No. _____

In the Supreme Court of the United States

October Term 2019

RANDY ETHAN HALPRIN,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Institutions Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In May 2018, after the district court denied Randy Halprin's first federal habeas petition, the *Dallas Morning News* published a story about Halprin's trial judge titled "White, Straight and Christian: Dallas County candidate admits rewarding his kids if they marry within race." In the article, the judge admitted that he created an anti-miscegenation clause in a living trust. The article also quoted a 2006 campaign aide for the judge who said the judge regularly used the word "nigger" around her, and referred to cases involving black defendants as "T.N.D.s" for "Typical Nigger Deals."

The article did not mention Halprin (who is white and Jewish), his case, his co-defendants, or the judge's attitude towards Jews.

Halprin interviewed the campaign aid and other people close to the judge. He discovered that the judge who presided over his capital trial in 2003 called him a "goddamn kike" and "fuckin' Jew," and called his Latino co-defendants "wetbacks." The judge believed he had been selected to try their cases to "insure [*sic*] that the guilty were punished," and said about the trials, "From the wetback to the Jew, they knew they were going to die."

In May 2019, Halprin presented his judicial bias claim in a second federal petition. It was uncontested below that the judge was biased and had a constitutional, statutory, and ethical duty to recuse himself.

But the Court of Appeals for the Fifth Circuit held that Halprin's judicial bias claim was barred as successive under 28 U.S.C. § 2244(b) because the claim "ripened" in 2003, when the judge presided over the trial, even if the judge's anti-Semitic bias was "unknown to Halprin at the time."

The question presented is:

Whether Halprin's second federal petition raising a judicial bias claim is "second or successive" under 28 U.S.C. § 2244(b)(2) if the judge concealed his bias by failing to recuse himself, and the public exposure of his bigotry after the conclusion of Halprin's initial habeas proceedings in the district court created Halprin's first fair opportunity to present his claim?

CORPORATE DISCLOSURE STATEMENT

Petitioner Randy Ethan Halprin, a death-sentenced Texas inmate scheduled for execution on October 10, 2019, was the appellant in the United States Court of Appeals for the Fifth Circuit. Respondent, Lorie Davis, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division, was the appellee in that court.

LIST OF PROCEEDINGS

State v. Halprin, Texas 283rd District Court No. F01-00327 (trial proceeding)

Halprin v. State, 170 S.W.3d 111 (Tex. Crim. App. 2005) (direct appeal)

In re Halprin, Tex. Crim. App. No. WR-77,175–01, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013) (initial state habeas proceeding).

Halprin v. Davis, U.S. Dist. Ct. N.D. Tex. No. 3:13-cv-1535-L, 2017 WL 4286042 (N.D. Tex. Sep. 27, 2017) (initial federal habeas case)

Halprin v. Davis, Fifth Circuit No. 17-70026, 911 F.3d 247 (5th Cir. 2018)

Halprin v. Davis, U.S. Supreme Court No. 18-9676 (pending)

Halprin v. Davis, U.S. Dist. Ct. N.D. Tex. No. 3:19-cv-1203-L (second federal habeas proceeding)

In re Halprin, Tex. Crim. App. No. WR-77,175-05 (successive state habeas application) (pending)

In re Halprin, Fifth Cir. Nos. 19-10960 & 19-10970, 2019 WL 4619749 (5th Cir. Sep. 23, 2019) (denial of motion for authorization to file second or successive petition)

Halprin v. Davis, Fifth Cir. Nos. 19-70016 & 19-70017, 2019 WL 4619934 (5th Cir. Sep. 23, 2019) (affirmance of district court order transferring second petition)

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LOWER COURTS' OPINIONS AND ORDERS

The Fifth Circuit's decision is *Halprin v. Davis*, ___ F. App'x ___, 2019 WL 4619934, and is reprinted in the Appendix (App.) at App. 1. That decision relies on the reasons set forth in the court's opinion denying Halprin's motion for authorization to file a successive habeas petition, *In re Halprin*, ___ F. App'x ___, 20019 WL 4619794, and reprinted at App. 2.

BASIS FOR JURISDICTION

The opinion of the Fifth Circuit was entered on September 23, 2019. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Article I, Section 9, Clause 2 of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Section 2244(b), Title 28 of the U.S. Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides in relevant part:

> (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 the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> * * *
>
> 3(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 [§ 2244(b)].

STATEMENT OF THE CASE

I. The Facts

A. The crime for which Halprin was tried

Halprin was convicted of capital murder and sentenced to death under Texas' "law of parties" in connection with the killing of Irving, Texas police officer Aubrey Hawkins in the course of a Christmas Eve robbery of a sporting goods store. Judge Vickers Cunningham presided over Halprin's trial and sentenced him to death.

In December 2000, Halprin and six other men participated in a notorious escape from the Connally Unit, a Texas state prison, in Kenedy, Texas. The escape, Officer Hawkins's murder, and the manhunt for the escapees—the so-called "Texas Seven"—drew extensive media coverage. Between his escape and capture, multiple news reports published

in the Dallas area discussed Halprin's Jewish identity. *See* ROA.971-72; ROA.980; ROA.1033-1050.[1]

Judge Cunningham was appointed by then-Governor Rick Perry to the 283rd Judicial District Court in Dallas to fill a vacancy in that court. He presided over the final five Texas Seven cases, including Haplrin's. *See* ROA.1051-54. From his appointment, Judge Cunningham knew his principal task would be overseeing the capital trials of the remaining members of the Texas Seven, including Halprin. ROA.1055-57. Cunningham would later tell then-Governor Perry that, regarding his role in the trials of the Texas 7, he "was honored to be selected to administer justice and insure that the guilty were punished." ROA.1605-06.

During Halprin's trial, Judge Cunningham presided over a portion of the questioning and selection of jurors, made critical pre-trial rulings, ruled on the admissibility of evidence relevant to Halprin's guilt and punishment, instructed the jury, and sentenced Halprin to death based on the jury's answers to the special issues.

Halprin's Jewish identity was a recurring subject during his trial. For example, in the liability phase, Halprin testified that, while in prison, he was "picked on" for being Jewish. ROA.8476-77. The State argued at the close of the liability phase that Halprin may not "look bad" but "you know he's deceitful" and "different than us," that he could not help but show his "true colors" and "true nature" when he testified. ROA.8672.

In the punishment phase, the defense presented evidence that Halprin's life was shaped by his search for a Jewish identity and his desire to please his Jewish father. The State,

[1] The record citations refer to the electronic record on appeal from the court below, and are cited as "ROA.[ ]".

in turn, elicited the fact that Halprin professed to "hat[ing] Christians . . . with a passion" and "despising everything dealing with Jesus" after he was sent away to a Christian boarding school in middle school. ROA.8962 (quoting SX 975 (Letter from Randy Halprin to Mindi Sternblitz, Oct. 4, 2001)).

