No. 18-

IN THE

Supreme Court of the United States

TERRENCE EDWIN PRINCE,

Petitioner,

v.

JOE A. LIZARRAGA, WARDEN OF MULE CREEK PRISON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes gatekeeping provisions that prohibit federal district courts from even considering the merits of a "second or successive" habeas petition raising a claim based on newly discovered evidence unless the petitioner can "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B). Read literally, that provision would bar even a claim based on exculpatory evidence that the state had intentionally suppressed until after a petitioner filed his first habeas petition. As this Court has repeatedly held, however, "second or successive" is a term of art that does not apply to all second-in-time petitions.

The questions presented are:

1. Is a *Brady* claim brought in a second-in-time habeas petition "second or successive" for purposes of AEDPA's gatekeeping provisions when the claim is based on previously undisclosed evidence?

2. Does applying AEDPA's severely limiting gatekeeping provisions to a second-in-time petition violate the presumption against retroactivity, where the petitioner's initial petition was filed pre-AEDPA, and the second-in-time petition would have survived under the pre-AEDPA standard?

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INTRODUCTION

This case presents two cert-worthy questions about the reach of AEDPA's limits on "second or successive" habeas petitions. Both are of fundamental importance to federal habeas practice. And both are of enormous consequence to Petitioner Terrence Prince, who, under the Ninth Circuit's rule, is essentially foreclosed from any federal review of his meritorious *Brady* claim simply because he filed a habeas petition in 1991, when he (1) had no reason to know of the *Brady* violation, because the suppressed evidence had not yet been disclosed, and (2) had no reason to know that AEDPA might foreclose him from bringing a *Brady* claim in the future.

I. In 2010, Mr. Prince learned that the State had withheld an exculpatory eyewitness statement from his 1982 murder trial. Because the State did not disclose the evidence until long after Mr. Prince's first state and federal habeas petitions were denied, Mr. Prince had to bring his *Brady* claim in a second federal habeas petition. The Ninth Circuit concluded that Mr. Prince's petition was subject to AEDPA's gatekeeping restrictions on "second or successive" petitions, 28 U.S.C. § 2244(b), and that he therefore could not even present that claim to the district court unless the court of appeals found "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Mr. Prince] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B).

The Ninth Circuit's holding that claims based on newly revealed *Brady* violations are subject to

AEDPA's gatekeeping provisions simply because they follow a previously adjudicated habeas petition is contrary to this Court's precedent. This Court has explained that a new petition is "second or successive" for purposes of § 2244(b) only if it raises claims that were or could have been adjudicated on their merits in an earlier petition. *See Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007). The Ninth Circuit's contrary conclusion flouts that rule and, if allowed to stand, would incentivize prosecutors to withhold evidence until after a petitioner's initial habeas petition is adjudicated. The result is to insulate the prosecutor's misdeeds in withholding exculpatory evidence from judicial review. It also illogically requires a petitioner to raise a *Brady* claim *before* it ripens or forego any opportunity for federal habeas review of a meritorious constitutional claim. In the Ninth Circuit's own words, its holding would "saddle petitioners with a stringent standard of proof that is a function of the government's own neglect, or, worse, malfeasance[]." Pet. App. 39a.

II. The Ninth Circuit's holding also implicates a deep and acknowledged divide amongst the courts of appeals over the question whether AEDPA's gatekeeping provisions have an impermissible retroactive effect. The Third, Sixth, Tenth, and D.C. Circuits have held that AEDPA's bars on "second or successive" petitions do not apply if a prisoner filed an initial petition under pre-AEDPA law and could have brought a successive petition under the law in effect at that time. The First, Second, Fifth, Seventh, and Eleventh Circuits agree with the Ninth Circuit that AEDPA's gatekeeping provisions apply regardless of when a first petition was filed.

The Ninth Circuit's retroactivity ruling is contrary to this Court's precedent. At the time Mr. Prince filed his 1991 habeas petition, he was not precluded from bringing a meritorious *Brady* claim in a successive petition to challenge either his sentence or his conviction should *Brady* evidence later come to light. Section 2244(b)(2)(B), if applied, would now bar him from bringing that same claim absent a showing of actual innocence. AEDPA would thus attach a severe retroactive consequence to his pre-AEDPA act of filing an initial petition. Because AEDPA contains no unambiguous statement of congressional intent that its gatekeeping provisions apply to cases in which the first habeas petition was filed before AEDPA's enactment, the traditional presumption against retroactivity mandates the conclusion that § 2244(b) does not apply.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is unpublished but available at 733 F. App'x 382 and reproduced at Pet. App. 1a. The decision of the Ninth Circuit in *Brown v. Muniz*, which the decision below incorporates, is published at 889 F.3d 661 and reproduced at Pet. App. 7a. The decision of the district court adopting the report and recommendation of the magistrate judge, and the magistrate judge's report and recommendation, are unpublished but available at 2016 WL 927134 and 2016 WL 922636, respectively, and reproduced at Pet. App. 41a and 43a, respectively.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on May 8, 2018, Pet. App. 1a, and denied Mr. Prince's timely petition for rehearing and rehearing en banc on July 20, 2018, Pet. App. 60a-61a. On September 20, 2018, Chief Justice Roberts extended the deadline for filing this petition to and including November 19, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(b) provides:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error,

no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT OF THE CASE

Thirty-six years ago, Terrence Prince was convicted and sentenced to life without parole for the special-circumstance murder of the owner of a small restaurant and check-cashing business. Pet. App. 2a. The trial hinged on the testimony of two eyewitnesses; no physical evidence linked Mr. Prince to the crime. The special circumstance—which the State charged based on its theory that Mr. Prince was the shooter—triggered a mandatory sentence of either life without parole or death. Cal. Penal Code § 190.2(a)(17)(i) (1980). Mr. Prince's direct appeal and pre-AEDPA state and federal habeas petitions were unsuccessful. Pet. App. 3a.

