No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE SEBASTIAN ECCLESTON

On Petition for Writ of Certiorari Before Judgment
to the United States Court of Appeals for the Tenth Circuit
in Case No. 16-2126

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Respectfully submitted,

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QUESTIONS PRESENTED

In 2016, Sebastian Eccleston, a federal prisoner, filed a motion in the court of appeals requesting authorization to pursue a second or successive post-conviction action in the district court. Section 2244(b)(3)(D) of the federal post-conviction statute specifies that "[t]he court of appeals shall grant or deny . . . authorization to file a second or successive application not later than 30 days after the filing of [a] motion" for authorization. The court of appeals (for unspecified reasons) *sua sponte* abated Mr. Eccleston's motion and—over Mr. Eccleston's objection—has kept the case abated without explanation for more than three years. The following questions are presented:

(1) Whether § 2244(b)(3)(D)'s 30-day deadline for deciding motions for authorization is binding or merely advisory.

(2) Whether the Tenth Circuit's three-year delay in resolving this case constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

PARTIES TO THE PROCEEDING

Petitioner (movant in the court of appeals) is Sebastian Eccleston.

The proceedings below are a single-party case, but the United States has an interest in Mr. Eccleston's conviction and has been served with this petition.

LIST OF RELATED PROCEEDINGS

The following cases are directly related under Rule 14(1)(b)(iii):

Federal district court:

United States v. Eccleston, No. 1:95-cr-00014-JB-2 (D. N.M.) (judgment entered Nov. 12, 1996).

United States v. Eccleston, No. 1:01-cv-00500-LH-WD (D. N.M.) (judgment entered June 15, 2001).

United States v. Eccleston, No. 1:04-cv-00250-LH-CG (D. N.M.) (judgment entered June 24, 2008).

Eccleston v. United States, No. 1:08-cv-01079-LH-LAM (D. N.M.) (judgment entered Nov. 25, 2008).

Eccleston v. United States, No. 09-cv-2654-JAP (D. N.J.) (judgment entered Feb. 3, 2010).

Eccleston v. United States, No. 11-cv-1352-JAP (D. N.J.) (judgment entered Dec. 7, 2011).

Eccleston v. United States, No. 12-cv-3999-JSL (C.D. Cal.) (judgment entered June 3, 2013).

Eccleston v. United States, No. 1:16-cv-00414-LH-WPL (D. N.M.) (judgment entered May 20, 2016).

Eccleston v. United States, No. 16-cv-1322-TDC (D. Md.) (judgment entered June 7, 2016).

Eccleston v. United States, No. 1:19-cv-00538-RB-CG (D. N.M.) (pending).

Federal courts of appeals:

United States v. Eccleston, No. 96-2272 (judgment entered Dec. 17, 1997).

Eccleston v. United States, No. 04-2107 (10th Cir.) (judgment entered Oct. 17, 2005).

United States v. Eccleston, No. 07-2123 (10th Cir.) (judgment entered Mar. 31, 2008).

In re Eccleston, No. 09-2022 (10th Cir.) (judgment entered Mar. 10, 2009).

Eccleston v. United States, No. 10-1525 (3d Cir.) (judgment entered Aug. 9, 2010).

In re Eccleston, No. 10-2231 (10th Cir.) (judgment entered Nov. 2, 2010).

In re Eccleston, No. 10-2256 (10th Cir.) (judgment entered Dec. 13, 2010).

In re Eccleston, No. 11-2215 (10th Cir.) (judgment entered Dec. 5, 2011).

United States v. Eccleston, No. 13–2112. (10th Cir.) (judgment entered Dec. 20, 2013).

Eccleston v. United States, No. 10-6856 (10th Cir.) (judgment entered Nov. 25, 2013).

In re Eccleston, No. 14-2092 (10th Cir.) judgment entered June 18, 2004).

Eccleston v. United States, No. 13-56065 (9th Cir.) (judgment entered Apr. 14, 2016).

In re Eccleston, No. 16-2126 (10th Cir.) (pending).

In re Eccleston, No. 16-2130 (10th Cir.) (pending).

United States Supreme Court

Eccleston v. United States, No. 08-6163 (U.S.) (certiorari denied Oct. 14, 2008).

Eccleston v. United States, No. 10-6856 (U.S.) (certiorari denied Nov. 8, 2008).

Eccleston v. United States, No. 13-8862 (U.S.) (certiorari denied Mar. 31, 2014).