During its six hours of deliberations over the appropriate punishment, the jury indicated through a note that its answer to the second special issue necessary for a death sentence turned on the difference between whether Halprin "'anticipated that a human life would be taken' and 'should have anticipated.'" ROA.1877. Up to that point, this was the longest time any Texas Seven jury had deliberated. ROA.1091-93. The record does not memorialize how Judge Cunningham responded to the note, if at all.

B. The discovery, investigation and presentation of Halprin's judicial bias claim

1. Judge Cunningham's prejudice exposed in the May 18, 2018 *Dallas Morning News*

In 2018, Vickers Cunningham was seeking office as a county commissioner. Still running as "Judge Cunningham," and still citing the fact that he had "presided over the 'Texas 7' capital murder death penalty trials," he bragged that he "has put more criminals on Death Row than almost any judge in the nation." ROA.1111-15.

Cunningham made it to a run-off for the Republican nomination. On May 18, 2018, less than one week before the run-off, the *Dallas Morning News* published a story revealing that Cunningham had created a living trust for his children that withheld distributions if they opted to marry a nonwhite, non-Christian person; it also quoted Cunningham's friend and former campaign worker, Amanda Tackett, who said Cunningham used the acronym

"T.N.D." which stood for "Typical Nigger Deals" to refer to cases involving Black defendants. ROA.1116-27. In a videotaped interview for the piece—an excerpt of which was posted online with the article—Cunningham confirmed that he created the anti-miscegenation clause in the trust. ROA.1128-29. Cunningham explained he was motivated by "my faith of being a Christian"; he "wanted to support my faith" and "traditional family values." *Ibid.*

Beyond exposing Cunningham's anti-miscegenation views, the *Dallas Morning News* reported that people close to Cunningham—including his mother, brother, and the former political aide—knew him to be "a longtime bigot." ROA.1116-27.

Judge Cunningham took to his campaign website to post a "personal note from Vic Cunningham." ROA.1137-62. The judge admitted he set up the trust and stated that his "views on interracial marriage have evolved since [he] set-up the irrevocable trust in 2010." *Id.* He categorically denied ever using the N-word, attacked his brother's motives, and pointed out that Tackett's story was "without collaboration [sic: corroboration]." *Id.* Judge Cunningham lost the run-off election by 25 votes. ROA.1163-68.

2. The investigation into actual bias against Halprin during his trial.

The *Dallas Morning News* article did not mention Halprin, the Texas Seven, or Judge Cunningham's feelings about Jewish people. Therefore, it was insufficient to support a due process claim. *See Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (emphasizing that petitioner presented a prima facie case of judicial bias "by pointing not only to [his judge]'s conviction for bribe taking in other cases, but also to additional evidence . . . that lends support to his claim that [the judge] was actually biased in petitioner's own case") (emphasis in original).

Nevertheless, Halprin's counsel followed up on the allegations about Judge Cunningham to determine whether he harbored similar discriminatory views toward Halprin or Halprin's co-defendants. Counsel contacted Amanda Tackett, Cunningham's former campaign worker who was quoted in the *Dallas Morning News*, and other friends of the judge, including Tammy McKinney, who grew up with Cunningham and knew him intimately.

Cunningham and McKinney's parents were close friends, ran in the same social circles, went to the same church, and were members of the same clubs. See ROA.1062-63. McKinney and Cunningham were friendly and "Vic really trusted" McKinney. ROA.1063. When he became a judge, Cunningham even offered McKinney the position of court coordinator. *Ibid.*

McKinney told Halprin's investigator that Judge Cunningham "took special pride in the death sentences [of the Texas Seven] because they included Latinos and a Jew." *Ibid.* Judge Cunningham would call Halprin a "goddamn kike" and "that fuckin' Jew." ROA.1064. He also used the term "'wetback' to describe some of the Texas 7 defendants." *Ibid.* On at least one occasion, McKinney remembers Cunningham saying, "From the wetback to the Jew, they knew they were going to die." *Ibid.* When Judge Cunningham "los[t] inhibitions" and aired his prejudices at parties, he would often return to discussing the Texas Seven. *Ibid.*

Amanda Tackett told Halprin's investigator that when she worked on Judge Cunningham's campaign to be the Republican nominee for Dallas district attorney, he privately "said that he was running for DA so that he could return Dallas to a Henry-Wade style of justice where we did not have to worry about 'niggers,' Jews, 'wetbacks,' and

Catholics." ROA.1099; *see also* ROA.1064 (Cunningham said "he wanted to run for office so that he could save Dallas from 'niggers,' 'wetbacks,' Jews, and dirty Catholics").

Tackett personally heard Judge Cunningham refer to Mexicans as "wetbacks," Catholics as "idol-worshippers," Jewish people as "dirty," and African-Americans as "niggers." ROA.1099. She also heard Judge Cunningham express classic anti-Semitic tropes such as when he conceded that "some Jews were good attorneys," but "as far as Jews in general, they needed to be shut down because they controlled all the money and all the power." *Ibid. See also* ROA.1187-89.

At a campaign event in the Dallas neighborhood of Lakewood, where Cunningham grew up, Tackett recalled hearing Cunningham refer to Halprin as "the Jew" and others in the Texas Seven as "wetbacks."[2] ROA.1100. In 2008 or 2009, Tackett remembers Judge Cunningham wearing a stereotypical banker's outfit—green visor and suspenders—and declaring that he would be her "Jew banker" at a casino-themed party. ROA.1101. McKinney and Tackett both told Halprin's counsel about a 2014 incident in which Judge Cunningham "interfered with his daughter's . . . relationship with a young Jewish man she dated when she was in college." ROA.1065; ROA.1101. Tackett recalled Cunningham instructing his daughter, Suzy, to break up with "that Jew boy" when referring to her then-boyfriend. ROA.1101.

[2] Tackett said the conversations in which the judge made racist and anti-Semitic statements were not public. Decl. Amanda Tackett dated Sept. 17, 2019 (filed in the Court of Appeals on Sept. 20, 2019).

Counsel sought out that Jewish young man, Michael Samuels, who confirmed the incident in his own declaration. ROA.1108-10. Samuels said that during his two-and-one-half-year relationship with Cunningham's daughter he tried to meet Cunningham several times, but Cunningham "never made an effort to meet me." ROA.1109. Suzy eventually explained "that her father did not like [Samuels] because [he] was Jewish" and her father threatened not to pay for her law school tuition unless she broke up with Samuels. *Ibid.*

3. Establishing Cunningham's bias as long-held and deeply seated.

Vic Cunningham's bigotry prevented McKinney and Vic from ever becoming "truly good friends." ROA.1063. Cunningham "did not like anyone not of his race, religion or creed, and he was very vocal about his disapproval." *Ibid.* For example, Cunningham belittled his brother Bill by calling him "nigger Bill" "for as long as [McKinney] can remember." ROA.1065. *See also* ROA.1124. He was "always []like this," but "his level of hatred" seemed to grow with age. ROA.1063. By the time McKinney and Cunningham were around thirty—long before Judge Cunningham presided over Halprin's trial—McKinney found Cunningham "so hateful." *Ibid.* She remembers that "[h]e would regularly use offensive" language "such as 'nigger,' 'wetback,' 'spic,' 'kike,' 'the fuckin' Jews.'" *Ibid.*

Judge Cunningham "would often use race or ethnicity to refer to people . . . who were members of groups he did not like. . . . If someone were actually African-American, he would call them 'Nigger' and their first name. It was his signature way of talking about people of color. For Jewish people, he would say a 'fuckin' Jew' or a 'goddamn kike.'" ROA.1065. *See also* ROA.1124. When he discussed the cases, he would "often" make "extremely hateful

comments" and always mention the defendants' "race, ethnicity or religion." ROA.1063. Speaking of his judgeship, "Vic said any 'nigger' or 'wetback' walking into his courtroom knew they were going to go down." ROA.1064.

