No. 15-324

In the Supreme Court of the United States

JO GENTRY, *et al.*,

Petitioners,

v.

MARGARET RUDIN,

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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Rudin does not dispute any of the facts relevant to the State's petition, including that she waited 350 days *after* the Nevada Supreme Court ruled that her state habeas petition was improperly filed before she filed her first federal petition. Opp. 4. And while disputing some of the circuit conflicts presented by the State, Rudin does concede that the State has "demonstrate[d] … vividly" at least one split that the Court could address in this case. Opp. 14.

Rudin attempts to dismiss the other conflicts by arguing that "[e]quitable tolling cases are fact-intensive" and thus always require a "case-by-case" analysis. Opp. 7, 14. If that was enough to prevent review, then no equitable tolling case would ever merit this Court's consideration. In reality, the first Question Presented by this case presents several well-developed and important *legal* issues related to the application of equitable tolling in habeas cases:

- Is a lower state court's erroneous acceptance of an improperly filed state habeas petition an "extraordinary circumstance" for purposes of equitable tolling?
- Is the government's failure to object earlier and more vigorously to an improperly filed petition an "extraordinary circumstance"?
- Is a petitioner who is on notice that her state petition may be improperly filed "reasonably diligent" when she fails to file a protective federal petition?

The panel below decided each of those legal questions at odds with how other circuits have ruled. These multiple conflicts presented by this case are real. And they spotlight an ongoing trend in the Ninth Circuit to disregard this Court's guidance and apply equitable tolling expansively—a trend confirmed by the *Amici* States, many of which are also in the Ninth Circuit. *See* States' Amici Br. 16-18.

All of Rudin's arguments against this Court's review—and in defense of the Ninth Circuit's grant of over *six years* of equitable tolling—ultimately revert back to one thing: she was abandoned by her first post-conviction counsel, which makes this a "unique," "extraordinary," and "messy" case. Opp. 7, 8, 9, 10, 13, 15. Rudin was abandoned, and the Ninth Circuit generously gave her equitable tolling for that entire period of abandonment plus more than a year after. The State does not contest any of *that* equitable tolling, including the bonus year. *See* Pet. 17 n.4. It is the almost four more years of additional equitable tolling long *after* Rudin received new counsel—and *after* Rudin and her new counsel were on notice that her state court petition had been filed late, Pet. 7 & n.2—that is at issue here. The Ninth Circuit never purported to base that tolling on Rudin's earlier abandonment.[1] Rudin's attempts to import earlier issues that not even the Ninth Circuit considered relevant should not obscure the obvious legal problems presented by her tolling *after* August 2007—the only tolling at issue here.

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[1] The Ninth Circuit based equitable tolling after August 2007 on the state lower court's supposed "misleading" acceptance of Rudin's untimely habeas petition and the lack of a stronger objection by the State. Pet. App. 31-32.

I. This decision has created a split with the Fifth Circuit on whether a lower state court's later-overturned acceptance of an improperly filed habeas petition constitutes an "extraordinary circumstance" warranting equitable tolling.

Consistent with her argument that all "equitable tolling cases are fact-intensive" and thus ill-suited to review by this Court, Rudin claims that the two Fifth Circuit decisions identified in the petition as conflicting with this case—*Larry* and *Jones*—"are factually not even similar" because, among other things, there "were no allegations in *Larry* [or *Jones*] about attorney abandonment." Opp. 9.

No case is identical to any other. But just as in this case, the state trial court in *Larry* "mistakenly" reviewed an improperly filed state habeas petition, "not realizing it lacked jurisdiction to consider his application." *Larry v. Dretke*, 361 F.3d 890, 895 (5th Cir. 2004). And just as in this case, Larry argued that he should be granted equitable tolling because he was "misled by the state trial court into believing that his first state habeas application was properly filed" until the state's highest court disallowed the petition as improper. *Id.* at 897. The Fifth Circuit rejected Larry's argument, holding that "the state habeas court did not mislead Larry in any way or prevent him from asserting his rights." *Id*. The first Ninth Circuit decision in this case reached the same conclusion: "Rudin had every reason to act diligently to protect her rights. Yet she failed to do so." Pet. App. 69. The second Ninth Circuit decision never concluded that

anything *prevented* Rudin from asserting her rights, yet it inexplicably excused her failure to do so. Pet. App. 31-33. The disagreement between *Rudin II* and *Larry* is just as unmistakable as the disagreement between *Rudin II* and *Rudin I*.