Eccleston v. United States, No. 16-6805 (U.S.) (certiorari denied Jan. 9, 2017).

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioner, Sebastian Eccleston, respectfully requests that this Court issue a writ of certiorari before judgment to the United States Court of Appeals for the Tenth Circuit in order to review its failure to act on Mr. Eccleston's motion for authorization to pursue a second or successive post-conviction action. Mr. Eccleston has also filed, concurrently with this petition for a writ of certiorari, a petition for writ of mandamus. Should the Court determine that this case does not meet the criteria for a writ of certiorari, it should grant Mr. Eccleston's alternative request for a writ of mandamus for the reasons stated in that petition.

DECISIONS BELOW

The judgment of the United States District Court for the District of New Mexico convicting Mr. Eccleston of violating 18 U.S.C. § 924(c) and of committing other related offenses is unpublished but is reproduced as Appendix A to this Petition.

The Tenth Circuit's decision affirming the judgment against Mr. Eccleston on direct appeal is unpublished, but it is available on Westlaw at 1997 WL 774758, and it is reproduced as Appendix B.

The decision of the United States District Court for the District of New Mexico denying Mr. Eccleston's first post-conviction motion is unpublished but is reproduced as Appendix C.

The order of the Tenth Circuit abating Mr. Eccleston's motion for authorization to file a second or successive post-conviction motion is unpublished but is reproduced as Appendix E.

JURISDICTION

This is a petition for writ of certiorari before judgment, filed pursuant to Rule 11. In part, Mr. Eccleston is asking the Court to review the Tenth Circuit's order of abatement, issued on June 24, 2016. In the main, however, Mr. Eccleston is asking the Court to review the Tenth Circuit's failure to decide his case for more than three years.

This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. § 1254(1), which expressly authorizes the Court to review by writ of certiorari "[c]ases in the court of appeals" "before . . . rendition of judgment." This petition is timely under 28 U.S.C. § 2101(e), which provides that "[a]n application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244(3)(b):

> (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.

28 U.S.C. § 2255(h):

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

I. Over Mr. Eccleston's Objection, the Tenth Circuit Has Delayed Ruling on Mr. Eccleston's Motion for Authorization for More Than Three Years.

In 1996, Sebastian Eccleston was convicted of (among other offenses) using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). App'x A. He was sentenced to nearly 35 years' imprisonment.

Mr. Eccleston filed a direct appeal, but the Tenth Circuit affirmed the judgment against him. *See United States v. Eccleston*, No. 96-2272, 1997 WL 774758 (10th Cir. Dec. 17, 1997) (unpublished). Mr. Eccleston then moved for post-conviction relief pursuant to 28 U.S.C. § 2255, but the district court denied relief in a 2001 order. App'x C.

Nineteen years after Mr. Eccleston's conviction, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* held that the Armed Career Criminal Act's so-called residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally

vague. The following year, this Court held that *Johnson* is retroactive to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

On April 28, 2016, just weeks after the *Welch* decision, Mr. Eccleston filed in the Tenth Circuit a *pro se* motion for authorization to file a second or successive § 2255 motion.[1] App'x D. He claimed that § 924(c)'s residual clause, like § 924(e)'s residual clause, was unconstitutionally vague—and that he was entitled to file a second or successive motion based on *Johnson* because that decision created a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *Compare* App'x D at 4, *with* 28 U.S.C. § 2255(h)(2).

In the weeks that followed, Mr. Eccleston submitted various *pro se* supplements to his motion for authorization, arguing, among other things, that his § 924(c) conviction was predicated on conspiracy to commit Hobbs Act robbery, which the courts have uniformly held fails to qualify as a predicate "crime of violence" under any portion of § 924(c) except for that statute's residual clause.

In June 2016, counsel entered an appearance and presented additional supplemental filings on his behalf.

On June 24, 2016, the Tenth Circuit *sua sponte* abated this case in an order that reads, in its entirety:

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[1] A second or successive post-conviction motion is forbidden absent authorization from the court of appeals. *See* 28 U.S.C. § 2255(h).

> Sebastian L. Eccleston filed, on June 7, 2016 [sic], a motion for authorization to file a second or successive motion pursuant to 28 U.S.C. § 2255. This matter is abated pending further order of this court.

App'x E. The court did not give a reason for the abatement, specify what event or events might support lifting the abatement, or give any time frame for how long the case would remain abated.