Decades after the trial, during proceedings on a second state habeas petition, the Los Angeles County District Attorney's Office produced critical, previously undisclosed evidence relating to Mr. Prince's trial: a page of notes taken by an LAPD officer on the day of the crime. *Id.* The notes detailed the officer's interview with Nelida Walsh, who at the time of the shooting was across the street from the restaurant. When she heard shots, Ms. Walsh saw a man standing in the doorway of the restaurant moving a firearm out of a shooting position. *Id.*; C.A. Excerpts of Record (ER) 38.

Walsh's description of the man was incompatible with the accounts of the State's two eyewitnesses, one of whom was a minor, had suffered a head injury at the scene, and did not see the shooting. Pet. App. 48a; ER 78, 85. The man Ms. Walsh described wore different clothing, carried a different weapon, and was in a

different location than the two robbers the State's witnesses described. Pet. App. 3a-4a; ER 100. But the State never disclosed anything about Ms. Walsh or her statements until decades after Mr. Prince's trial. Pet. App. 3a.

Mr. Prince amended his state habeas petition to add a *Brady* claim based on the Walsh evidence. Pet. App. 46a. Following a 42-day evidentiary hearing, the judge granted the petition. Pet. App. 4a; ER 104. The court found that the Walsh evidence was suppressed and was exculpatory because it tended to show that Mr. Prince was not at the scene at all (and therefore not guilty of murder) or that there was "an alternate suspect who arguably could have been the shooter," undermining the State's theory that led to the special circumstance and mandatory sentence of life without parole. ER 100-04. The court also concluded that the evidence was material, i.e., that there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Strickler v. Greene*, 527 U.S. 263, 279 (1999) (internal quotation marks omitted). ER 104.

The California Court of Appeal reversed, second-guessing the trial court's finding of "materiality" of the suppressed evidence. Pet. App. 4a. The California Supreme Court denied review. *Id.*

Mr. Prince filed a federal habeas petition based on the Walsh evidence, arguing that, as the trial court found, the suppressed evidence was material to both his murder conviction and the special circumstance that led to his sentence of life without parole. *Id.* The district court did not reach the merits. It dismissed for

lack of jurisdiction. *Id.* The district court held that Mr. Prince's petition was "second or successive" within the meaning of § 2244(b) because he had previously filed a federal habeas petition that was adjudicated on the merits, and thus he could not pursue his *Brady* claim without permission from the Ninth Circuit upon a showing that his claim meets the extremely restrictive gatekeeping criteria for "second or successive" petitions. Pet. App. 56a-57a; *see* 28 U.S.C. § 2244(b)(3)(A). It also rejected Mr. Prince's argument that AEDPA imposes impermissible retroactive consequences on his pre-AEDPA act of filing a first petition. Pet. App. 56a n.7.

The court of appeals affirmed. It rejected Mr. Prince's argument that newly disclosed *Brady* claims are not "second or successive" within the meaning of § 2244(b), citing "the reasons set forth in [its] concurrently filed published opinion [in] *Brown v. Muniz*, 16-15442, [889] F.3d [661] (9th Cir. 2018)," which was argued the same day. Pet. App. 5a-6a.[1] The court "appreciate[d] that [its] application of AEDPA's second or successive bar to *Brady* claims … [would] saddle petitioners with a stringent standard of proof that is a function of the government's own neglect, or worse, malfeasance." Pet. App. 39a. But the court believed

[1] The petitioner in *Brown* has also filed a petition for a writ of certiorari seeking review of the first question presented in this petition. *See Brown v. Hatton*, No. 18-__ (petition for cert. filed Nov. 19, 2018). The first question presented is also presented in *Solorio v. Muniz*, No. 18-6396 (petition for cert. filed October 17, 2018), and in *Scott v. United States*, No. 18-__ (petition for cert. filed Nov. 14, 2018).

that "harsh" and "seem[ingly] inequitable" rule accurately reflects "the framework Congress established." *Id.* Citing prior circuit precedent, it also held that AEDPA's gatekeeping provisions on "second or successive" petitions apply regardless of whether the initial petition was filed pre-AEDPA. Pet. App. 4a-6a.

Mr. Prince filed a petition for rehearing en banc, which was denied. Pet. App. 60a.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari To Determine Whether All Second-In-Time *Brady* Claims Are "Second Or Successive."

Section 2244(b) provides that claims brought in "second or successive" petitions must be "dismissed" except in specific, narrow circumstances. Even if a claim is based on evidence that "could not have been discovered previously through the exercise of due diligence," a "second or successive" petition must be dismissed unless the petitioner can show that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). That standard, commonly referred to as an "actual innocence" standard, *see Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005), is far more stringent than the already rigorous standard for initial federal habeas petitions filed under 28 U.S.C. § 2254(d). And § 2244(b) is much more limited in

scope: Whereas an initial habeas petition may challenge the constitutionality of a sentence as well as a conviction, *see, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003), a petition deemed "second or successive" under § 2244(b) may raise a claim based on newly discovered evidence only to challenge conviction of the "underlying offense," 28 U.S.C. § 2244(b)(2)(B)(ii).

This Court has "declined to interpret 'second or successive' as referring to all [federal habeas] applications filed second or successively in time." *Panetti*, 551 U.S. at 944. "Second or successive" is a "term of art." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). In *Panetti*, this Court concluded that "[t]he statutory bar on 'second or successive' applications does not apply" to claims "brought in an application filed when the claim is first ripe." *Panetti*, 551 U.S. at 945-47. Seven Justices later affirmed that "a 'claim' that 'the petitioner had no fair opportunity to raise' in his first habeas petition is not a 'second or successive' application." *Magwood v. Patterson*, 561 U.S. 320, 343 (2010) (Breyer, J., concurring); *see id.* at 349 (Kennedy, J., dissenting) ("*Panetti* establishes that deciding whether an application itself is 'second or successive' requires looking to the nature of the claim that the application raises to determine whether the petitioner had a full and fair opportunity to raise that claim in his earlier petition.").

