No. 15-324

IN THE
SUPREME COURT OF THE UNITED STATES

JO GENTRY, *et al.*,
Petitioners,
v.
MARGARET RUDIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, ET AL., AS AMICI CURIAE SUPPORTING PETITIONERS.

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QUESTIONS PRESENTED

(1) Whether a later overturned lower court decision accepting an untimely state habeas petition can equitably toll the federal habeas deadline when the prisoner was on notice that her state petition was filed late and she failed to file a protective federal petition per *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

(2) Whether the Ninth Circuit warrants summary reversal because, although it purported to toll Respondent Rudin's federal deadline because she was misled by the lower court, the Ninth Circuit without explanation granted another 350 days of equitable tolling for the period after the Nevada Supreme Court reversed the misleading decision.

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INTEREST OF AMICI CURIAE

The Amici States have a vital interest in the finality of their criminal judgments. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Responding to federal courts' failure to protect the States' finality interests, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), including for the first time a statute of limitations for filing a federal habeas petition. This Court's opinions have specified the narrow application of equitable tolling to the statute. The Amici have a vital interest in faithful application of the federal statute of limitations and this Court's opinions that protect the finality of state criminal judgments.

SUMMARY OF THE ARGUMENT

This Court struggled for years with how to protect the States' interest in finality in criminal cases from dilatory federal petitions for a writ of habeas corpus, but ultimately concluded that, outside the narrow scope of Habeas Rule 9(a), it was up to Congress to protect that interest. In 1996, Congress responded by passing AEDPA, setting a 1-year statute of limitations, allowing statutory tolling during litigation of a prisoner's properly-filed state post-conviction petition.

After issuing two opinions assuming that equitable tolling applied, this Court, when squarely confronted with the issue, held that it did apply. *See Holland v. Florida*, 560 U.S. 631 (2010). But *Holland* emphasized the narrow application of the exception, requiring a prisoner seeking equitable tolling to show both: (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way and prevented timely filing of a federal petition. *Id.* at 649.

Because statutory tolling requires that the state petition be timely to be "properly filed," and because there might be a question under state law as to whether the state petition was timely, a state prisoner might be unsure when to file his federal petition. This Court recognized the dilemma and provided diligent habeas petitioners with the means to protect their rights by filing a "protective" federal petition when facing the possibility that a state court of last resort will find the state petition untimely after substantial time spent litigating the petition in the state courts. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005).

This Court's opinions thus set forth a narrow scope for the application of equitable tolling to dilatory federal petitions. Initially, the Ninth Circuit faithfully enforced the dual requirements of *Holland* and the protective petition mandate of

Pace. But the Ninth Circuit's faithful adherence to this Court's authority has eroded, as exemplified by its opinion in this case.

The majority panel opinion found that the state trial court's erroneous acceptance of an untimely state habeas petition, and the State's failure to more vigorously contest the untimely filing, "misled" the prisoner (Rudin) into thinking statutory tolling applied as she litigated her state petition. It held this constituted an "extraordinary circumstance" that prevented Rudin from filing a timely federal petition. The Ninth Circuit also found diligence, despite Rudin not filing a protective federal habeas petition, even though she was obviously aware her state petition was late, and then not filing the federal petition until 350 days after the Nevada Supreme Court found the state petition untimely.

The Ninth Circuit opinion so clearly misapplies this Court's opinions regarding equitable tolling that this Court should grant review and summarily reverse. Alternatively, this Court should grant Nevada's petition for a writ of certiorari, undertake plenary review, and make clear the narrow application of equitable tolling cannot undo the statute of limitations that Congress enacted to protect the finality of the States' criminal judgments.

ARGUMENT

THE NINTH CIRCUIT'S OPINION FAILS TO FOLLOW THIS COURT'S DIRECTIVES REQUIRING A NARROW APPLICATION OF EQUITABLE TOLLING TO THE STATUTE OF LIMITATIONS. IT PORTENDS A RETURN TO THE PRE-AEDPA EQUITABLE REVIEW OF DILATORY FEDERAL PETITIONS THAT FAILED TO PROTECT THE STATES' FINALITY INTERESTS.

A. CONGRESS ENACTED A STATUTE OF LIMITATIONS FOR FEDERAL HABEAS PETITIONS AFTER THIS COURT'S EQUITABLE ANALYSIS FAILED TO PROTECT THE STATES' INTERESTS IN FINALITY.

Prior to the passage of AEDPA and its enactment of a federal habeas statute of limitations, this Court struggled to maintain a balance between respecting the finality of state criminal judgments and state prisoners' statutory right to federal habeas review. The only "constraint upon the timing of the petition," was "a flexible 'prejudicial delay' rule, akin to the equitable doctrine of laches." 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure 232 (5th ed. 2001).