II. Procedural History

After trial, Halprin's conviction and sentence were affirmed. *Halprin v. State*, No. AP-74,721, 170 S.W.3d 111 (Tex. Crim. App. 2005). Some years later, his state habeas application was denied. As described above, in late 2005, Judge Cunningham resigned his judicial seat in order to run for Dallas District Attorney in the Republican primary. After two changes of presiding judge, the trial court adopted the State's proposed findings of fact and conclusions of law with minimal alterations. The Texas Court of Criminal Appeals (CCA) then adopted the trial court's findings and conclusions and denied relief. *Ex parte Halprin*, No. WR-77,174-01, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013). In his application, Halprin raised thirty-one allegations challenging his conviction and sentence, none related to judicial bias. *Id.* at *1.

In March 2014, Halprin timely filed a federal habeas petition, which the district court denied in September 2017. *Halprin v. Davis*, No. 3:13-cv-01535-L, 2017 WL 4286042 (N.D. Tex. Sept. 27, 2017). The Fifth Circuit denied Halprin's request to certify an appeal of his claims. *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018). On June 12, 2019, Halprin petitioned this Court for writ of certiorari. *See Halprin v. Davis*, No. 18-9676 (U.S.). The petition was scheduled for conference on October 1, 2019.

On May 17, 2019, Halprin filed a second petition in the district court raising this judicial bias claim. *See Halprin v. Davis*, Nos. 3:13-cv-1535-L; 3:19-cv-1203-L (N.D. Tex.).

Halprin filed in the district court without seeking authorization because the petition was not "second or successive" within the meaning of 28 U.S.C. § 2244(b), and asked the district court to stay its proceedings to allow him to return to state court to exhaust this claim. ROA.1221-44.

Aware of both Halprin's Supreme Court litigation on his initial petition and the litigation on the new petition filed in federal district court, on June 5, 2019, the State sought an order from the trial court setting an execution date for Halprin. Over Halprin's objections and request for a hearing on the State's motion, the trial court entered an order on July 3, 2019, setting Halprin's execution date for October 10, 2019. ROA.1470-71.

In August 2019, the district court entered an order transferring the petition to the Fifth Circuit. ROA.1621-27. The district court determined that Halprin's petition should be characterized as a "second or successive" petition and transferred to the Fifth Circuit "for determination of whether it should be allowed to proceed," ROA.1627.

In the meantime, Halprin also filed a subsequent application for writ of habeas corpus in the CCA raising the same judicial bias claim and a claim related to Texas's death penalty scheme. Application for Writ of Habeas Corpus, *Ex parte Halprin*, No. WR-77,175-05 (Tex. Crim. App. July 16, 2019). He also sought a stay of his execution. The State did not move to dismiss Halprin's application, did not file an opposition to it, and did not file any opposition to the stay motion.

While pursuing his appeal, Halprin also filed a motion for authorization with the Fifth Circuit to file a successive petition in the district court. *See* Motion for Order Authorizing the District Court to Consider Second or Successive Petition for Writ of Habeas Corpus

Pursuant to 28 U.S.C. § 2244, *In re Randy Ethan Halprin*, Nos. 19-10960 & 19-10970 (5th Cir. Sept. 6, 2019).

In a single opinion, the Fifth Circuit denied both Halprin's motion for authorization and his appeal of the district court order. App. 3.[3] The Fifth Circuit held that Halprin's claim was "second or successive" because "the claim was ripe in 2003, even if unknown to Halprin at the time." App. 6. Like Respondent Lorie Davis and the Attorney General's Office,[4] the court acknowledged, "Assuming the allegations to be true, Cunningham's racism and bigotry are horrible and completely inappropriate for a judge." App. 4 n.2. The court concluded: "In sum, as reprehensible as Cunningham's remarks are, we are bound to apply the law as written." App. 9.[5]

[3] The Fifth Circuit ruled on the appeal before Appellee Lorie Davis could file a brief.

[4] Respondent Lorie Davis and the Attorney General's Office have similarly conceded that Judge Cunningham's alleged bias is "abhorrent" and the allegations are "disturbing." Opposition to Motion for Authorization to File a Successive Habeas Petition at 30-31, *In re Halprin*, No. 19-10960 (5th Cir. Sept. 20, 2019); *see also* ROA.1333 (Respondent's Motion to Dismiss) ("To be clear, the details of Cunningham's living trust and the accounts of those who knew Cunningham regarding his bigoted statements and beliefs are troubling to say the least. The Attorney General's Office does not condone or excuse Cunningham's creation of his living trust, and the racist and religiously-bigoted statements he is alleged to have made are abhorrent.").

[5] Review of the authorization ruling is barred by 28 U.S.C. § 2244(b)(3)(E). Halprin concedes for purposes of this petition that his judicial bias claim could not meet the requirements for "second or successive" petitions.

REASONS FOR ALLOWING THE WRIT

I. This Court Should Settle The Important Federal Question Whether Abuse-Of-The-Writ Principles, Including Whether The Petitioner Had A Fair Opportunity To Raise His Claim In His First Petition, Govern The Determination Whether An Application Challenging An Undisturbed State-Court Judgment Is "Second Or Successive"

A. This Court has adopted abuse-of-the-writ principles, including whether the petitioner had a fair opportunity to raise his claim, govern the determination of whether a claim is "second or successive."

The term "second or successive" in § 2244(b) is "a term of art" that is "not self-defining." *Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007). Instead, the term "takes its full meaning" from Supreme Court case law, including pre-AEDPA cases. *Ibid. See also Slack v. McDaniel*, 529 U.S. 473, 486 (2000) ("The phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases."). In *Felker v. Turpin*, 518 U.S. 651 (1996), the Court found § 2244(b) is "within the compass" of "what is called in habeas corpus practice 'abuse of the writ,'" a doctrine that is "'a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" 518 U.S. at 664 (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). Applying that doctrine "[i]n the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar. There are, however, exceptions." *Panetti*, 551 U.S. at 947.