The Tenth Circuit took no action on the matter for more than two years until, in June 2018, counsel for Mr. Eccleston moved to withdraw and for the court to appoint substitute counsel. The Tenth Circuit lifted the abatement for the limited purpose of appointing the undersigned to represent Mr. Eccleston. The order specified that the case otherwise remained abated.

In July 2018, the undersigned filed a Motion to Lift Abatement. App'x F. The motion detailed five reasons that justified lifting the abatement:

(1) 28 U.S.C. § 2244(b)(3)(D) requires the court of appeals to resolve motions for authorization within 30 days.

(2) Mr. Eccleston is plainly entitled to a grant of authorization under 28 U.S.C. § 2255(h)(2) because his motion is based on *Johnson*, which created "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

(3) The abatement lacks any articulated basis: "[t]he Court did not specify what it is/was waiting on when it abated this matter," and "[a]bsent a compelling reason for further delay, Mr. Eccleston is entitled to have this matter decided."

(4) Mr. Eccleston has a strong case on the merits that his § 924(c) conviction must be vacated.

(5) Mr. Eccleston is being prejudiced by the delay because, absent the § 924(c) conviction, he "would now be eligible for immediate release."

The court of appeals did not take any action or give any response to Mr. Eccleston's motion to lift the abatement—and, more than a year later, it still has not done so. App'x H.

In June 2019, this Court decided *Davis v. United States*, 139 S. Ct. 2319 (2019). *Davis* held that § 924(c)'s residual clause is, indeed, unconstitutionally vague under *Johnson*.

On July 1, 2019, counsel for Mr. Eccleston filed a Status Report that alerted the court to the *Davis* decision and reiterated that "for the reasons set forth at pp. 2–4 of Mr. Eccleston's motion to lift abatement, this Court should lift the abatement and grant Mr. Eccleston authorization to file a second or successive § 2255 motion." App'x G. The Status Report also "respectfully submit[ted] that due process requires a prompt resolution of this case."

To date, the court of appeals has taken no action on Mr. Eccleston's status report and, indeed, has taken no action at all in Mr. Eccleston's case since June 28, 2018, when it appointed the undersigned to represent him. The case has now been abated without explanation for more than three years.

II. The Tenth Circuit Has Abated More Than 80 Cases for More Than Three Years.

Mr. Eccleston's case is hardly unique. Using PACER's advanced search function, the undersigned identified more than 80 motions for authorization that (at least as of July 29, 2019) have been pending in the Tenth Circuit for more than three years. *See* App'x I.

Among the 80-plus delayed cases are multiple other cases like Mr. Eccleston's, in which a party (sometimes pro se, sometimes through counsel) has filed a motion to lift an abatement.[2] Such motions remain largely unanswered. Also among the 80-plus delayed cases are numerous cases in which prisoners have written pro se letters asking for information about the status of their long-pending cases. In one letter, a prisoner wrote:

> I remain unable to determine exactly why my motion was abated by the Tenth Circuit. If I were to prevail upon the issues submitted to that Court, it would mean that my sentence would have expired, and I would have been released, more than 15 years ago.
>
> Accordingly, I am hereby requesting that, (1) the Tenth Circuit Court explain why my motion of July 6, 2016, was "abated," (2) the Tenth Circuit Court appoint counsel to represent me in this matter, and (3) the Tenth Circuit Court grant me release on O/R bond to the Federal Halfway House in Denver, Colorado, pending resolution of all the issues presented in my case.

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[2] *See, e.g.*, Motion to Rescind Abatement, *In re Andretti*, No. 16-1203 (10th Cir. Feb. 11, 2019); United States' Motion to Lift Abatement, *In re Solarin*, No. 16-1201 (10th Cir. Feb. 7, 2019); Motion for Writ of Mandamus, *In re Sandoval-Flores*, No. 16-4046 (10th Cir. Jan. 7, 2019) (arguing that the court's refusal to decide the motion for authorization violates § 2244(b)(3)(D) and deprives the movant of due process because it "keeps him away from his freedom and a life with his family"); Motion to Lift Abatement, *In re Richardson*, No. 16-8050 (10th Cir. Aug. 29, 2018); Motion to Vacate Order of Abatement, *In re Barrett*, No. 16-7039 (10th Cir. Aug. 7, 2018); Status Report, *In re Garcia*, No. 16-2133 (10th Cir. July 9, 2018) (requesting that the court lift the abatement); Petition for Leave to Remove the Abatement, *In re Raifsnider*, No. 16-3159 (10th Cir. July 2, 2018); Motion to Lift Abeyance Stay, *In re Rayford,* No. 16-3166 (10th Cir. June 11, 2018); Motion to Compel the Court for Ruling, *In re Brown*, No. 16-3199 (10th Cir. Apr. 23, 2018); Opposition Motion any Hold Placed on § 2244 Petition, *In re Watson*, No. 16-5062 (10th Cir. Aug. 21, 2017).