For instance, in *McCleskey v. Zant*, 499 U.S. 467, 470 (1991), this Court noted: "The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." That case considered a *second* federal habeas petition, and found an abuse of the writ from the prisoner's failure to present the claim in his first federal habeas petition. *Id.* This Court noted that, although the standard of abuse of the writ was central to many federal habeas actions, it had been afforded "little occasion to define it." *Id.* at 477. This Court acknowledged: "Indeed, there is truth to the observation that we have defined abuse of the writ in an oblique way, through dicta and denials of certiorari petitions or stay applications." *Id.* After reviewing the history of federal habeas corpus, acts of Congress, and its case law, this Court concluded: "Our discussion demonstrates that the doctrine of abuse of the writ refers to a complex and evolving *body of equitable principles* informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.* at 489 (emphasis added). It limited its protection of the States' interests in finality to extending its "cause and prejudice" standard from the procedural default context to "abuse of the writ" inquiries. *Id.* at 493-96. It found an abuse of the writ, and thus no excuse for the prisoner's failure

to raise the claim in the first petition. *Id.* at 497-503.

In *Lonchar v. Thomas,* 517 U.S. 314, 322 (1996), this Court held that the court of appeals erred by dismissing a *first* federal habeas petition "for special ad hoc 'equitable' reasons." It found there had been a "gradual evolution of more formal judicial, statutory, or rules-based doctrines of law." *Id.* Even though the writ had been called an "equitable remedy," this Court held that it did not "authorize a court to ignore this body of statutes, rules, and precedents." *Id.* at 323. It explained:

> There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges." . . . (citation omitted). Rather, "courts of equity must be governed by rules and precedents no less than the courts of law." (citations omitted). As Selden pointed out so many years ago, the alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot. (citation omitted).

Id.

This Court then discussed the role of Habeas Corpus Rule 9(a), under which a "delayed petition" "may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." 517 U.S at 326 (emphasis deleted). While noting a "considerable debate about whether the present Rule properly balances the relevant competing interests," this Court concluded:

> [T]hat debate's focus upon Congress also reveals the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process.

Id. at 328. *See also Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) ("[D]espite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. We should not lightly create a new judicial rule ... to achieve the same end.").

Congress then passed AEDPA, which "modified a federal habeas court's role in reviewing

state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone*, 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403–04 (2000)). *See also Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (AEDPA was specifically enacted to further comity, finality, and federalism).

Among other things, AEDPA amended 28 U.S.C. § 2244 to include a 1-year statute of limitations on the time to file a federal habeas petition challenging a state court judgment. *Id.* § 2244(d)(1). Thus, for the first time, there was a fixed statute of limitations for federal habeas petitions. *See Mayle v. Felix*, 545 U.S. 644, 654 (2005); *Rhines v. Weber*, 544 U.S. 269, 274 (2005) ("The enactment of AEDPA dramatically altered the landscape for federal petitions . . . [by] imposing a 1-year statute of limitations on the filing of federal petitions.") (internal citations omitted).

B. THIS COURT SPECIFIED A NARROW APPLICATION FOR EQUITABLE TOLLING OF AEDPA'S STATUTE OF LIMITATIONS.

The limitations statute specifically provides for "statutory tolling" while "a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C.

§ 2244(d)(2). But the statute did not provide for equitable tolling, and in the first case considering the issue, this Court "assume[d] without deciding" (because the respondent so presumed), that equitable tolling could apply to AEDPA's statute of limitations. *Pace*, 544 U.S. at 418 & n.8.

This Court held that a litigant asserting equitable tolling had to show: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Id.* at 418. The prisoner complained that "state law made it appear as though he might gain relief, despite the [state] petition's untimeliness," and thus there was a "trap" "on which he detrimentally relied as his federal time slipped away." *Id.* But this Court found a lack of diligence, for several reasons—one of which was that he "sat" on his rights for 5 additional months after his state proceedings became final for filing his federal petition. *Id.* at 419. This Court noted that a prisoner facing such a possible "trap" could file a "protective" petition in federal court and ask the court to stay and abey the federal habeas proceedings pending exhaustion of state remedies. *Id.* at 417.