Panetti considered one such exception, a claim that the petitioner was incompetent for execution and the state court did not afford him the hearing on that claim that due process

required under *Ford v. Wainwright*, 477 U.S. 399 (1986).[6] Although the signs of Panetti's mental illness were a matter of record from at least the time of trial, 551 U.S. at 936-938, federal courts are not "able to resolve a prisoner's *Ford* claim before execution is imminent." *Id.* at 946. By that time, *Ford* entitled the State to presume Panetti was competent, and to require "'a substantial threshold showing of insanity,'" before he could obtain a stay of execution and a hearing on his claim. *Panetti*, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 426 (Powell, J., concurring)).

Under those circumstances, this Court held the "statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe." *Id.* at 947. In reaching that conclusion, this Court relied upon three factors: (1) the practical effects or perverse implications for habeas practice by reading 'second or successive' literally for a specific class of claims, (2) whether allowing such claims would be consistent with AEDPA's purposes, including promoting comity, finality, and federalism, and (3) the history of habeas jurisprudence, including the common law abuse-of-the-writ doctrine. *See Panetti*, 551 U.S. at 942-45; *see also United States v. Lopez*, 577 F.3d 1053, 1056 (9th Cir. 2009) (distilling *Panetti*'s test).

Three years later, in *Magwood v. Patterson*, 561 U.S. 320 (2010), the Court decided that a "fair-warning claim" that was available to the petitioner at the time of his first petition, was not barred as "second or successive" because, between the filing of the first and second

[6] *Panetti* answered a question left open in another the case of another second-in-time petition raising a *Ford* claim, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). *Panetti*, 551 U.S. at 943.

petition, the state court had entered a new judgment. 561 U.S. at 342. The Court clarified that this additional exception "neither purports to alter nor does alter our holding in *Panetti*." *Id.* at 343 (Breyer, J., concurring); *id.* at 335 n.11.

Three concurring Justices agreed with the four-Justice dissent that "if Magwood were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply, including *Panetti*'s holding that an 'application' containing a 'claim' that 'the petitioner had no fair opportunity to raise' in his first habeas petition is not a 'second or successive' application." *Id.* at 343 (quoting *id.* at 345 (Kennedy, J., dissenting)). That is, under *Panetti*, "a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application." *Id.* at 345.).[7]

The *Magwood* Justices' distillation of a "fair opportunity" rule from *Panetti* is not a new gloss.[8] One month after this Court first articulated the abuse-of-writ doctrine in *Salinger v. Loisel*, 265 U.S. 224 (1924), the Court held that a petitioner must have had "full opportunity to offer proof" of a claim in a first habeas proceeding to trigger an abuse of the

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[7] The State of Texas agreed with the rule articulated by the State of Alabama and endorsed by these seven Justices in *Magwood*: "Federal habeas petitioners are entitled to one, but only one, full and fair opportunity to litigate a claim." Brief for Respondents at 16, *Magwood v. Patterson*, 561 U.S. 320 (2010) (No. 09-158), 2010 WL 565216; *accord* Brief of South Carolina and other States as Amici Curiae in Support of Respondents at 16, *ibid.*, 2010 WL 565215 (endorsing Respondents "'one opportunity' rule" as "a sensible and workable reading of Section 2244(b) . . . faithful to Congress' intent and the history of the abuse of the writ doctrine."). Halprin is asking no more than this.

[8] *Cf. Boumediene v. Bush*, 553 U.S. 723, 774 (2008) ("The provisions at issue in *Felker*, however, did not constitute a substantial departure from common-law habeas procedures. The provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine.").

writ with a second petition. *Wong Doo v. United States*, 265 U.S. 239, 241 (1924). And this interpretation of § 2244(b) is in line with prior cases from this Court which analyzed the very nature and purpose of the writ itself. *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) ("To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice.").

That rule, this Court held in *Panetti*, "is confirmed" by considering AEDPA's "design . . . to 'further the principles of comity, finality, and federalism.'" *Panetti*, 551 U.S. at 945 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)). It also avoids unwanted "practical effects" such as petitioners "'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)).

This Court's incorporation of abuse-of-the-writ principles into the "second or successive" determination[9] also is consistent with other cases that found AEDPA did not "'displace courts' traditional equitable authority.'" *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013) (quoting *Holland v. Florida*, 560 U.S. 631, 646 (2010)). "A federal habeas court's power to excuse these types of defaulted claims [i.e., those not presented in a first federal petition] derives from the court's equitable discretion." *McCleskey*, 499 U.S. at 490.

Contrary to this Court's decisions, the Fifth Circuit failed to apply an abuse-of-writ analysis to Halprin's judicial bias claim, including whether he had a fair opportunity to raise

[9] *Magwood*, 561 U.S. at 341 (Kennedy, J., dissenting) (§ 2244(b) "incorporates the pre-AEDPA abuse-of-the-writ doctrine").

his claim in his initial petition. Therefore, the lower court wrongly concluded the claim is governed by the restrictions in § 2244(b).[10]

B. The circuits are in substantial tension with *Panetti* and each other.

1. The rule applied in this case is inconsistent with *Panetti* and other decisions of this Court.

The decision below eschewed both *Panetti*'s rule and its method, and held the only exception to the "second or successor" bar is a claim that "ripened" after the initial habeas proceedings. App. 5. The Fifth Circuit followed *In re Coley*, 871 F.3d 455 (6th Cir. 2017) (per curiam), in limiting *Panetti*'s reach to the "only two situations" in which this Court made a "determination that a 'second in time' application was not successive." App. 5. The court of appeals found "neither [situation] applicable here," *ibid.*, and distinguished Halprin's claim from one "'where ripeness prevented, or would have prevented, a court from adjudicating the claim in an earlier petition,' such as request [*sic*] for relief on a *Ford*-based incompetency claim." *Ibid.* (quoting *Coley*, 871 F.3d at 457). The court held Halprin's "claim was ripe in 2003, even if unknown to Halprin at the time," and that alone precluded the application of *Panetti* to his claim. App. 6.

The Fifth and Sixth Circuit's approach does not consider whether allowing Halprin's judicial bias claim to proceed was consistent with the purposes of AEDPA, whether the claim would have been heard under the abuse-of-writ doctrine, or whether a denial of the claim would produce perverse effects.

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[10] Again, for purposes of this Petition, Halprin concedes, as he did in the district court that, like the *Ford* claim at issue in *Panetti* and *Martinez-Villareal*, a judicial bias claim cannot satisfy the requirements of 28 U.S.C. §§ 2244(b)(2)(A) or (B).