The Ninth Circuit acknowledged that previously unripe claims are not "second or successive" and are not subject to § 2244(b)'s severe restrictions. Pet. App. 25a-26a. It nevertheless held that a *Brady* claim based on previously undisclosed evidence *is* "second or successive." That conclusion is contrary to this

Court's precedent, produces perverse and unconscionable results, and should be reversed.

A. The Ninth Circuit's literal interpretation of § 2244(b) is contrary to this Court's precedent.

1. In *Panetti*, this Court addressed whether a claim that a prisoner is too mentally ill to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), brought for the first time once the prisoner's execution was imminent, is "second or successive" under AEDPA. *Panetti*, 551 U.S. at 945. The Court began by examining the types of claims it had already determined were not "second or successive." For example, when a first petition is dismissed for failure to exhaust state remedies, a second petition is not "second or successive." 551 U.S. at 944 (citing *Slack v. McDaniel*, 529 U.S. 473, 487 (2000)). Similarly, a claim brought in a subsequent petition is not "second or successive" where the same claim was previously dismissed as premature, *Panetti*, 551 U.S. at 944 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998)); otherwise, a petition dismissed "for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review," *Stewart*, 523 U.S. at 644-45.

Drawing on these cases, the Court looked to three factors to determine whether a claim presented for the first time in second-in-time petition is "second or successive": (1) the implications for habeas practice if AEDPA's gatekeeping provisions applied; (2) "AEDPA's purposes"; and (3) the Court's prior habeas corpus decisions, including decisions applying the

pre-AEDPA abuse-of-writ doctrine. *Panetti*, 551 U.S. at 943-47; *see also United States v. Lopez*, 577 F.3d 1053, 1063 (9th Cir. 2009); *Scott v. United States*, 890 F.3d 1239, 1248 (11th Cir. 2018).

The Court first considered the practical impact of treating the claim as "second or successive." *Panetti*, 551 U.S. at 945-46. It recognized that applying AEDPA's gatekeeping provisions to a *Ford* claim raised in a second-in-time petition would present petitioners with an untenable dilemma: "forego the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas application … even though it is premature." *Id.* at 943. Petitioners who declined to file an unripe, anticipatory claim would "run the risk … of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Id.* at 945-46 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). The Court "resisted an interpretation of the statute that would 'produce [those] troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Id.* at 946 (quoting *Castro v. United States*, 540 U.S. 375, 381 (2003)).

Panetti also took account of AEDPA's purposes of promoting "comity, finality, and federalism." *Id.* at 945 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)). The Court observed that "an empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies." *Id.* at 946. Moreover, this Court reasoned, "AEDPA's concern for finality… is not implicated" by

consideration of a claim that could not have been resolved in a prior petition. *Id.*

The *Panetti* Court also considered, in addition to post-AEDPA decisions like *Slack* and *Stewart*, "decisions predating the enactment of [AEDPA]." *Id.* at 943-44. The result under pre-AEDPA law was relevant because, as this Court observed, AEDPA was not a departure from the principles underlying the prior standard, but rather the codification of a modified pre-AEDPA abuse-of-the writ rule. *Id.* at 947 (citing *Felker v. Turpin*, 518 U.S. 651, 652, 664 (1996)); *cf. I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001) (declining to interpret AEDPA to bar consideration of a category of claims where that result "would represent a departure from historical practice"). Before AEDPA, a court could consider a claim not raised in a previous habeas petition if the petitioner could show his claim was not an "abuse of the writ," which he could do by showing cause for failing to raise the claim earlier and prejudice therefrom. *McCleskey v. Zant*, 499 U.S. 467, 489, 494-95 (1991). In *Panetti*, consideration of pre-AEDPA law weighed against dismissing the *Ford* claim as "second or successive" because a previously unripe claim was not an abuse of the writ. *Panetti*, 551 U.S. at 947.

This Court has since reaffirmed that the factors *Panetti* enumerated govern the question whether a second-in-time petition challenging the same underlying judgment is "second or successive." In *Magwood v. Patterson,* the Court fractured over the question whether a challenge to a *new* state court judgment is "second or successive" if the petitioner could have mounted the same challenge to the prior judgment.

The majority stressed, however, that it was not disturbing *Panetti*'s basic rules for determining "whether an application challenging the *same* state-court judgment" is "second or successive." 561 U.S. at 335 n. 11. And seven Justices expressly endorsed "*Panetti*'s holding that … a 'claim' that 'the petitioner had no fair opportunity to raise' in his first habeas petition is not … 'second or successive.'" *Id.* at 343 (Breyer, J., concurring; *id.* at 344-46 (Kennedy, J., dissenting).

2. The principles articulated in *Panetti* dictate that a second-in-time *Brady* claim based on a newly disclosed violation is not "second or successive."

Applying AEDPA's gatekeeping provisions to *Brady* claims like Mr. Prince's would require petitioners to make the same choice deemed unacceptable in *Panetti*: "file unripe (and, in many cases, meritless) *Brady* claims in each and every first [habeas] application," or wait, and file a "second or successive" *Brady* claim that will not even be considered on the merits unless it proves the petitioner's actual innocence. *Scott*, 890 F.3d at 1250 (criticizing the Eleventh Circuit's prior holding in *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009)). In either scenario, entire subsets of potentially meritorious *Brady* claims will be dismissed without consideration due to no fault of the petitioner's. *Lopez*, 577 F.3d at 1064 (leaving open the first question presented here). As the *Scott* court recognized, that "might well work a suspension of the writ of habeas corpus." *Scott*, 890 F.3d at 1251;[2] *accord Magwood*,

[2] *Scott* and *Lopez* involved motions filed under 28 U.S.C. § 2255(h), which governs "second or successive" post-conviction

561 U.S. at 349-50 (Kennedy, J., dissenting). "A construction of [AEDPA] that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." *St. Cyr*, 533 U.S. at 300.