Once again, in *Lawrence v. Florida*, 549 U.S. 327, 336 n.3 (2007), this Court assumed, because the parties did, that the statute allowed equitable tolling. It rejected the prisoner's argument that his counsel's mistake in miscalculating the limitations

period entitled him to equitable tolling: "Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." *Id.* at 336-37. It also found the state court appointment of the attorney did not "deprive[] States of the benefit of the AEDPA statute of limitations." *Id.* at 337. Finally, it rejected the prisoner's allegation that "mental incapacity" led to his reliance on counsel and justified equitable tolling. *Id.* Accordingly, it held: "Lawrence has fallen far short of showing 'extraordinary circumstances' to support equitable tolling." *Id.*

Finally, in *Holland v. Florida*, 560 U.S. 631, 634 (2010), this Court expressly decided that AEDPA's timeliness provision was subject to equitable tolling. It reasserted that a prisoner is only entitled to equitable tolling if he shows both: (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Id.* at 649, *citing Pace*, 544 U.S. at 418. It held that attorney misconduct, "far more than 'garden variety' or 'excusable neglect'," could constitute an "extraordinary circumstance." *Id.* at 652. It also found reasonable diligence because of the prisoner's repeated efforts through counsel, state courts, and the state bar, to have counsel removed. *Id.* at 653. Furthermore, when he discovered his "AEDPA

clock had expired," the prisoner promptly prepared and filed a *pro se* petition. *Id.* at 653. This Court reversed and remanded the case for further proceedings consistent with the opinion. *Id.* at 654.

Initially, the Ninth Circuit faithfully followed this Court's limits on applying equitable tolling. It affirmed *Pace's* requirement for a protective petition to show diligence. *See Lackey v. Hickman*, 633 F.3d 782, 787 (9th Cir. 2011). It emphasized the narrow application of equitable tolling: "To apply the doctrine in 'extraordinary circumstances' necessarily suggests the doctrine's rarity, and the requirement that extraordinary circumstances 'stood in his way' suggests that an external force must cause the untimeliness, rather than . . . merely 'oversight, miscalculation or negligence on the petitioner's part, all of which would preclude the application of equitable tolling.'" *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009) (quoting *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008)). Therefore, "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Id.* (internal marks and quotation omitted). The Ninth Circuit also held: "[e]quitable tolling is justified in few cases," *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003), and remains "unavailable in most cases." *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002). However, as this case demonstrates, the court has since departed

from this Court's precedent and ruled for an expansive application of equitable tolling.

C. THE NINTH CIRCUIT'S OPINION CONTRAVENES THIS COURT'S DIRECTIVES THAT EQUITABLE TOLLING BE NARROWLY APPLIED, AND INSTEAD PROVIDES FOR A BROAD APPLICATION OF EQUITABLE TOLLING.

The Ninth Circuit's analysis contravenes this Court's opinions and results in the equitable tolling exception swallowing the federal limitation rule. This Court's opinions require a narrow scope for equitable tolling. Amici will not repeat Nevada's arguments on why the opinion is wrong, but discuss further ways in which it disregards this Court's opinions, and why this Court should summarily reverse the Ninth Circuit opinion.

1. Diligence

First, the Ninth Circuit found *Pace* did not require the filing of a protective petition because Rudin could not have known that the Nevada Supreme Court would ultimately overrule the state trial court's acceptance of her untimely state petition. App. 34. The dissent points out that *Pace* covers this very situation where the prisoner and her counsel "were aware that there were potential timeliness issues with the state petition." App 40.

In fact, *Pace* says: "a petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out *at the end* that he was never properly filed, and thus that his federal habeas petition is time barred." *Pace*, 544 U.S. at 416 (quotation marks omitted, emphasis added). What does "at the end" mean, other than that the ultimate state court decision, here from the Nevada Supreme Court, is that the state petition was untimely? This Court has specifically instructed petitioners how to deal with this problem:

> A prisoner seeking state postconviction relief might avoid this predicament. . . by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings *until state remedies are exhausted*. A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court.

Id. (internal quotation marks and citation omitted, emphasis added).

The Ninth Circuit opinion notes that, during a conference on August 22, 2007, "the parties were still confused as to whether a petition for post-conviction relief had actually been filed." App. 17. The dissent correctly points out that, as of this

conference, Rudin and her new attorney were "put on notice of the fact that nothing had been 'properly filed' in either state or federal court on her behalf." App. 39. This is exactly the type of "reasonable confusion" that required Rudin's counsel to file a federal petition in order to show diligence.

An implied criticism of *Pace* is found in the concurring opinion from District Judge Adelman: "Requiring a protective petition would be *particularly pointless* in this case." App. 35, emphasis added. But that is simply questioning the wisdom of this Court's mandate in *Pace*—that prisoners file protective petitions when there is reasonable confusion as to the timeliness of the state petition. Whether *Pace* needs to be reconsidered is for this Court to decide, not the Ninth Circuit.