It was uncontested below that the judge's privately held bias required him to recuse himself under Texas law,[11] and the Due Process Clause. It also was uncontested that this Court recognizes a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). And that this Court has repeatedly held habeas petitioners are entitled to "'presume that public officials have properly discharged their official duties.'" *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (quoting *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (case involving judicial bias)). Thus, the Fifth Circuit held that Halprin's judicial bias claim ripened, and, presumably, became available to him, at the same time the judge concealed it through intentional misconduct. The Fifth Circuit's decision is in conflict with the view of the seven Justices in *Magwood* who said that, under *Panetti*, a claim is not "second or successive" if the petitioner had no fair opportunity to raise it in his initial petition.[12]

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[11] *See* Tex. Civ. R. 18b(a), (b)(1)-(2) ("[a] judge must recuse" whose "impartiality might reasonably be questioned" and who "has a personal bias or prejudice concerning . . . a party"); *McClenan v. State*, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983) (finding "bias as a ground for [judicial] disqualification [where] bias is shown to be of such a nature and to such an extent as to deny a defendant due process of law."), *overruled in part on other grounds by De Leon v. Aguilar*, 127 S.W.3d 1 (Tex. Crim. App. 2004); *see* 48B Robert Schuwerk & Lillian Hardwick, *Texas Practice Series: Handbook of Texas Lawyer and Judicial Ethics* § 40:44 ("a judge may err by not recusing *sua sponte*" on a record indicating bias).

[12] Although Halprin disputes that ripeness is the sole consideration under *Panetti*, other courts have disagreed with the Fifth Circuit's crabbed definition of "ripe." *See, e.g., Julian v. Hanna*, 732 F.3d 842, 849 (7th Cir. 2013) (Posner, J.) (finding petitioner's "*Brady* claim was ripe" no earlier than when "[t]he exculpatory evidence had been revealed"). *Cf. McDonough v. Smith*, 139 S. Ct. 2149, 2159 (2019) (holding time to bring 42 U.S.C. § 1983 malicious-prosecution claim based on fabricated evidence accrues not from earliest date plaintiff becomes aware of fabricated evidence, but from later date of favorable termination of proceedings against him).

2. Other circuits take different approaches.

While the Fifth and Sixth Circuits have eschewed abuse-of-the-writ principles, other circuits have created other tests that are also inconsistent with *Panetti* and each other.

The Tenth Circuit has held that, under *Panetti*, a claim brought under *Brady v. Maryland*, 373 U.S. 83 (1963), that is based on a factual predicate that was suppressed by the State until after the initial petition was filed should be treated as not "second or successive" under some circumstances. *Douglas v. Workman*, 560 F.3d 1156, 1188-89 (10th Cir. 2009). *Douglas* relied on *Panetti*'s concerns about the purposes of AEDPA and the perverse effects of rewarding the state-actor for their wrongful concealment by foreclosing review of the claim. *Id.* at 1195. The Court also reasoned that petitioners could rely on the presumption of public officials' integrity. *Id.* at 1188-89.[13] *See also Carter v. Bigelow*, 78 F.3d 1269, 1279-1280 (10th Cir. 2015) (citing *Douglas*, 560 F.3d at 1195, for proposition that "allowing prosecutors to escape habeas review by concealing *Brady* evidence 'cannot have been Congress's intent in enacting AEDPA'").

By contrast, the Ninth Circuit has held that a *Brady* claim premised on new evidence is categorically subject to the requirements for "second or successive" applications. *Brown v. Muniz*, 889 F.3d 661, 673 (9th Cir. 2018). The Ninth Circuit—like the decision below—

[13] The Tenth Circuit crafted seven factors to determine that a petitioner could raise a *Brady* claim in a second petition: (1) the initial habeas petition was still open and pending, (2) the pending claim was closely related to the new allegations, (3) the prosecutor's misconduct was willful and intentional, (4) the prosecutor's active concealment of his violation, (5) death penalty cases have special considerations, (6) inequity in treatment between the petitioner and a co-defendant would render the death penalty capricious, and (7) relief is not inconsistent with AEDPA purposes. *See* 560 F.3d at 1190-95. Only the final factor includes a consideration of the abuse-of-the-writ principles.

dismissed the relevance of abuse-of-the-writ principles to claims based on previously concealed evidence: AEDPA's "only concern is with the existence of those facts at the time of the initial habeas petition." *Ibid.*

Even so, the Ninth Circuit recognized that its rule was limited to the specific circumstances of *Brady*. *Brown* noted that *some Brady* claims could satisfy § 2244(b)(2)'s innocence requirement. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). *Id.* at 671. Those that did not meet the innocence requirement were not "extreme" enough "malfunctions" of state process. *See ibid.* (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)). And *Brown* recognized that its rule "saddle[d] petitioners with a stringent standard of proof that is a function of the government's own neglect, or worse, malfeasance." *Id.* at 676.

Moreover, *Brown* recognized its holding was in "some tension" with the Ninth Circuit's prior decision in *United States v. Lopez*, 577 F.3d 1053 (9th Cir. 2009). Applying *Panetti*'s factors, *Lopez* doubted that all newly discoverable *Brady* claims were subject to the "second or successive" bar, but expressly declined to reach that issue. *Id.* at 1067.

Finally, the Eleventh Circuit, like the Ninth, has struggled to consistently apply the rule of *Panetti* to previously unavailable claims based on concealed evidence. First, the circuit used a strict "ripeness" test that it found *Panetti* compelled, while also concluding *Panetti* is limited to *Ford* claims and other claims based on facts or legal arguments that came into existence after the time to file the initial petition. *See Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009).

Then, a subsequent panel questioned *Tompkins*' holding, concluding that *Panetti* mandated a three-factor test to analyze whether a claim is second or successive under §

2244(b). *See, e.g.*, *Scott v. United States*, 890 F.3d 1239, 1248 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 842 (2019). *Scott* followed *Tompkins* to bar a petitioner from accessing the sole fair opportunity to obtain relief where a second-in-time petition bringing a newly discoverable claim that did not satisfy AEDPA's gatekeeping criteria for second or successive petitions. 890 F.3d at 1243. But, because the *Scott* panel believed a newly discoverable claim was not "second or successive" under *Panetti*, *id.* at 1256-57, it "urge[d] the Court to rehear this case en banc to establish the rule that our Constitution and Supreme Court precedent require." *Id.* at 1259. The competing approaches of *Scott* and *Tompkins* have continued to engender controversy. *See Jimenez v. Sec'y, Fla. Dep't of Corrs.*, 758 F. App'x 682, 686 (11th Cir. 2018) (Carnes, C.J., concurring) (defending *Tompkins*); *id.* at 687 (Rosenbaum, J., concurring) (defending *Scott*).

Given the substantial confusion among the lower courts, this Court should clarify that the seven Justices in *Magwood* correctly stated "*Panetti*'s holding": "that an application containing a claim that the petitioner had no fair opportunity to raise in his first habeas petition is not a 'second or successive' application." *Magwood*, 561 U.S. at 343 (Breyer, J., concurring) (internal quotation marks omitted).

