confirm that federal courts, applying AEDPA's deferential standard, very rarely grant substantive relief. In 2007, the National Institute of Justice published a large empirical study of federal habeas proceedings, in which Professor Nancy King and her colleagues analyzed a randomly chosen sample of 2,384 post-AEDPA non-capital habeas petitions filed in 2003 and 2004—about 7.5% of the total filed in those years.[3] (This Court relied on Professor King's study earlier this term. *Garza* v. *Idaho*, 139 S. Ct. 738, 749 n.12 (2019).) Professor King found that only 7 cases (0.28%) resulted in a grant of relief to the petitioner by the District Court.[4] After appeals, just 0.8% of federal habeas petitioners were granted any form of relief.[5] The rate is lower still when considered as a percentage of all state felony prosecutions. According to Professor King, just 0.002% of all felony

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[3] N. King, F. Cheesman, B. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts* 15 (Aug. 21, 2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

[4] *Id.* at 52.

[5] Nancy J. King, *Non-Capital Habeas Corpus after Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 310 (2012); *see id.* at 311-15 tbl.4 (summarizing outcomes of the 18 of the 2,188 cases that had terminated in the district courts and in which the petitioner received "any favorable ruling").

cases begun in state courts will ultimately result in federal habeas relief.[6]

Because the probability that a federal writ of habeas corpus will be granted is "truly microscopic," Professor King concludes that federal habeas review of the merits of any individual criminal case is an "illusory remedy."[7] It would be "absurd" to expect that federal habeas review can "either correct or deter constitutional violations in any individual state criminal case."[8]

The very low rate of relief in federal habeas petitions calls for a change of focus: Federal courts should strive to ensure that state post-conviction procedures are fundamentally fair, and therefore are an adequate substitute for federal habeas review. See *Boumediene* v. *Bush*, 553 U.S. 723, 795 (2008) (the Suspension Clause requires either full federal habeas review or an adequate substitute). Legal scholars like Professor King, who have studied the matter, use metaphors—like "backstop" and "escape valve"—to describe the need for federal courts to ensure that state post-conviction procedures are fundamentally fair.[9] Federal courts should not defer to fundamen-

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[6] Nancy J. King & Joseph L. Hoffman, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 80 (2011).

[7] *Id.* at 81.

[8] *Id.*

[9] Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 140 (2012) ("when the state fails 'to provide adequate process to correct the constitutional violation,' due process requires a federal 'backstop'" (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 492 (1963)); Joseph F. Hoffmann & Nancy J. King, *Rethinking the*

tally flawed state post-conviction procedures, any more than federal courts should accord *res judicata* preclusion to prior proceedings that were fundamentally flawed. See *Montana* v. *United States*, 440 U.S. 147, 164 n.11 (1979) ("[I]f there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation," then federal court should "[r]edetermin[e]" the "issues" previously litigated).

Federal Role in State Criminal Justice, 84 N.Y.U. L. REV. 791, 822, 844 (2009) (proposing that the Suspension Clause operates as an "escape valve" on statutory limits of federal habeas, by which the Supreme Court "can ensure that those detained by the states will always have an adequate judicial forum in which to raise the constitutionality of their detention"); Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254(d) Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 64–65 (2010) (contending that AEDPA's constitutionality depends upon full and fair state procedures).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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