The conflict with *Jones* is no less apparent. As in both *Larry* and this case, the state trial court in *Jones* accepted the petitioner's state habeas application, which the state's higher court later rejected as procedurally improper. *Jones v. Stephens*, 541 App'x 499, 500-01 (5th Cir. 2013). Like Rudin, "Jones argue[d] that the state court's failure to timely inform him that his habeas application was improperly filed misled him into missing his federal deadline for filing a federal habeas petition and thus is an extraordinary circumstance." *Id.* at 503. The Fifth Circuit concluded that "even assuming that Jones was reasonably diligent in pursuing his rights, there was no extraordinary circumstance that stood in his way and prevented timely filing." *Id.* In clear conflict, the Ninth Circuit here ruled that "the inaccuracy of a state post-conviction court's extension of time may constitute an 'extraordinary circumstance' making it 'impossible' to file a petition on time." Pet. App. 32.

Lastly, Rudin attempts to dilute the disagreement between the Ninth Circuit in this case and *Larry* and *Jones* by pointing out other Fifth Circuit cases that Rudin believes do not conflict. *See* Opp. 10-12. First, that does not ameliorate the conflict. Even if Rudin was right that the Fifth Circuit is internally confused, the split between multiple Fifth Circuit cases (with one case going back to 2004) and the Ninth Circuit would still merit this Court's review. Indeed, the greater

confusion presented by intra-circuit as well as inter-circuit ambiguity would presumably, if anything, militate *further* in favor of this Court's intervention.

But there is no inconsistency within the Fifth Circuit. Both *Prieto* and *Cockrell* considered instances where the *federal* courts had directly misled habeas petitioners about how and when they should have filed their *federal* habeas petitions in *federal* courts. *See Prieto v. Quarterman*, 456 F.3d 511, 514-15 (5th Cir. 2006); *Alexander v. Cockrell*, 294 F.3d 626, 629-30 (5th Cir. 2002). There is a difference between claiming that (1) a *federal court* has directly misled a habeas petitioner on when and how to file her federal habeas petition in federal court, and claiming that (2) a *state trial court* has indirectly misled a petitioner on when to file her federal habeas petition—especially since this Court has already addressed the latter circumstance in *Pace*, instructing unsure state habeas petitioners to file a protective federal petition. *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005). Federal court petitioners are quite reasonably expected to rely on federal courts' instructions, even if later found erroneous; state court petitioners have no reason, especially after *Pace*, to believe that erroneous lower state-court decisions will dictate federal habeas deadlines.[2]

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[2] *Palacios v. Stephens*, which Rudin also references (Opp. 11), is even more inapposite because that case involved allegations that the petitioner's *attorney* had misled him as to the filing deadline, not any court. 723 F.3d 601, 602 (5th Cir. 2013).

II. This decision has created a split with the Eleventh Circuit on whether the government's failure to object earlier to a habeas petitioner's improperly filed petition constitutes an "extraordinary circumstance" warranting equitable tolling.

Rudin's main response to the conflict between the Ninth Circuit's decision in this case and the Eleventh Circuit's decision in *Hill* is to point to the period in this case before August 2007—stating that, unlike in *Hill*, "confusion in the court reigned" with "years of continuances" and attorney abandonment. Opp. 12-13. But none of that is relevant to the Ninth Circuit's grant of years of equitable tolling after August 2007.