C. Halprin's claim is not abusive.

Panetti considered whether a second-in-time application containing a *Ford* claim "constituted an abuse of the writ, as that concept is explained in our cases." *Panetti*, 551 U.S. at 947. One of the most "'basic rules . . . ' concerning the doctrine of abuse of the writ," is "that equitable principles govern[]," including 'the principle that a suitor's conduct in relation

to the matter at hand may disentitle him to the relief he seeks.'"[14] *McCleskey*, 499 U.S. at 484-85 (quoting *Sanders v. United States*, 373 U.S. 1, 15, 17, 18 (1963)). *See also Delo v. Stokes*, 495 U.S. 320, 321 (1990) (per curiam). Although "a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice," *McCleskey*, 499 U.S. at 489, this Court has held that the petitioner's claim should not be deemed abusive if the petitioner has not had a "full opportunity to offer proof" of that claim. *Wong Doo*, 265 U.S. at 240-241, *cited in McCleskey*, 499 U.S. at 481. *See also McCleskey*, 499 U.S. at 488 (discussing *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam)); *id.* at 490 (noting the "doctrine ... concentrate[s] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time").

Consequently, this Court adopted the "cause" standard from *Murray v. Carrier*, 477 U.S. 478 (1986), "to determine if there has been an abuse of the writ," *McCleskey*, 499 U.S. at 493, because *Murray* asks whether "'some objective factor *external to the defense* impeded counsel's efforts' to raise the claim." *Ibid.* (quoting *Murray*, 477 U.S. at 488) (emphasis added).

A long line of cases from this Court that apply that test hold harmless habeas petitioners whose delay in presenting, or fully developing, claims was attributable to the

[14] This hornbook rule of equity applies to the States, too. *See Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (explaining that *Martinez v. Ryan*, 566 U.S. 1 (2012), "announced a narrow[] 'equitable ... qualification' of the rule of *Coleman v. Thompson*, 501 U.S. 722 (1991)); *id.* at 2068 ("*Martinez* ... was responding to an equitable consideration" raised by state law).

failure of a public official to act properly, precisely the circumstance Halprin relied upon below. *See Banks*, 540 U.S. 668, 693-94 (2004); *Strickler v. Greene*, 527 U.S. 263, 283 (1999); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988); *Murray*, 477 U.S. at 488;[15] *cf.* (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 440-43 (2000) (holding petitioner did not "fail[] to develop the factual basis for his claim in state court," 28 U.S.C. § 2254(e)(2), because "underdevelopment" of factual basis was "attributable to [juror] and [prosecutor], if anyone").[16]

Halprin exceeds this showing of cause. Like the defendants in *Banks* and *Strickler* who relied upon the presumption that their prosecutors were telling the truth about meeting their discovery obligations, Halprin relied upon the "presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47. The judge's decision to sit this case cloaked him in a presumption that he was doing so because he could be fair. Under Texas law, if Judge Cunningham had "a personal bias or prejudice ... concerning a party," he was required to recuse himself. Tex. Civ. R. 18b(a), (b)(1)-(2). He did not, and that left Halprin to presume he was unbiased.[17]

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[15] The pre-AEDPA lower courts were in accord. *See* 2 Randy Hertz & James Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.3[c] nn.84-86 (8th ed. 2018) (collecting cases finding claims not successive because of state interference).

[16] These cases appear to be straightforward applications of "[e]quity's maxim that a suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands." *McKennon v. National Banner Pub. Co.*, 513 U.S. 352, 360 (1995).

[17] The uncontested evidence may—if proven—show that State officials had knowledge of the judge's bias. Halprin's claim is based on the observations of disinterested witnesses who were close to Judge Cunningham over many years. The trial prosecutor grew up with the judge and had known him for 30 years before the trial started. ROA.1059-60. Texas's

The abuse-of-the-writ doctrine also was "designed to discourage baseless claims and to keep the system open for valid ones." *McCleskey*, 499 U.S. at 493. Applying that principle in *Panetti*, this Court found "filings that are frivolous and designed to delay executions can be dismissed in the regular course." 551 U.S. at 946. This Court found *Ford*'s "requirement of a threshold preliminary showing, *for instance*, will, as a general matter, be imposed before a stay is granted or the action is allowed to proceed." *Id.* at 946-947 (emphasis added).

Here, there is no question that Halprin can show prejudice from the judge's concealment of his bias. It is uncontested that the judge was biased, that his bias was based on his anti-Semitic and anti-Latino stereotypes and hostility, and therefore disqualifying. *See United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980) (when an extrajudicial bias or prejudice is "somehow related to a suspect or invidious motive," "only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify"). It also was uncontested that the judge's failure to recuse was structural error that affected the "entire conduct of the trial from beginning to end," *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991), and "cause[d] fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (citing *Tumey*, 273 U.S. at 535). Such claims require "automatic reversal." *Id.* at 1912. *Cf.*

Governor hand-picked Cunningham to try the Texas Seven cases, ROA.1059, and Cunningham later wrote he "was honored to be selected to administer justice and insure [sic] that the guilty were punished." ROA.1605-06.

Strickler, 527 U.S. at 282 (prejudice necessary to excuse default of *Brady* claim parallels materiality inquiry).

Two pre-AEDPA cases confirm that previously unavailable judicial bias claims were not barred as abuses of the writ. In *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995), the Eleventh Circuit faced a situation similar to this case. After Porter had raised claims of judicial bias on appeal and lost in an initial round of habeas review, 49 F.3d at 1488, he filed a second federal application presenting a new affidavit by his trial court's clerk alleging (1) that the judge changed venue in order to improve chances of a first-degree murder conviction and (2) that the judge was predisposed towards the sentence of death, which under Florida law was up to the judge alone to determine. *Id.* at 1487. The account in the affidavit was partially corroborated by the judge's interview with a local newspaper, during which the judge stated he was always going to sentence Porter to death after the guilty verdict. *Ibid.* State courts ruled that the new claim was procedurally defaulted, and the district court denied relief on the new petition. *Id.* at 1488.

The Eleventh Circuit reversed, finding "an external impediment preventing counsel from constructing or raising the claim"—specifically, that an attorney conducting a reasonable investigation would not have discovered evidence of bias. *Ibid.* at 1489. The court concluded "that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics." *Ibid.*

In *Walker v. Lockhart,* the en banc Eighth Circuit similarly concluded that newly discovered evidence empowered the court to reach a judicial bias claim raised in a successive petition and grant relief. 763 F.2d 942, 961 (8th Cir. 1985) (en banc).[18]

D. Barring Halprin's claim would be inconsistent with AEDPA's purposes and produce perverse effects.

1. The decision will wreak havoc on Texas courts.

Panetti instructed that § 2244(b) must be interpreted in light of the "purposes" of the AEDPA and "the practical effects of our holdings." 551 U.S. at 945-46. Those considerations are "particularly" important "when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Ibid.* Yet the Fifth Circuit failed to consider either AEDPA's purposes or the practical effects of his holding. Therefore, it is not surprising that its decision violates principles of comity and, if allowed to stand, will spur unnecessary litigation.