The majority opinion also attempts to distinguish *Pace* on the ground that, there, "the state courts repeatedly and consistently found petitioner's filings untimely." App. 34. But even if the first finding by a state court that the state petition is untimely is what triggers the *Pace* diligence requirement, how can the Ninth Circuit find diligence that justifies equitable tolling for another 350 days *after* the Nevada Supreme Court found the petition untimely? Not only did Rudin fail to show diligence in not filing a protective habeas petition when filing her untimely state

petition with the trial court, she also failed to show diligence by waiting for 350 days after the state court of last resort determined the petition was untimely.

2. Extraordinary circumstances.

The Ninth Circuit also disregarded this Court's opinions by concluding that the erroneous state trial court ruling excusing Rudin's untimely filing of her state petition was an "extraordinary circumstance" that "prevented" her from filing a timely federal habeas petition. App. 31-32. It held that the state trial court's ruling, along with the State's failure to more vigorously contest the ruling, "'affirmatively misled' Rudin into believing that the state court had excused her late filing and that the federal statute of limitations would be tolled." App. 31.

The first question is: "Who misled whom?" Rudin's counsel obviously knew her state petition was late, but persuaded the state trial court to commit error by accepting the late petition. And counsel's persuasiveness also apparently led the State into declining to more vigorously contest the ruling. Nothing in this Court's opinions even remotely suggests that defense counsel's effectiveness in persuading the state trial court to make an erroneous ruling accepting an untimely petition is an extraordinary circumstance that prevented Rudin from filing a timely federal

petition. Neither the state trial court nor the State "prevented" Rudin from filing a timely federal habeas petition.

D. THIS COURT SHOULD GRANT REVIEW AND SUMMARILY REVERSE TO REAFFIRM ITS OPINIONS AS TO THE NARROW SCOPE OF EQUITABLE TOLLING AND TO FORESTALL A RETURN TO PRE-AEDA ANALYSIS OF DILATORY FEDERAL PETITIONS.

This Court should grant review and summarily reverse to reaffirm its opinions setting forth the narrow application of equitable review. The Ninth Circuit's opinion essentially disregards this Court's opinions in *Pace, Lawrence*, and *Holland.*

This is not likely to be an isolated opinion. Not one judge on the Ninth Circuit, other than the panel dissenter, voted to grant rehearing *en banc*. App. 116-17. Moreover, Nevada cites two recent Ninth Circuit opinions that questionably expand the application of equitable tolling: *Gibbs v. LeGrand*, 767 F.3d 879 (9th Cir. 2014), and *Sossa v. Diaz*, 729 F.3d 1225 (9th Cir. 2013). Pet. at 13 n.3. *See also Luna v. Kernan*, 784 F.3d 640, 647-49 (9th Cir. 2015) (expanding equitable tolling to cover "professional misconduct" short of abandonment and acknowledging a split with the Eleventh Circuit).

The Ninth Circuit opinion in this case portends a return to the pre-AEDPA regime, when federal courts performed a virtually standardless "equitable" review of the state case. Indeed, in this case, the Ninth Circuit appeared to "look though" to the prisoner's allegations of federal constitutional in deciding whether to apply equitable tolling. The majority opinion discusses the trial and direct appeal (App 5-8), neither of which has anything to do with a proper equitable tolling analysis. The majority opines: "Rudin's trial was replete with alleged errors and professional misconduct on the part of the defense team." App. 6. But that should have nothing to do with a proper statute of limitations analysis. A prisoner's untested habeas allegations may often appear to present the specter of federal constitutional error, even though a tiny percentage of habeas petitioners obtain habeas relief.

This Court has already provided a "safety valve" by finding an "actual innocence" exception to the statute of limitations bar. *See McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). In contrast to a standardless "equitable" review, the actual innocence exception to the statute can be analyzed under the strict and well-developed case law regarding actual innocence as an excuse for a procedural default.

Congress, at this Court's urging, enacted a

statute of limitations to protect the States' substantial interest in finality of their criminal judgements. This Court has specified a narrow application of equitable tolling to the statute of limitations. This Court should grant review to uphold Congress' intent in passing AEDPA's statute of limitations, and this Court's subsequent opinions mandating a narrow application of equitable tolling to the statute.

CONCLUSION

This Court should grant Nevada's petition for a writ of certiorari and summarily reverse the Ninth Circuit's opinion in this case. Alternatively, it should grant the petition for plenary review.

Respectfully submitted this 15th day of October, 2015.

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