That tolling, the Ninth Circuit ruled, was justified in part because of "the state's failure to brief the timeliness question or move to dismiss Rudin's petition" in the state trial court. Pet. App. 31. Yet in *Hill v. Jones*, Hill had improperly filed his appeal from the state trial court's denial of his state habeas petition and the state's "response to Hill's appeal … made no mention of the untimeliness of the appeal." 242 F. App'x 633, 634 (11th Cir. 2007) (unpublished). The Eleventh Circuit ruled that "Hill is entitled to no equitable tolling merely because the state failed to flag his error earlier." *Id.* at 637. "That the state might have brought Hill's mistake to his attention does not shift the burden of diligence to the state." *Id.*

The Ninth Circuit's ruling below did just what the Eleventh Circuit refused to do. Under longstanding Nevada law, even the State's acquiescence cannot relieve a habeas petitioner from "the mandatory

procedural default rules" governing state habeas petitions. *State v. Haberstroh*, 69 P.3d 676, 681 (Nev. 2003); *see also State v. Eighth Jud. Dist. Ct.*, 112 P.3d 1070, 1074 (Nev. 2005). The record is clear that the State *did* voice an objection to the Nevada trial court's acceptance of Rudin's late-filed habeas petition at the August 22, 2007 status conference. Pet. 7. And the State *did* brief the timeliness issue on appeal, Pet. 8, which is more than the state did in the Eleventh Circuit's *Hill* case. But the State had no burden or obligation to do even that. The Ninth Circuit's ruling that the State's failure to do more to object earlier to Rudin's improperly filed state petition cannot be reconciled with either Nevada law or the Eleventh Circuit's ruling in *Hill*.

III. This decision exacerbates an existing split between the Ninth and Fifth Circuits on whether a state habeas petitioner's failure to file a protective federal petition under *Pace* shows that the petitioner lacked the "reasonable diligence" necessary for equitable tolling.

Rudin concedes that "nothing demonstrates a split more vividly" than the conflict between the Ninth Circuit's *Szabo* decision and the Fifth Circuit's *Palacios* decision. Opp. 14. The Ninth Circuit has repeatedly held that "a state prisoner's failure to file a protective federal petition 'does not demonstrate the diligence required for application of equitable tolling.'" *Szabo v. Ryan*, 571 F. App'x 585 (9th Cir. 2014) (unpublished) (quoting *White v. Martel*, 601 F.3d 882, 884-85 (9th Cir. 2010) (per curiam)). By contrast, the Fifth Circuit in *Palacios* held that "failure to file a protective federal

habeas petition weighs against, but is not dispositive of, the reasonable diligence inquiry." 723 F.3d at 608.

The petition for certiorari mentions that split, but only in passing (Pet. 17), because the addition of this case to the mix makes for a peculiar conflict. Before this case, the split was straightforward: the Fifth Circuit had concluded that failure to file a protective petition was relevant, but not dispositive, and the Ninth Circuit had repeatedly concluded that a petitioner could not demonstrate reasonable diligence without filing a protective petition. In the Ninth Circuit's first decision in Rudin's case, it expressly agreed with and relied on that Ninth Circuit precedent in stating that because Rudin failed to file a protective petition, "[w]e are therefore compelled to conclude that she is not entitled to equitable tolling … after August 22, 2007." Pet. App. 70 n.18 (citing *White*, 601 F.3d at 884-85). But after the Ninth Circuit's second decision in Rudin's case, there is still a split, but now it looks like this: Ninth Circuit authority holds that a protective petition is *necessary* to show reasonable diligence (*Szabo*, *White*); Fifth Circuit authority holds that a protective petition is *relevant but not necessary* to show reasonable diligence (*Palacios*); and now Ninth Circuit authority supports that a protective petition is *irrelevant* to show reasonable diligence (*Rudin II*). The Ninth Circuit is internally conflicted, and both sides of that split conflict with the Fifth Circuit. This Court's review could resolve this conflict also.

IV. Rudin confirms that the Ninth Circuit's grant of an extra 254 days of additional equitable tolling, for the period after the Nevada Supreme Court reversed the lower court's acceptance of Rudin's improperly filed petition, is contrary to the Ninth Circuit's own rationale, and indefensible.