When choosing between competing interpretations of AEDPA, this Court "ha[s] been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *(Michael) Williams*, 529 U.S. at 436. The Court of Appeals' determination that Halprin's judicial bias claim is successive disrupts "this delicate balance." *Ibid.*

As in *Panetti*, treating Halprin's claim as "second or successive" creates an incentive for petitioners to bring judicial bias allegations even when the factual basis is "factually

[18] The Eighth Circuit's standards for the abuse of the writ in 1985 were similar to the standard adopted in *McCleskey* and "provide considerable guidance to post-*McCleskey* adjudication." *See* 2 Hertz & Liebman, *supra*, § 28.3[c] n.105.

unsupported as a mere formality, to the benefit of no party." *Panetti*, 551 U.S. at 947. That rule, *Panetti* concluded, was counter to the purposes of AEDPA to "streamline" prisoner litigation and conserve judicial resources. *Id.* at 946. But a bar to second-in-time judicial bias claims would not just burden the federal courts, it would intrude on state courts.

As the Eleventh Circuit realized in *Porter*, *supra*, treating a newly discovered judicial bias claim as abusive effectively means defense "counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear." *Porter*, 49 F.3d at 1489. The imposition of that duty on Texas lawyers sharply conflicts with comity, finality, and federalism because it will "undermine public confidence in the [Texas] judiciary and hinder, if not disrupt, the judicial process—all to the detriment of the fair administration of justice." *Ibid.*

The Fifth Circuit's holding effectively withdraws from Texas the "presumption of honesty and integrity" that attaches to "those serving as adjudicators." *Withrow*, 421 U.S. at 47. This Court's judicial bias cases recognize that "[m]ost questions of recusal are addressed by *more stringent* and detailed ethical rules" and state standards. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1908 (2016) (emphasis added). But the Court of Appeals' holding requires criminal defense and post-conviction lawyers to follow trial judges to campaign events and interview their childhood friends in search of potential bias claims based on allegations the judge denied and that would not even support a recusal motion under Texas law. *Compare* Opp. to Mot. Authoriz. at 23-25, *In re Halprin*, Nos. 19-10960 & 19-10970 (5th Cir. Sept. 13, 2019) (grounds Texas says compel investigation of its judges) *with In re Commitment of*

Winkle, 434 S.W.3d 300, 310-11 (Tex. Ct. App.—Beaumont 2014) (example of grounds Texas court says do not support recusal).

2. The decision below is inconsistent with Section 2244(b)'s principles of finality and federalism.

Section 2244(b)(2) furthers principles of finality by narrowing the circumstances in which a previously unavailable claim may be raised in a "second or successive" petition. But recognizing a narrow exception to § 2244(b)'s application for Halprin's previously unavailable judicial bias claim does not offend principles of finality. In fact, exempting claims which attack the fundamental fairness of a criminal trial from finality rules was the express intention of the authors of the doctrines Congress codified in § 2244(b)(2). A judicial bias claim that became available only after an initial petition is such a claim.

Congress's decision to allow consideration of successive petitions raising previously unavailable retroactive rules, § 2244(b)(2)(A), and constitutional violations bearing on innocence, § 2244(b)(2)(B), tracks the views of the jurists who crafted the anti-retroactivity doctrine and the innocence gateway: Justice John Marshall Harlan, who conceptualized the anti-retroactivity rule and its exceptions,[19] and Judge Henry Friendly, who articulated the innocence requirement.[20] Significantly, then, both Justice Harlan and Judge Friendly exempted a previously unavailable claim of judicial bias from the ambit of their now-operative rules.

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[19] *See Teague v. Lane*, 489 U.S. 288, 292 (1989) (O'Connor, J., plurality op.) ("adopt[ing] Justice Harlan's approach to retroactivity for cases on collateral review").

[20] *See Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) ("adopt[ing]" Judge Friendly's standard for a "colorable showing of factual innocence" in order to raise a successive habeas petition).

A biased judge presiding over a criminal trial, Justice Harlan wrote, is among those "certain types of official misbehavior [that] require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct." *Chapman v. Mississippi*, 386 U.S. 18, 56 & n.7 (1963) (Harlan, J., dissenting). A biased judge presiding over a criminal trial is a defect in the "whole adjudicatory framework." *Williams*, 136 S. Ct. at 1902. "The entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial." *Fulminante*, 499 U.S. at 309-10 . A judge's "lightest word or intimation is received [by jurors] with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). Therefore, a "criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." *Edwards v. Balisok*, 520 U.S. 641, 647 (1997).

Judge Friendly maintained that an innocence requirement should not apply in cases where "the criminal process itself has broken down; the defendant has not had the kind of trial the Constitution guarantees." Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970); *see also ibid.* (arguing that another structural error, racial discrimination in jury selection, should not be subject to innocence requirement). Like the claims excluded by Judge Friendly, Halprin's judicial bias claim concerns "the very basis of the criminal process," such that collateral attack would be appropriate "regardless of the defendant's guilt." *Id.* at 152.

AEDPA's solicitude toward state courts' work stops precisely where a state court has failed to afford a "full and fair" opportunity to bring a claim. Halprin's claim maps onto

Professor Paul Bator's influential[21] description of a quintessential denial of fair adjudication: "Claims of violations of due process because the state trial judge was bribed or dominated by a mob." Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455 n.28 (1963) (emphasis in original). In these circumstances, the judge's bias "invalidate[s] all of the findings of the trial court (including findings with respect to other federal constitutional rights, *e.g.*, admissibility of a confession)," but also undermines the conviction "because the findings of the trial court itself with respect to these very allegations should not be deemed conclusive." *Ibid.* In these circumstances, Professor Bator concluded, "the due process clause requires that the question of mob domination should be passed on by at least *one* tribunal (state or federal), which is concededly free of that flaw." *Ibid. Cf. Brown*, 889 F.3d at 671 (leaving open possibility that newly discovered claims that amounted to "*extreme malfunctions* in the state criminal justice systems," quoting. *Richter*, 562 U.S. at 102–03 (emphasis added), should be exempt from the "second or successive" requirements).

There has been no fair opportunity to raise a claim of egregious judicial bias in this case. The decision below made the biased judge in Halprin's trial the sole arbiter of whether his bias ought to receive what due process of law requires: "[a] fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955). Denying review of a judicial bias claim here also

[21] AEDPA reflects the concerns of Professor Bator in its scheme for "deference" to state court adjudications of claims on the merits. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 411 (2000) (O'Connor, J., for the Court) (finding Justice Thomas's opinion in *Wright v. West*, 505 U.S. 277 (1992), "sheds light on" interpretation of 28 U.S.C. § 2254(d)(1)); *West*, 505 U.S. at 285-86 & n.3 (relying on Bator's "full and fair litigation" standard).

rewards state actors who conceal their covert biases. *See Douglas*, 560 F.3d at 1195. Barring Halprin's claim cannot be justified under either the theory or the practical concerns of federal habeas law.