Barring consideration of newly disclosed *Brady* claims would be contrary to AEDPA's fundamental goals of comity, finality, and federalism. Where the state is the cause of the belated discovery of evidence, "[a]ny delay, inefficiency, or waste of judicial resources stems from the prosecution." *Douglas v. Workman*, 560 F.3d 1156, 1195 (10th Cir. 2009); *accord Scott*, 890 F.3d at 1252. Indeed, the Ninth Circuit's rule "rewards the government for its unfair prosecution and condemns the petitioner for a crime that a jury in a fair trial may well have acquitted him of." *Scott*, 890 F.3d at 1244; *accord Lopez*, 577 F.3d at 1064-65 (recognizing that "perverse" result). "It cannot have been Congress's intent in enacting AEDPA" to encourage prosecutors to conceal exculpatory evidence "until it is too late, preventing the habeas petitioner from asserting the existence of such [exculpatory evidence] in his initial habeas petition and thereby insulating egregious government behavior from any habeas review." *Douglas*, 560 F.3d at

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challenges to federal, as opposed to state, judgments. Section 2255(h)'s gatekeeping restrictions for "second or successive" motions are nearly identical to the restrictions set forth in § 2244(b), so courts generally "interpret[] both provisions interchangeably." Pet. App. 21a n.4; *see also, e.g.*, *Gonzalez v. Sec., Dep't of Corr.*, 366 F.3d 1253, 1262 (11th Cir. 2004) (noting "no material difference in the relevant statutory language").

1195. "Finality," in that sense, is "certainly not an AEDPA goal." *Lopez*, 577 F.3d at 1065.

With respect to pre-AEDPA law, the Ninth Circuit acknowledged that a material *Brady* claim based on a newly disclosed violation establishes cause and prejudice and therefore would not have been barred as an abuse of the writ. Pet. App. 33a, *see Lopez*, 577 F.3d at 1064. "[I]nterference by officials," including failure to disclose exculpatory evidence, is cause. *Strickler*, 527 U.S. at 283-84 & n. 24 (citation omitted). The materiality of the evidence establishes prejudice. *Id.* at 289; *Lopez*, 577 F.3d at 1060 n. 5.

3. The Ninth Circuit acknowledged the *Panetti* framework, Pet. App. 21a-28a, but believed that cutting off all *Brady* claims that could not have been raised in an earlier petition was required absent a showing of actual innocence. The court thought such a rule would further "finality" by "limiting collateral attacks on state judgments to those where 'extreme malfunctions in the state criminal justice systems' occurred." Pet. App. 27a (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)).

While the Ninth Circuit relied on *Richter*, there this Court observed that § 2254(d)—the standard that applies to a claim that is *not* "second or successive"—already ensures that federal courts grant relief from state judgments only when "there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." 562 U.S. at 103. Only clearly meritorious *Brady* claims will result in relief under that standard. Section 2244(b), on the other hand, would bar even clearly

meritorious *Brady* claims. There is no legitimate "finality" interest in insulating such substantial prosecutorial errors from any federal review.

The Ninth Circuit tried to justify its illogical reading of AEDPA by noting that there was no Suspension Clause concern because *some* newly disclosed *Brady* claims may meet § 2244(b)'s requirements. Pet. App. 39a. But that bar is "almost insurmountable," *Douglas*, 560 F.3d at 1192, and the Suspension Clause protects against more than just "strict impossibility." *Muniz v. United States*, 236 F.3d 122, 128 (2d Cir. 2001); *see Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.). The loss of any meaningful opportunity for federal habeas review is exactly the "troublesome result[]" this Court rejected in *Panetti.* 551 U.S. at 946.

B. The widespread impact of the Ninth Circuit's rule warrants this Court's review.

The question presented will continue to recur. "*Brady* violations in state and federal courts have been continuous and persistent since the *Brady* decision." Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 434 (2010). They are "the most common form of prosecutorial misconduct cited by courts when overturning convictions." Vida B. Johnson, *Federal Criminal Defendants out of the Frying Pan and into the Fire – Brady and the United States Attorney's Office*, 67 CATH. U. L. REV. 321, 322-23 (2018) (noting that over the past two decades, "1,100 people have been exonerated after it was

found that the prosecution had engaged in misconduct."); *see also United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) (referring to the "epidemic" of *Brady* violations). One study found that "prosecutorial suppressions of evidence accounted for sixteen percent of reversals at the state postconviction stage" in capital cases. Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L. REV. 1450, 1454 n.12 (2006).

These data are based solely on those violations that have been brought to light. Because of the nature of *Brady* violations, it is impossible to know just how many more violations go unnoticed and uncured. *See Scott*, 890 F.3d at 1250. The only certainty is that *Brady* violations occur often, accounting for a substantial percentage of wrongful convictions. *See* Dewar, *supra*, at 18; Johnson, *supra*, at 322-23; *cf.* Barry Scheck et al., *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* 246 (2000) (finding prosecutorial misconduct a cause of wrongful conviction in forty-two percent of sixty-two cases examined).

Exculpatory evidence often does not arise until years after a conviction. *See* David E. Singleton, *Brady Violations: An In-depth Look at "Higher Standard" Sanctions for a High Standard Profession*, 15 WYO. L. REV. 139, 156 (2015). By the time the evidence is disclosed, a first habeas petition—which must be filed within one year of the final judgment, *see* 28 U.S.C. § 2244(d)(1)-(2)—likely will have already been adjudicated. *Expanded Discovery in Criminal Cases*, THE JUSTICE PROJECT, 6 (2007) (noting

that exculpatory evidence is sometimes withheld for decades); *see, e.g.*, *Haley v. City of Boston*, 657 F.3d 39, 45 (1st Cir. 2011) (impeachment evidence came to light more than thirty years after conviction); *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013) (exculpatory evidence came to light more than a decade after conviction). Petitioners routinely file second-in-time habeas petitions raising *Brady* claims discovered after the filing of their first petition. *See, e.g.*, *In re Wogenstahl*, 902 F.3d 621, 625-26 (6th Cir. 2018); *Brown v. Muniz*, 889 F.3d 661, 674 (9th Cir. 2018); *Scott v. United States*, 890 F.3d 1239, 1243, 1248 (11th Cir. 2018); *Carter v. Kelley*, No. 5:16-cv-00367, 2017 WL 4214139, at *2, 7 (E.D. Ark. 2017). So resolution of the question presented will have widespread impact.