Pro Se Letter, *In re O'Bryan*, No. 16-3222 (Jan. 30, 2017). More than 2 1/2 years after this letter, the Tenth Circuit has provided no explanation for the abatement, nor taken any action on the case. Multiple other cases involve similar unaddressed *pro se* requests for information and for various forms of relief.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over Whether § 2244(b)(3)(D)'s 30-day Deadline Has Legal Force, and Must Be Followed Absent Extraordinary Circumstances, or Is Merely "Hortatory," and Can Be Exceeded in a Large Number of Cases.

The Court should grant certiorari to resolve a circuit split over whether § 2244(b)(3)(D)'s 30-day time limit imposes a binding obligation on the courts of appeals.

Under the federal post-conviction statute, "the court of appeals shall grant or deny [a motion for] authorization to file a second or successive application [for writ of habeas corpus] not later than 30 days after the filing of the motion." 28 U.S.C. § 2244(b)(3)(D). This provision applies to federal prisoners seeking post-conviction relief under 28 U.S.C. § 2255 by virtue of § 2225(h), which states that second or successive § 2255 motions are allowed only if authorized "as provided in section 2244 by a panel of the appropriate court of appeals."

The circuits are divided over whether they are bound to follow § 2244(b)(3)(D) absent extraordinary circumstances or can exceed it in a large number of cases. *See generally* Circuit Review Staff, *Current Circuit Splits*, 11 SETON HALL CIR. REV. 381, 390 (2015) ("[T]he 1st, 4th, 6th, 7th and 10th Circuits have held the time limit is hortatory, while the 11th Circuit considers this provision mandatory.") (citing *Ezell*

v. United States, 778 F.3d 762, 764–65 (9th Cir. 2015) (acknowledging the circuit split and adopting the majority view)).

The Eleventh Circuit has recognized that it "must comply with the statutory deadline," *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007), and that "the statute expressly requires us to resolve [an] application [for authorization] within 30 days, no matter the case," *In re Henry*, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014); *see In re Bradford*, 830 F.3d 1273, 1275 (11th Cir. 2016) ("Section 2244(b)(3)(D) states, '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.' We must follow the unambiguous command of Congress and therefore cannot hold such applications in abeyance.") (citation omitted); *see also United States v. St. Hubert*, 918 F.3d 1174, 1177, 1189 (11th Cir. 2019) (Tjoflat, Carnes, William Pryor, Newsom, and Branch, JJ. concurring in the denial of rehearing en banc) (reiterating that the 30-day rule is one of "Congress's statutory mandates to federal courts" and suggesting that "30 days" is ordinarily adequate time "for three judges with the help of their law clerks and staff attorneys to research and decide the discrete legal issue[s]" presented by motions for authorization); *In re Williams*, 898 F.3d 1098, 1103 (11th Cir. 2018) (Wilson, Martin, and Jill Pryor, JJ., specially concurring) ("[J]udges in this Circuit consider themselves bound by the thirty-day limit . . . ."); *In re Clayton*, 829 F. 3d 1254, 1265 (11th Cir. 2016) (Martin and Jill Pryor, JJ., concurring) ("[O]urs is the only court to force a decision on every one of these cases within 30 days of filing.").

Admittedly, the Eleventh Circuit also holds that the 30-day deadline is not jurisdictional and may be exceeded in the rare situation "where it cannot be met if a court of appeals is properly to perform its function." Eleventh Circuit General Order No. 43, at 2 (2018), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder43.pdf. It's clear, however, that the Eleventh Circuit treats the 30-day deadline as binding absent extraordinary circumstances, as it meets the deadline in "virtually every" case—"at least 99.9% of them." *Id.*