3. The decision below raises doubts about the constitutionality of 28 U.S.C. § 2244(b) as applied to Halprin.

Panetti sought to avoid an interpretation of "second or successive" that would foreclose any federal remedy for a substantial claim of a constitutional violation. *Panetti*, 551 U.S. at 945-46. That is not just a principle of equity, but a sound application of the doctrine of constitutional avoidance. Refusal to entertain a second-in-time habeas petition previously concealed claim of judicial bias "might work a suspension of the writ of habeas corpus." *See Magwood*, 561 U.S. at 350 (Kennedy, J., dissenting); U.S. Const. art. I, § 9, cl. 2.

This Court has availed itself of saving constructions of habeas statutes that avoid these constitutional difficulties, so long as the construction is as least "fairly possible." *INS v. St. Cyr*, 533 U.S. 289, 299–301 (2001) (construing statues to avoid suspension of habeas corpus in immigration context); *see also Dretke v. Haley*, 541 U.S. 386, 396 (2004) (adopting construction of habeas statute to avoid difficult constitutional question regarding sentencing innocence); *cf. Panetti*, 551 U.S. at 945-46.

In *Felker*, 518 U.S. 651, this Court rejected a *facial* challenge to § 2244(b)(2) brought under the Suspension Clause. *Id.* at 664. But the rationale for that facial holding only demonstrates that Halprin would have a strong constitutional challenge to the successor bar if it were applied to the facts of his case. The *Felker* Court assumed that AEDPA's primary change to federal court jurisdiction was that it "simply transfer[ed] from the district court to

the court of appeals a screening function which would previously have been performed by the district court." *Ibid.* As this Court later clarified, *Felker* assumed that § 2244(b)'s "provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine." *Boumediene v. Bush*, 553 U.S. 723, 774 (2008). Thus, *Felker* did not confront a substantial constitutional claim that would have been heard under the abuse-of-the-writ doctrine, but that cannot be heard under AEDPA, because the claim—though it is a structural error and implicates fundamental fairness—does not bear on the petitioner's innocence.

Section 2244(b)(2) is an unconstitutional encroachment upon a petitioner's privilege to receive a federal habeas remedy, assuming this Court applies the same analysis as *Felker*—"that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."[22] *Felker*, 518 U.S. at 664. As shown above, under the pre-AEDPA equitable doctrine, Halprin's claim was cognizable. Therefore, § 2244(b)(2) cannot suspend federal habeas jurisdiction to entertain Halprin's claim.

The problem is only worse if, as the State has contended, the Texas courts would refuse to entertain Halprin's claim. *See* Opp. to Mot. Authoriz. at 37-38, *In re Halprin*, Nos. 19-10960 & 19-10970 (5th Cir. Sept. 13, 2019). If Halprin lacks a remedy in state court, reading the statute to allow review in federal court offers a safety valve against an unconstitutional denial of any remedy in *any* court for his constitutional claim. Reading the statute to bar any review of a petitioner's substantive constitutional claim in this unique

[22] As *St. Cyr* noted: "The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." 533 U.S. at 301 n.13.

situation would invoke grave constitutional concerns. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). *See also* Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 Va. L. Rev. 905, 927 (2017) (arguing that after *Montgomery*, "the Constitution requires a remedy for the ongoing violation of a constitutional right" when personal liberty is at stake).

For these reasons, the decision below poses grave constitutional problems by foreclosing relief on a previously unavailable claim of judicial bias.[23] Those constitutional problems, however, would be readily avoided by treating petitioner's claim as exempt from the "second or successive" application bar, as *Panetti* and *Magwood* compel.

4. The decision below undermines confidence in the criminal justice system by enabling state-court judges to act out of religious or ethnic bias.

Panetti and *Martinez-Villareal* held *Ford* claims were not "second and successive" in part *because* the statute's exceptions failed to recognize them, *see Panetti*, 551 U.S. at 943-946, not despite it. This Court found that "if the State's 'interpretation of "second or successive" were correct, the implications for habeas practice would be far reaching and seemingly perverse.'" *Id.* at 943 (quoting *Martinez-Villareal*, 523 U.S. at 644). Barring Halprin's judicial bias claim would be just as perverse.

[23] Beside the unconstitutional suspension of the writ, the denial of a remedy in any court may also cause serious constitutional doubt under the Due Process Clause or Article III. *See Wellness Intern. Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938 (2015); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (recognizing "the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.").

A *Ford* claim asks "not *whether*, but *when*, [the petitioner's] execution may take place. This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all." *Ford*, 477 U.S. at 425 (Powell, J., concurring) (emphasis in original). In contrast, Halprin's judicial bias claim asserts a defect in the "whole adjudicatory framework," *(Terrance) Williams*, 136 S. Ct. at 1910, an error that "cause[d] fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver*, 137 S. Ct. at 1911. "Since fundamental fairness is the central concern of the writ of habeas corpus," *Strickland v. Washington*, 466 U.S. 668, 697 (1984), the exclusion of Halprin's claim from federal review would have more far reaching and perverse implications for federal habeas law than the interpretation of § 2244(b) that was rejected in *Panetti* and *Martinez-Villareal*. The nature of the bias here increases the problem by an order of magnitude.

Barring Halprin's claim would retreat from the promise of a fair and legitimate justice system described in *Buck v. Davis*, 137 S. Ct. 759 (2017). In *Buck*, this Court strongly condemned a single witness's reliance on racial stereotypes finding them "toxi[c]" and even "deadly in small doses." *Id.* at 777. The toxin poisons not just the defendant's trial, but "'poisons public confidence' in the judicial process," and undermines the legitimacy of "'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Id.* at 778 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015), and *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

Like reliance on invidious racial stereotypes, a judge's religious animus represents "a disturbing departure from a basic premise of our criminal justice system: Our law punishes

people for what they do, not who they are." *Buck*, 137 S. Ct. at 778. Equal administration of justice for religious minorities is no less important than it is for racial minorities. "The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment); *see also Murphy v. Collier*, 139 S. Ct. 1475, 1476 (May 13, 2019) (statement of Kavanaugh, J., joined by Roberts, C.J., respecting grant of application for stay of execution) (discussing "the Constitution's guarantee of religious equality").

As the Court recently observed, "the public legitimacy of our justice system relies on procedures that . . . provide for error correction." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (quoting Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215-16 (2012)). That concern is especially compelling in a case where the judiciary is deciding whether to insulate review of the religious and ethnic bias of a fellow judge. Correcting constitutional error is not just a matter of reputation, it is a matter of efficacy. "Legal authorities are legitimate when they act impartially, honestly, transparently, respectfully, ethically, and equitably. The criminal justice system that optimally expresses these values is not only morally defensible but also quite probably stable and effective." Bowers & Robinson, *supra*, at 215-16.

II. Conclusion

This Court should grant certiorari to resolve this important question.

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Dated: October 2, 2019