II. The Court Should Also Grant Review Of The Ninth Circuit's Holding That § 2244(b) Has No Impermissible Retroactive Effect On A Petitioner Whose First Petition Predates AEDPA.

This Court should also grant certiorari to determine whether § 2244(b) has an impermissible retroactive effect when applied to a claim in a second-in-time petition that would have survived the abuse-of-the-writ standard in effect when the petitioner filed a first, pre-AEDPA petition. Whether AEDPA's gatekeeping provisions apply in these circumstances has divided the federal courts of appeals four to six. The Third, Sixth, Tenth, and D.C. Circuits hold that, consistent with the presumption against retroactivity, AEDPA's gatekeeping provisions do not apply when a first petition was filed before AEDPA's enactment and applying AEDPA would bar consideration of a claim

that was reviewable at the time the first petition was filed. The First, Second, Fifth, Seventh, and Eleventh Circuits, however—along with the Ninth Circuit below—disagree. They hold that AEDPA's gatekeeping provisions apply regardless of when a petitioner's first habeas petition was filed. This Court's review is warranted to resolve this acknowledged and intractable split.

Review is also warranted because the Ninth Circuit's holding contravenes this Court's precedent. Applying AEDPA to Mr. Prince's claim would impose severe retroactive consequences on his past act of filing a first habeas petition. Because Congress has not expressly provided for § 2244(b) to have retroactive effect, this Court's holding in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), dictates that it does not apply retroactively.

A. The courts of appeals are divided over the retroactive effect of AEDPA's gatekeeping provisions.

1. Four circuits hold that AEDPA does not apply to a second-in-time petition that would have met the gatekeeping standard in effect when a petitioner filed a first, pre-AEDPA petition.

The Sixth Circuit has declined to apply AEDPA's gatekeeping provisions retroactively where AEDPA would bar consideration of a claim that would have survived the pre-AEDPA abuse-of-the-writ standard. *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997). In *In re*

Hanserd, the prisoner filed, in 1996, a request for authorization to file a post-AEDPA second-in-time § 2255 motion based on new Supreme Court precedent that called into question the legality of the prisoner's convictions. *Id.* at 924. A federal district court had previously denied Mr. Hanserd's pre-AEDPA § 2255 challenge to his sentence. *Id.* The court of appeals observed that AEDPA's new substantive gatekeeping provisions would require it to deny the application and prevent the district court from even considering the merits of the prisoner's claim. *Id.* at 930-31. At the time that Mr. Hanserd filed his first § 2255 motion, however, a subsequent motion based on new Supreme Court rule would not have been precluded. *Id.* at 928-29.

The Sixth Circuit reasoned that, "[h]ad Hanserd known that [under] AEDPA … his initial § 2255 motion would bar a later motion, … he might well have waited to file that initial motion." *Id.* at 931 (citing this Court's opinion in *Landgraf*). Observing that Congress did not unambiguously provide for AEDPA's gatekeeping provisions to have retroactive effect, the court reasoned that the prisoner "d[id] not need [the court of appeals'] permission to challenge his … convictions," and "h[e]ld that a federal prisoner must satisfy the new requirements of 28 U.S.C. § 2255 only if he has filed a previous § 2255 motion on or after April 24, 1996, the date AEDPA was signed into law." *Id.* at 934; *accord Cress v. Palmer*, 484 F.3d 844, 852 (6th Cir. 2007) (explaining that § 2244(b) does not apply when "the second or successive habeas petition would have survived under the pre-AEDPA 'abuse of the writ' standard").

The Third Circuit also concluded that AEDPA's substantive gatekeeping provisions do not apply retroactively in *In re Minarik*, which examined whether a second-in-time habeas challenge to a 1971 murder conviction was subject to § 2244(b). 166 F.3d 591 (3d Cir. 1999). In the Third Circuit's view, where a petitioner "had a right to prosecute a second or successive petition prior to AEDPA's passage, but would be deprived of that right by these new gatekeeping provisions, we conclude that applying the AEDPA standard would have a 'genuine retroactive effect' because it would attach a new and adverse consequence to pre-AEDPA conduct—the prosecution of the original proceeding." *Id.* at 600. The court explained that this Court's precedents prohibit such a retroactive application because Congress expressed no clear intent that AEDPA apply retroactively.[3] *Id.* It observed that "two other circuits"—the Sixth Circuit and D.C. Circuit—had reached the same conclusion. *Id.* at 601 (citing *In re Hanserd*, *supra* 21, and *United States v. Ortiz*, 136 F.3d 161 (D.C. Cir. 1998), *infra* 23).

The Tenth Circuit, too, takes this view. The petitioner in *Daniels v. United States* filed two pre-AEDPA habeas petitions challenging his sentence for a drug conviction. 254 F.3d 1180 (10th Cir. 2001). After AEDPA's passage, he filed a third petition, challenging his sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). 254 F.3d at 1184. The court of

[3] The court concluded that AEDPA posed no constitutional concerns in the case before it, because "Minarik would have been precluded from filing his second habeas petition under pre-AEDPA law." 166 F.3d at 608.

appeals concluded that if § 2244(b) applied, the petition would be dismissed without consideration. *Id.* at 1195-99. But it explained that, consistent with the presumption against retroactivity, § 2244(b) governed only if it did not impose new substantive restraints on the petitioner's ability to bring his claim, because Congress did not indicate that § 2244(b) should apply retroactively to petitions that would have survived the pre-enactment standard. *Id.* at 1187-88. The court ultimately concluded that the claim would not have survived the pre-AEDPA standard, so AEPDA had "no retroactive effect as applied." *Id.* at 1198.