The most untenable aspect of the Ninth Circuit's decision in this case is its grant of 254 days of extra tolling after the Nevada Supreme Court on May 10, 2010 reversed the lower court's supposedly "misleading" acceptance of Rudin's state petition. Rudin did not file her first federal habeas petition until April 25, 2011—350 days later. Even ignoring all of the other problems with the decision below, that one plainly merits reversal.[3]

Rudin's only attempt to defend this aspect of the Ninth Circuit's ruling is to make an argument that not even the Ninth Circuit accepted: that she was "entitled to statutory tolling under § 2244(d)(2) … until remittitur did issue on January 20, 2011." Opp. 15-16. The Ninth Circuit rejected that argument in *both* of its decisions below, as Rudin acknowledges. Opp. 4-5 ("The [*Rudin I*] panel found no statutory tolling …."); Opp. 6 ("the [*Rudin II*] panel still held that Rudin was not entitled to statutory tolling under Section 2244(d)(2) for the duration of her state post-conviction proceedings").

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[3] To be clear, the State emphatically does *not* "concede th[at] equitable tolling is appropriate up to at least [when] the Nevada Supreme Court's decision overruled the lower court's new trial order." Opp. 15. *See* Pet. 14-17.

Rudin suggests that reversing on this basis would be mere error correction. Opp. 14-15. As shown, this case presents multiple important conflicts ripe for this Court's review. By granting plenary review and addressing those issues, this Court can *also* reverse this unexplained extra grant of equitable tolling *and* reverse the Ninth Circuit's dangerous trend towards overextending equitable tolling.

Even as a stand-alone error, the Ninth Circuit's grant of 254 extra days of tolling merits summary reversal. As the *Amici* States explained, "[t]his is not likely to be an isolated opinion." States' *Amici* Br. 16. The panel's apparent willingness to ignore this Court's guidance—and even the panel's own rationale—to reach a desired outcome simply because it believed that Rudin "potentially has meritorious claims" is troubling, not just for this case but for future habeas cases and the rule of law. Opp. 5-6 (citing Pet. App. 71, 73). It "portends a return to the pre-AEDPA regime, when federal courts performed a virtually standardless 'equitable' review" of state habeas petitions. States' *Amici* Br. 17. Reversing this panel will affect more than just this case, discouraging future improper decisions of this sort.

V. Review of this decision is necessary to reverse the Ninth Circuit's trend of applying equitable tolling over-expansively and contrary to this Court's guidance.

In recent years, there is an unmistakable trend in the Ninth Circuit to expand the availability of equitable tolling well beyond this Court's directions in *Pace* and *Holland v. Florida*, 560 U.S. 631 (2010). Judge O'Scannlain, in his dissent below, emphasized

that the decision "cannot be squared with … our precedents." Pet. App. 37. The *Amici* States, many of them in the Ninth Circuit, explained that the Ninth Circuit is drifting in recent cases towards "a virtually standardless 'equitable' review …. in deciding whether to apply equitable tolling." States' *Amici* Br. 17. Petitioners and *Amici* States provided this Court with four cases (including this one) in just the past couple of years illustrating this movement. *See id.* at 16; Pet. 13 n.3.

Rudin denies the existence of any trend, Opp. 7, but only addresses one of the cases cited—*Gibbs v. Legrand*, 767 F.3d 879 (9th. Cir. 2014)—and even then only to mention briefly that Gibbs, like Rudin, was also abandoned by the same attorney. Opp. 8. But as in this case, the controversial part of *Gibbs* was not the equitable tolling granted for the period of attorney abandonment; it was the *second* period of equitable tolling allowed "after an extraordinary circumstance [of attorney abandonment] barring filing was lifted." *Gibbs*, 767 F.3d at 892. It is *that* equitable tolling—unrelated to attorney abandonment—that expanded equitable tolling well beyond the facts and reasoning of *Holland*. The Ninth Circuit's decision in *Gibbs* was just a smaller version of what it did here. Both *Rudin* and *Gibbs* are published decisions. The trend is real, and it should be addressed by this Court.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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