Nos. 19-6156, 19A377

IN THE
Supreme Court of the United States

RANDY HALPRIN,
Petitioner,

vs.

LORIE DAVIS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JENNIFER MORRIS
Assistant Attorney General
Criminal Appeals Division

Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711–2548
(512) 936–1400
jennifer.morris@oag.texas.gov

Counsel for Respondent

QUESTION PRESENTED

Are late-discovered claims that do not implicate innocence exempt from 28 U.S.C. § 2244(b)(2)(B)?

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BRIEF IN OPPOSITION

Petitioner Randy Halprin fails to identify any compelling reason for this Court to review the Fifth Circuit's decision dismissing his unauthorized second or successive habeas petition. The lower court properly applied this Court's precedent when it found that Halprin's late-discovered judicial-bias claim does not fit within any of the recognized exemptions to § 2244(b)(2)'s bar on second or successive petitions. Pet. App'x 1 (citing *Panetti v. Quarteman*, 551 U.S. 930, 944–45 (2007); *Slack v. McDaniel*, 529 U.S. 473, 485–86 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998)). Halprin concedes that he cannot satisfy AEDPA's prerequisites for review of claims asserted in second or successive petitions. Pet. 11 n.4. Indeed, Halprin does not allege that his newly discovered evidence "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

Unable to satisfy the statutory requirements, Halprin asks this Court to create a claim-specific rule that judicial-bias claims are categorically exempt from AEDPA's general ban on claims raised in second or successive petitions. Halprin's proposed exemption is contrary to AEPDA's text and purpose. Congress plainly anticipated that petitioners would bring claims based on previously undiscoverable evidence, but it foreclosed such claims as second or

successive unless the newly discovered facts would prove the petitioner's innocence by clear and convincing evidence. *See* 28 U.S.C. § 2244(b)(2)(B). Halprin's proposed exemption is also unsupported by pre-AEDPA doctrine, which subjected judicial-bias claims to abuse-of-the-writ principles. This Court should deny the petition for a writ of certiorari.

STATEMENT OF JURISDICTION

The Court has jurisdiction to determine whether the Fifth Circuit erred in finding Halprin's petition "second or successive" under § 2244(b). 28 U.S.C. § 1254; *see also Panetti v. Quarterman*, 551 U.S. 930, 942–45 (2007).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

The Court of Appeals for the Fifth Circuit summarized the facts of the capital murder as follows:

> Halprin was a member of a group known as the "Texas Seven" who escaped from the Texas Department of Criminal Justice ("TDCJ") John B. Connally Unit (the "Connally Unit"). During their escape, the Texas Seven violently took hostages and stole guns and ammunition from the Connally Unit.
>
> Several days after the escape, the Texas Seven set out to rob a Texas store. . . .
>
> During the robbery, an onlooker called the police. Officer Hawkins of the Irving Police Department then arrived on the scene. Officer Hawkins was shot at least eleven times almost immediately upon his arrival at the store. . . . While fleeing the scene, the Texas Seven

> backed over Officer Hawkins's body in their vehicle, dragging it several feet. Officer Hawkins died from his gunshot wounds.

Halprin v. Davis, 911 F.3d 247, 252 (5th Cir. 2018).

Evidence presented at Halprin's trial showed that, during the prison escape, the escapees stole ammunition and sixteen firearms. ROA.7843–44.[1] On Christmas Eve, Halprin and five of the other escapees entered an Oshman's sporting-goods store in Irving, Texas armed with the stolen firearms. ROA.7312, 7343–44, 7452, 8280. The escapees ushered the employees at gunpoint to the breakroom and forced them to kneel, facing the wall. ROA.7316–19, 7330; 7452, 8282–83. After binding the employees, the escapees stole the employees' personal belongings, more than $70,000 in cash, forty-four firearms, miscellaneous ammunition, and other clothing and equipment. ROA.7321–29, 7345–48, 7452–53.

A witness outside the store called 911. ROA.7525–35. Officer Hawkins responded to the scene, pulling up behind the store to its loading dock while the escapees were preparing to leave. ROA.7332, 7453, 8288–92. The escapees opened fire on the police cruiser. Officer Hawkins suffered eleven gunshot wounds fired by at least five different guns. ROA.7568–70, 7630–31, 8091–8104, 8292–93. Officer Hawkins was then pulled from his patrol car and left on the pavement. Fleeing the scene, the escapees backed their get-away vehicle

[1] "ROA" citations refer to the record on appeal in the Fifth Circuit.

over Officer Hawkins, dragging him several feet. ROA.7604–23, 7789–90, 7835–36.

After murdering Officer Hawkins, the escapees fled to Colorado where they lived in an RV park under the guise of traveling missionaries. ROA. 7440–43, 7852–57. A resident at the park later recognized the escapees from the television show "America's Most Wanted" and alerted authorities. ROA.7866–78, 7893–7900. The next day, a Colorado SWAT team captured Halprin and four of the other escapees. ROA.7900–06, 7920, 7922,7934–47, 7979–84, 8308–09.[2] Two days later, police captured the remaining two escapees. ROA.7455.