The D.C. Circuit adopts this view as well. It has, in a number of cases, recognized the impermissible retroactive effect AEDPA would have if it were to bar a petition that could have been considered at the time a petitioner filed an initial petition. *See, e.g.*, *Ortiz*, 136 F.3d at 165 (observing that the question "[w]hether [AEDPA's] amendments would be impermissibly retroactive in such cases" has divided the courts of appeals); *In re Fashina*, 486 F.3d 1300, 1302, (D.C. Cir. 2007); *In re Cannon*, No. 02-3080, 2002 WL 31426658, at *1 (D.C. Cir. Oct. 29, 2002). In each of these cases, the court ultimately found AEDPA would have no retroactive effect as applied, because the petition would fail under the pre-AEPDA standard. *Ortiz*, 136 F.3d at 167; *Fashina*, 486 F.3d at 1306-07; *Cannon*, 2002 WL 31426658, at *1. But the rule the court applies is clear: AEDPA's gatekeeping provisions apply only where the second-in-time petition would have failed when the petitioner brought his first petition.

2. Six circuits hold that AEDPA's gatekeeping provisions apply regardless of when a first petition was filed.

The decision below, in contrast, holds that § 2244(b) can never have an impermissible retroactive effect and applies regardless of when a petitioner filed his first petition. Pet. App. 5a-6a. Relying on its prior decision in *United States v. Villa-Gonzalez*, 208 F.3d 1160 (9th Cir. 2000), the court concluded that "AEDPA's enactment does not 'impair' a petitioner's right to file a second-in-time habeas petition." Pet. App. 5a. It reasoned that, even if a second-in-time petition would have survived the pre-AEDPA standard, the "fact that the standard for bringing a second or successive petition was different at the time of the first habeas filing 'does not make the application of the new provisions to his most recent motion retroactive.'" *Id.* (quoting *Villa-Gonzalez*, 208 F.3d at 1163).

The Eleventh Circuit, too, holds that "the right to file a second or successive application and have it judged according to pre-AEDPA law is determined by the date of filing of the application for permission to file a successive petition," regardless of when the first petition was filed. *In re Magwood*, 113 F.3d 1544, 152 (11th Cir. 1997); *In re Medina*, 109 F.3d 1556, 1561-62 (11th Cir. 1997). It relied on this Court's decision in *Felker*, which applied § 2244(b) in a case in which the first petition was filed prior to AEDPA's enactment. 518 U.S. at 664. The Eleventh Circuit presumed that *Felker* stands "for the proposition that the AEDPA amendments relating to second or successive

applications do apply to cases in which the first application was filed before the effective date of that statute." *Medina*, 109 F.3d at 1561-62.

The First Circuit has also cited *Felker* as implicitly holding that AEDPA's gatekeeping restrictions apply regardless of the timing of the initial petition. *Pratt v. United States*, 129 F.3d 54, 58 (1st Cir. 1997). In *Pratt*, the First Circuit additionally relied on this Court's opinion in *Lindh v. Murphy*, which held that AEDPA's amendments to non-capital proceedings apply "*only* to such cases as were filed after the statute's enactment," and not to cases already pending at the time of enactment. 521 U.S. 320, 326-27 (1997) (emphasis added). The First Circuit thought *Lindh* meant that "Congress intended that AEDPA apply to *all* section 2255 petitions filed after its effective date." 129 F.3d at 58 (emphasis added).

The Second and Fifth Circuits agree. They "conclude that the AEDPA applies to a habeas petition filed after the AEDPA's effective date, regardless of when the petitioner filed his or her initial habeas petition." *Mancuso v. Herbert*, 166 F.3d 97, 101 (2d Cir. 1999); *see Graham v. Johnson*, 168 F.3d 762, 782 (5th Cir. 1999) ("Congress fully intended that AEDPA govern applications" following an initial, pre-AEDPA application). Those courts, too, cited *Lindh* for the idea that Congress's intent to apply AEDPA retroactively can be inferred from this Court's holding that the statute applies only to cases filed after its enactment. *Graham*, 168 F.3d at 781-82; *Mancuso*, 166 F.3d at 101; *see also United States v. Orozco-Ramirez*, 211 F.3d 862, 866 (5th Cir. 2000). The Fifth Circuit explicitly acknowledged that its view conflicts with opinions

of the Third, Sixth, and D.C. Circuits. 211 F.3d at 866 n.5.

The Seventh Circuit is generally in agreement. It has rejected the position that AEDPA's restrictions on second-in-time § 2255 motions should apply only when the initial motion was filed after AEDPA's passage, noting that "[t]he Supreme Court will have to resolve" the circuit conflict over that question. *In re Davenport,* 147 F.3d 605, 607-08 (7th Cir. 1998). The Seventh Circuit has acknowledged that Congress did not express clear intent that AEDPA's gatekeeping provisions apply retroactively when an initial petition was filed pre-AEDPA. *Id.* But in the Seventh Circuit's view, AEDPA *has no* impermissible retroactive effect unless a prisoner can show that he "reasonably relied on the previous law in holding back a ground presented in the successive motion." *Id.*; *see Burris v. Parke*, 95 F.3d 465 (7th Cir. 1996) (en banc). That exception is narrow: It applies only when the prisoner "furnishe[s] evidence" that he relied on the continued availability of pre-AEPDA law. *Alexander v. United States*, 121 F.3d 312, 314 (7th Cir. 1997). If the prisoner cannot affirmatively prove that he withheld a ground for relief from his first petition in reliance on pre-AEDPA law, AEDPA's gatekeeping provisions apply.[4]

[4] The First, Fifth, and Eleventh Circuits, which found clear congressional intent to apply AEDPA retroactively, suggested that, *if* Congress's intent was not clear, they would agree with the Seventh Circuit that a petitioner must prove actual detrimental reliance. *See Pratt*, 129 F.3d at 59; *Orozco-Ramirez*, 211 F.3d at 866 n.5*; Medina*, 109 F.3d at 1561-62.