In contrast to the Eleventh Circuit, other courts of appeals—including the Tenth Circuit—do not understand § 2244(b)(3)(D) to impose a legal obligation. *See, e.g.*, *Moore v. United States*, 871 F.3d 72, 77 (1st Cir. 2017) (deadline "operates as a guideline, not as an imperative"); *In re Hoffner*, 870 F.3d 301, 307 n.11 (3d Cir. 2017) (deadline is "advisory or hortatory rather than mandatory"); *In re Embry*, 831 F.3d 377, 387 (6th Cir. 2016) ("ideally within 30 days"); *Orona v. United States*, 826 F.3d 1196, 1199 (9th Cir. 2016) ("[T]he 30-day time limit imposed by § 2244(b)(3)(D) is 'hortatory, not mandatory.'"); *In re Watkins*, 810 F.3d 375, 379 n.5 (6th Cir. 2015) ("§ 2244's 30–day 'provision is hortatory or advisory rather than mandatory'"); *Carranza v. United States*, 794 F.3d 237, 239 n.1 (2d Cir. 2015) (court could exceed the 30-day deadline because it wanted to write a published opinion); *Ochoa v. Sirmons*, 485 F.3d 583, 539 n.1 (10th Cir. 2007) ("hortatory or advisory rather than mandatory"); *In re Williams*, 330 F.3d 277, 280 (4th Cir. 2003) ("precatory, not mandatory").

In practice, some courts exceed § 2244(b)(3)(D)'s 30-day deadline in a large number of cases. As noted above, the Tenth Circuit currently has pending at least 83

motions for authorization that have been delayed for more than three years. *See* App'x I. And the Tenth Circuit is not alone in countenancing extraordinary delays in a large number of cases.

Consider these examples from just the Ninth Circuit from the past 12 months alone: *Garcia v. United States*, 923 F.3d 1242 (9th Cir. 2019) (denying motion for authorization filed on June 16, 2017, in an opinion dated May 16, 2019—699 days after the motion was filed); *Turner v. Baker*, 912 F.3d 1236 (9th Cir. 2019) (denying motion for authorization filed on July 14, 2017, in an opinion dated January 15, 2019—550 days after the motion was filed); *Anderson v. Williams*, 744 F. App'x 484 (9th Cir. 2018) (unpublished) (denying motion for authorization filed on January 23, 2017, in an opinion dated December 3, 2018—679 days after the motion was filed); *Smith v. Baker*, No. 17-72083, 2018 WL 7108172 (9th Cir. Aug. 23, 2018) (unpublished) (denying motion for authorization filed on July 21, 2017, in an opinion dated August 23, 2018—398 days after the motion was filed); *Henry v. Spearman*, 899 F.3d 703 (9th Cir. 2018) (granting motion for authorization filed on January 19, 2017, in an opinion dated August 6, 2018—564 days after the motion was filed).

Indeed, the Ninth Circuit has cited with approval the fact that it has "repeatedly ruled on § 2244(b)(3) motions well after the expiration of the thirty-day period" and noted, without disapproval, that it once decided on motion "more than three years after it was filed." *Ezell*, 778 F.3d at 764 n.2.

In short, the circuits are divided over the extent to which § 2244(b)(3)(D)'s thirty-day deadline imposes a legal obligation upon the courts, with the Eleventh Circuit treating it as mandatory absent extraordinary circumstances, and courts like the Ninth and Tenth Circuits treating § 2244(b)(3)(D)'s deadline as one that can be exceeded in a large number of cases. This Court should grant certiorari to resolve the circuit split.

II. Granting Review Before Judgment Is the Only Way to Resolve the Circuit Split by Way of Certiorari.

Pre-judgment review under Rule 11 is warranted because granting review before judgment in a case like Mr. Eccleston's may be the only way to resolve the circuit split over whether § 2244(b)(3)(D) is binding—at least absent the grant of an extraordinary writ. Under 28 U.S.C. § 2244(b)(3)(E), "[t]he grant or denial of authorization by a court of appeals to file a second or successive application shall not be the subject of a petition for rehearing or for a writ of certiorari." Thus, the Court cannot wait until the Tenth Circuit finally acts upon Mr. Eccleston's motion for authorization to issue a writ of certiorari; at that point, it wouldn't have jurisdiction to do so. Moreover, once the Tenth Circuit finally acts upon Mr. Eccleston's motion, the propriety of its delay in deciding the motion might become moot. In the current posture, however, the issue is not moot and, given that the Tenth Circuit has not yet "grant[ed] or deni[ed]" authorization, the jurisdiction-stripping provision in § 2244(b)(3)(E) does not apply. *See Gray-Bey v. United States*, 201 F.3d 866, 873–74 (7th Cir. 2000) (Easterbrook, J., dissenting) (suggesting that "a refusal to issue a timely decision" on

a motion for authorization "may be reviewed by . . . a petition for certiorari before judgment"). Accordingly, certiorari review before judgment is warranted.