* * *

The conflict amongst the circuits is clear and acknowledged. *See, e.g.*, *Davenport,* 147 F.3d at 607-08; *Orozco-Ramirez*, 211 F.3d at 866 n.5. The disuniformity among the courts of appeals matters, because the issue will continue to arise. Although years have passed since AEDPA's passage, new evidence not infrequently comes to light decades after a conviction, appeal, and initial habeas proceedings are complete. *See, e.g.*, *Haley*, 657 F.3d at 45 (impeachment evidence revealed more than thirty years after conviction); *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013) (exculpatory evidence came to light more than a decade after conviction). This case is yet another example. Moreover, new rules of constitutional law may undermine the basis of the petitioner's conviction. *See, e.g.*, *Daniels*, 254 F.3d 1180. So the question whether AEDPA's gatekeeping provisions apply to a successive petition that follows a pre-AEDPA petition remains vitally relevant. *See, e.g.*, *Barnes v. Forman*, No. 16-CV-12240, 2017 WL 467410, at *2 (E.D. Mich. Feb. 3, 2017) (citing *In re Hanserd* and holding that a successive petition is not subject to § 2244(b) if it "would have survived under the pre-AEDPA 'abuse of the writ' standard"); Order, *In re: George Edward Austin*, No. 13-2345 (3d Cir. Aug. 5, 2013) (citing *In re Minarik* and holding that the petitioner "has made a prima facie showing that applying AEDPA's gatekeeping procedures for a second or successive petition would be unduly retroactive").

B. The Ninth Circuit's retroactivity holding is contrary to this Court's precedent.

As the Third, Sixth, Tenth, and D.C. Circuits have recognized, the conclusion that AEDPA's gatekeeping provisions do not bar claims that would not have been barred when the petitioner filed a first habeas petition follows directly from this Court's precedents.

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. These interests, protected under the Due Process Clause, are threatened by retroactive legislation that upsets "settled expectations" by "imposing new burdens on persons after the fact." *Id.* at 265, 269-70. To avoid these concerns, courts employ a "deeply rooted" presumption against retroactivity. *Id.* at 265.

To determine whether a civil statute applies retroactively, courts apply a two-step analysis. The first question is whether the statute expresses Congress's unambiguous intent that the statute apply retrospectively. *Landgraf*, 511 U.S. at 280. "The standard for finding such unambiguous direction is a demanding one. 'Cases where this Court has found truly retroactive effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation.'" *St. Cyr*, 533 U.S. at 316-17 (quoting *Lindh*, 521 U.S. at 328 n.4) (brackets omitted). If Congress's intent is sufficiently clear, the inquiry ends. *Id.* If not, courts determine whether the statute, as applied to the party challenging retroactivity, "would have retroactive effect, i.e.,

whether it would impair rights a party possessed when he acted." *Id.* Where the statute would have retroactive effect, the "presumption [against retroactivity] teaches that it does not govern." *Landgraf*, 511 U.S. at 265, 268.

The answer at the first step of this analysis, as applied to AEDPA's gatekeeping provisions, is clear: AEDPA evinces no unambiguous congressional intent regarding the retroactive application of its gatekeeping provisions. Unambiguous means an "'express command,' 'unambiguous directive,' and the like." *Lindh*, 521 U.S. at 325 (brackets omitted). AEDPA is entirely silent on the retroactive application of § 2244(b); it contains nothing remotely approaching the "clear evidence" of congressional intent that this Court requires. *Id.*; *see also, e.g.*, *In re Minarik*, 166 F.3d at 599 ("AEDPA contains no unambiguous guidance regarding retroactive application of AEDPA's new 'second or successive' petition standards and procedures to cases in which the first habeas petition was filed before AEDPA's enactment"); *Mueller v. Angelone*, 181 F.3d 557, 566-67 (4th Cir. 1999); *In re Green*, 144 F.3d 384, 386 (6th Cir. 1998); *Ortiz*, 136 F.3d at 165.

The courts of appeals that point to *Lindh* as evidence of Congress's intent to apply AEDPA retroactively have it exactly backwards. *See supra* 25-26. *Lindh* held that the plain language of AEDPA showed Congress did *not* intend its non-capital provisions to apply retroactively to cases pending at the time of enactment. 521 U.S. at 326-30. That is, *Lindh* held that retrospective application of AEDPA to pending petitions was improper even under the *ordinary* rules of

statutory construction, let alone the high bar required to infer intent of retroactivity. *Id.* As to other retrospective applications of AEDPA, "*Lindh* did not foreclose—and indeed contemplated—continuing resort to the *Landgraf* analysis in order to ensure that application of chapter 153's new provisions is not impermissibly retroactive in such cases." *Mueller*, 181 F.3d at 567.

The second step of the *Landgraf* analysis shows AEDPA's gatekeeping provisions indeed would have a genuinely retroactive effect if applied to petitions like Mr. Prince's. When Mr. Prince filed his first habeas petition in 1991, a *Brady* claim based on newly disclosed evidence would have been considered on the merits. *See supra* 16. If § 2244(b) is read to apply retroactively, Mr. Prince's *Brady* claim will be dismissed without consideration unless he can prove actual innocence.[5] Because that result would attach adverse consequences to his past act of filing an initial petition, the "traditional presumption [against

[5] Moreover, whereas pre-AEDPA law would have permitted Mr. Prince to challenge both the guilty verdict and the special circumstance that led to his sentence of life without parole, *see, e.g., McQueen v. Whitley*, 989 F.2d 184 (5th Cir. 1993) (successive petition challenging sentence can be considered if it satisfies cause-and-prejudice test), a post-AEDPA "second or successive" petition based on new evidence must prove that "no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). To the extent that AEDPA wholly bars Mr. Prince from challenging the special circumstance, in addition to and apart from the guilty verdict, it attaches another adverse legal consequence to his pre-AEDPA conduct.

retroactivity] teaches that [§ 2244(b)] does not govern." *Landgraf*, 511 U.S. at 280.[6]

The same rationale applies here as that which led to the conclusion that AEDPA's one-year statute of limitations does not apply to convictions that were final prior to AEDPA's enactment, but rather runs from the date of AEDPA's enactment. *Wood v. Milyard*, 566 U.S. 463, 468 (2012). Applying the new statute of limitations based on the date a conviction became final would have meant that "[t]hose state prisoners whose year had elapsed prior to AEDPA's enactment would be altogether barred from filing petitions that would have been timely under the old regime." *Calderon v. U.S. Dist. Court for the Cent. Dist. Of Cal.*, 128 F.3d 1283, 1287 (9th Cir.), *as amended on denial of reh'g and reh'g en banc* (9th Cir. 1997), *overruled in part on other grounds by Calderon*, 163 F.3d 530 (9th Cir. 1998). Because barring a prisoner from raising a previously timely petition for federal relief would impose new, "dire consequences" on the prisoner's act of delay

[6] *Felker* is not to the contrary. *Contra Medina*, 109 F.3d at 1561-62. The claims at issue in *Felker*—that the state court applied the wrong standard for establishing guilt in voir dire and jury instructions, and that forensic evidence supported an alibi—were available at the time of the first petition. 518 U.S. at 657-58. The claims therefore "would not have satisfied pre-Act standards for obtaining review on the merits of second or successive claims." *Id.* at 658; *id.* at 666 (Stevens, J., concurring). AEDPA had no genuinely retroactive effect as applied to the claims in *Felker*, so the presumption did not apply. *Felker* had no occasion to examine an application of § 2244(b) that would cut off a meritorious claim a petitioner could have raised in a subsequent petition at the time that his first petition was filed.

in filing, it would have an impermissible retroactive effect. *Id.*

The consequences here are equally "dire," but more perverse. Instead of attaching new consequences to a prisoner's "having wasted the time prior to AEDPA's enactment" to file a previously *ripe* claim, *id.*, AEDPA's gatekeeping restrictions on "second or successive" petitions would attach new consequences to a petitioner's having failed to assert a previously *unripe* claim in a prior petition. If the former "would be entirely unfair and a severe instance of retroactivity," *id.* (quoting *Reyes v. Keane*, 90 F.3d 676, 679 (2d Cir. 1996)), this Court should be even more reluctant to apply AEDPA's restraints retroactively here.

III. This Case Is An Ideal Vehicle To Resolve The Questions Presented.

This case presents an ideal setting to consider the meaning of § 2244(b) in the questions presented. The Ninth Circuit based its decision exclusively on its answer to the questions presented, so those questions are outcome determinative here. If the Ninth Circuit erred in its answer to those questions, its conclusion that all *Brady* claims presented in second-in-time petitions are "second or successive" cannot stand.

This case also presents a clean context in which to consider the questions presented. It is undisputed, for purposes of the questions presented, that *Brady* evidence was suppressed, and that Mr. Prince could not have reasonably known about that evidence when he filed his first, pre-AEDPA petition. *See, e.g.*, Pet. App. 5a (noting Mr. Prince's "ignorance of the *Brady*

material at the time he filed his initial federal petition."); Resp. Ans. Br. 32, C.A. Dkt. 17 (arguing that "all newly-discovered [*Brady*] claims" are "second or successive"). The only questions at issue are the purely legal questions (1) whether § 2244(b) applies to previously undisclosed *Brady* claims that could not have been brought in a prior petition; and (2) whether § 2244(b) can permissibly bar consideration of a second-in-time petition that would not have been barred at the time a first, pre-AEDPA petition was filed.

The Ninth Circuit's disposition of the first question presented—whether all second-in-time *Brady* claims are "second or successive," even when based on newly disclosed evidence—fully incorporates the "reasons set forth in [the court's] concurrently filed published opinion [in] *Brown v. Muniz*, 16-15442, [889] F.3d [661] (9th Cir. 2018)." Pet. App. 5a. The question was squarely raised and extensively briefed in both cases, which were argued and decided on the same day. That the Ninth Circuit chose to dispose of Mr. Prince's case in a memorandum disposition that cross-referenced the opinion in *Brown* by no means suggests the court gave insufficient consideration to the important legal issues and practical implications at issue in this case.

As to the second question presented, the Ninth Circuit thought Mr. Prince's view was foreclosed by *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1163-64 (9th Cir. 2000). Pet. App. 5a. This Court frequently grants review of memorandum dispositions to decide legal questions resolved in prior circuit precedent. *See, e.g.*, *Class v. United States*, 138 S. Ct. 798 (2017) (reviewing unpublished decision in *United States v.*

Class, No. 15-3015, 2016 WL 10950032 at *1 (D.C. Cir. 2016), which relied on the D.C. Circuit's "well-established law"); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2017).

Moreover, this case exemplifies why this Court's intervention is necessary to resolve the circuit conflict and prevent grave injustice. As the California trial court found, there is a reasonable probability that but for the State's suppression of material, exculpatory eyewitness evidence, a jury would not have found Mr. Prince guilty of murder and would not have sentenced him to life without parole. Had the State disclosed that evidence sooner, Mr. Prince would have been entitled to seek relief in federal court. But under the Ninth Circuit's ruling, the State's egregious delay in disclosing that evidence means that it is now immune from its misconduct, and Mr. Prince is now barred from even presenting his claim in court, unless Mr. Prince can prove his actual innocence. This Court should grant certiorari to clarify that this Court's precedents and fundamental fairness preclude that result.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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