III. The Tenth Circuit's Failure to Abide by the 30-day Deadline Is Erroneous.

Certiorari should also be granted because the majority interpretation of § 2244(b)(3)(D) is erroneous and because the issue is objectively important: the will of Congress is being thwarted in a large class of cases.

Judge Easterbrook's dissent in *Gray-Bey*, 201 F.3d at 871–77, persuasively explains why the Tenth Circuit's failure to abide by § 2244(b)(3)(D) is wrong. In *Gray-Bey*, a majority of the panel, acting on the thirtieth day after the movant requested authorization to file a second or successive petition, decided to neither grant nor deny the motion, as the statute appears to require. Instead, the panel appointed counsel, called for supplemental briefing, and scheduled oral argument. *Id.* at 870–71. Judge Easterbrook dissented on the ground that "[w]e lack authority to depart from an Act of Congress." *Id.* at 871.

First, Judge Easterbrook explained that the statutory directive "is explicit": the court "shall grant or deny" a motion for authorization "not later than 30 days" after it is filed. *Id.* at 871. The statute says "'*[s]hall*, not 'should' or 'endeavor to' or 'make progress toward.'" *Id.* In this context, "'shall' means 'must,'" and "does not leave wriggle room." *Id.*

Second, Judge Easterbrook rejected the notion that courts could justify exceeding the 30-day deadline based on their own view that taking more time to reach a

decision was preferable in a given case. *Id.* at 871–72. "[W]hether a lengthier adjudication *is* 'better,'" he said, "is the very question to which § 2244(b)(3)(D) speaks." *Id.* He posited that "statutes are superior to judges' views about wise policy," and that the majority was doing nothing more than "assert[ing] a right to violate a statute." *Id.* at 872. Congress decided that a lengthier adjudication was *not* better, he argued, because it "want[ed] to reduce the period during which the validity of a conviction is open to question." *Id.* Even if "more time leads to fewer substantive errors," he argued, "how to reconcile the quest for accuracy with other competing objectives is a legislative task." *Id.*; *see also id.* at 874 ("In the end, the majority's approach rests on the proposition that federal judges have discretion to depart from federal statutes for good reasons—and that judges, rather than the political branches, define which reasons are 'good.' Few propositions could be more subversive of the rule of law.").

Finally, Judge Easterbrook disputed the idea—advanced by the Sixth Circuit—"that § 2244(b)(3)(D) is unenforceable because it does not specify a consequence of delay." *Id.* at 872. He argued that this theory proves far too much, as it suggests—among other illustrative absurdities—that judges would "be free to disregard the entire Antiterrorism and Effective Death Penalty Act (of which § 2244 is a part)" "because no statute attaches a penalty to judges' failure to apply correct rules of law on collateral review." *Id.* at 872–73. "The omission of a consequence from § 2244(b)(3)(D)," he posited, "means only that the courts must select a consequence in common-law fashion." *Id.* at 873. He suggested among the possibilities (1) "mandamus by a higher court" or (2) "a generous attitude toward the uncertainty that

abbreviated decisionmaking produces (applications should be granted in close cases)." *Id.* at 873.

For the reasons explained by Judge Easterbrook, § 2244(b)(3)(D) is correctly understood as binding. Even absent a circuit split, certiorari would be warranted for the same reason that it is often warranted in other AEDPA cases: to correct the lower courts' repeated violations of statutory law.

IV. Exercise of this Court's Supervisory Powers Is Warranted to Correct the Tenth Circuit's Excessive Delay in Resolving Mr. Eccleston's Motion for Authorization.

Even if the proper interpretation of § 2244(b)(3)(D) weren't sufficiently important to warrant resolution by this Court, and even if § 2244(b)(3)(D) were not binding, the Tenth Circuit's excessive delay in Mr. Eccleston's case amounts to such a departure from the accepted and usual course of judicial proceedings as to justify an exercise of this Court's supervisory powers. This Court should grant certiorari before judgment, vacate the Tenth Circuit's abatement order, and instruct it to decide Mr. Eccleston's motion without further delay.

Mr. Eccleston has sought to invoke 28 U.S.C. § 2255, and that statute is supposed to provide "an *expeditious* remedy for correcting erroneous sentences (of federal prisoners)"—a remedy that is "*swift* and imperative." *Sanders v. United States*, 373 U.S. 1, 13–14 (1963) (emphasis added). The Tenth Circuit's undue delay in Mr. Eccleston's and similar cases violates this basic principle.

The prompt adjudication of § 2255 claims serves multiple compelling interests. The Tenth Circuit's excessive delay in this case not only undermines those interests

but does so without good cause and to the detriment of the public perception of judicial proceedings.

First, "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *United States v. Frady*, 456 U.S. 152, 166 (1982). More broadly, "society[]" has a "legitimate interest in the finality of the judgment." *Id.* at 164. "Neither innocence nor just punishment can be vindicated until the final judgment is known," and "'without finality, the criminal law is deprived of much of its deterrent effect.'" *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). By dramatically extending "the period during which the validity of . . . conviction[s] [are] open to question," *Gray-Bey*, 201 F.3d at 872 (Easterbrook, J., dissenting), the Tenth Circuit's delay in cases like Mr. Eccleston's deprives the Government and the public of these benefits of finality. Further, delaying resolution of motions for authorization risks prejudice to the Government because, the longer that an adjudication is delayed, the greater the likelihood that, if the § 2255 claimant prevails, "erosion of memory" and "dispersion of witnesses" will effectively prevent the Government from retrying the defendant. *McCleskey*, 499 U.S. at 491–92.

Second, the prisoner has an equally compelling interest in prompt adjudication of § 2255 claims. This Court has recognized that individuals should not be forced "to linger longer in federal prison than the law demands" and that, when courts allow them to do so, "reasonable citizen[s]" may "bear a rightly diminished view of the judicial process and its integrity." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333–34 (10th

Cir. 2014) (Gorsuch, J.)). When a court of appeals unreasonably delays in deciding a challenge to the movant's sentence, such delay often forces the movant to remain in prison for the very same years of imprisonment that he seeks to challenge as having been imposed in violation of the Constitution. When a movant seeks to challenge his conviction, undue delay forces him to suffer both the prejudice of enduring a sentence that may be invalid and the risk that witnesses and evidence necessary for him to vindicate himself at any retrial will become unavailable. And when a movant challenges his conviction on substantive legal grounds—such as Mr. Eccleston's claim that he was convicted under a portion of § 924(c) that is unconstitutional—the prejudice may be even more severe. This Court has recognized that, when a defendant has suffered "conviction and punishment for an act that the law does not make criminal," "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice.'" *Davis v. United States*, 417 U.S. 333, 346 (1974). By delaying adjudication of Mr. Eccleston's motion for years, the Tenth Circuit delays correcting for years what may be a complete miscarriage of justice. In this situation, justice delayed is justice denied.

Third, there's no reasonable justification for the delay. The lone issue posed by Mr. Eccleston's motion is a straightforward question of law with a clear answer. Under 28 U.S.C. § 2255(h), "[a] second or successive motion must be certified" if it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Mr. Eccleston's motion obvi-

ously meets these criteria. His claim that § 924(c)'s residual clause is unconstitutionally vague relies on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which articulated a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016). It shouldn't have required more than 30 days—much less three years—for the Tenth Circuit to conclude that Mr. Eccleston's motion for authorization satisfies § 2255(h). To allow the straightforward question presented by Mr. Eccleston's motion to linger more than three years is an abuse of discretion that warrants intervention by this Court.

Finally, the Tenth Circuit's delay undermines the public perception of judicial proceedings. Citizens may lose faith in the judicial system when they learn that the court has taken no action for years on urgent pleas from prisoners who may be entitled to release; that the court has not given an explanation for its actions; and that reasonable requests for information about the status of such pleas are going unanswered.

Accordingly, the Court should, in the exercise of its supervisory powers, grant certiorari before judgment, vacate the Tenth Circuit's abatement order, and direct it to rule on Mr. Eccleston's motion for authorization forthwith.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

In the alternative, Mr. Eccleston has filed, concurrently with this petition, a separate petition for writ of mandamus. Should the Court determine that this case

does not meet the criteria for a writ of certiorari, it should grant Mr. Eccleston's alternative request for a writ of mandamus for the reasons stated in that petition.

Respectfully submitted,

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