B. The State's punishment-phase evidence

During the punishment phase, the jury heard evidence concerning Halprin's violent disposition and potential for future dangerousness. In 1996, Halprin had been dating a woman named Charity Smith and was babysitting her toddler son, Jarrod. ROA.7600, 7693. Halprin savagely beat the toddler, fracturing his skull, legs, and arms. ROA.7594, 7601–02, 7697–99, 7705–10, 7989–91. The toddler's x-rays showed fractures in the back part of his head, in both radii, both femurs near the knee, and the upper portion of the tibia on his right leg. ROA.8155–8163. Halprin's confession was read to the jury:

> The first time I hit Jarrod he was sitting up on the bed and I hit him up side the left side of his head, just a slap. I hit him about

[2] Larry Harper committed suicide in the RV. ROA.7906.

> five or six times. I didn't realize how hard I was hitting him. He laid back down and I pulled him back up and he was saying "mama." And I said, "Do you want to go to mama" and put him down. And then I kicked him on his real hurt knee and then he fell down. I got back up and I pushed him back down and he hit the floor real hard. I pulled him back up right hard by the wrist and I was telling him to stop crying. I didn't realize I was hurting him, but I think that I could have broken his arms then. I could have hurt his other leg when I was pushing him back down because he was trying to stay off his hurt leg and he was twisting, trying to get away, and I was shoving him back down. I guess I hurt his eye when I slapped him because I was slapping him hard enough to bruise his face. I wasn't aiming for any particular place. I was just slapping him. I got scared and put him down on the bed and kept saying, "I'm sorry, I'm sorry."

ROA.8785–86.

II. Procedural History

A jury found Halprin guilty of capital murder in 2003 based on the fatal shooting of Officer Hawkins. ROA.1880–85, 1897. The Texas Court of Criminal Appeals upheld Halprin's conviction and death sentence on direct appeal. *Halprin v. State*, 170 S.W.3d 111 (Tex. Crim. App. 2005). Halprin filed a state application for a writ of habeas corpus, which was denied. *Ex parte Halprin,* No. 77,175-01 through -04, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013) (unpublished order).

Halprin then filed a federal habeas petition in June 2014, and the district court denied it in September 2017. ROA.886–928. The Fifth Circuit denied COA on December 17, 2018. *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018).

This Court denied certiorari on October 7, 2019. *Halprin v. Davis*, No. 18-9676 (U.S. June 12, 2019).

While Halprin's petition for certiorari was pending, he filed several pleadings in federal and state court. On May 21, 2019, he filed in federal district court a successive petition raising a judicial bias claim. ROA.960–1028. The following day, he moved to stay proceedings to exhaust his judicial bias claim in state court. ROA.1221–44. The Director moved to dismiss Halprin's successive petition for lack of jurisdiction and opposed staying the case. ROA.1311–35, 1337–43. Halprin then sought discovery in the federal district court so that he could develop his claim in state court. ROA.1483–1504. The federal district court transferred Halprin's petition to the Fifth Circuit pursuant to 28 U.S.C. § 2244(b) and dismissed his motions for stay and discovery as moot. ROA.1621–27.

Halprin then filed in the Fifth Circuit a motion for authorization to file a successive petition in district court. Motion for Authorization, *In re Halprin*, Nos. 19-10960 & 19-10970 (5th Cir. Sept. 6, 2019). A week and a half later, he appealed the district court's order transferring his petition to the Fifth Circuit. Brief for Appellant, *Halprin v. Davis*, Nos. 19-70016 & 19-70017 (5th Cir. Sept. 18, 2019) Halprin then filed motions to stay in both appeals. Opposed Motion for Stay of Execution, *In re Halprin*, Nos. 19-10960 & 19-10970 (5th Cir. Sept. 20, 2019); *Halprin v. Davis*, Nos. 19-70016 & 19-70017 (Sept. 20, 2019). On

September 23, 2019, the Fifth Circuit affirmed the district court's transfer order and denied his motion for authorization. Pet. App'x 1; Pet. App'x 2. The following day, the Fifth Circuit denied Halprin's motions for stay as moot. Order Denying Stay, *Halprin v. Davis*, Nos. 19-70016 & 19-70017 (Sept. 24, 2019); *In re Halprin*, Nos. 19-10960 & 19-10970 (Sept. 24, 2019).

On October 2, 2019, Halprin filed a petition for a writ of certiorari and an application for stay of execution. Petition for Writ of Certiorari & Application for Stay of Execution, *Halprin v. Davis*, No. 19-6156. Meanwhile in state court, Halprin filed a motion to stay his execution and a subsequent habeas application raising his judicial bias claim. ROA.1438–40.[3] On October 4, 2019, the CCA granted Halprin's motion to stay his execution and remanded his judicial bias claim to the trial court. Order Granting Stay and Remanding to Trial Court, *Ex parte Halprin*, No. WR-77,175-05 (Tex. Crim. App. Oct. 4, 2019).

[3] He also asserted that Texas's future-dangerousness special issue in the capital-sentencing scheme is void for vagueness. *See* Application for Writ of Habeas Corpus Seeking Relief from a Judgment Imposing Death, *Ex parte Randy Halprin*, No. WR-01-00327-T(B).

ARGUMENT

I. Halprin's Claim Is Foreclosed by AEDPA's Bar Against Second or Successive Petitions.

A. AEDPA imposes a near-total ban on claims raised in second or successive habeas petitions.

AEDPA was enacted to bring finality to state court judgments. *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998) ("AEDPA's central concern [is] that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of innocence."); *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("AEDPA's purpose [is] to further the principles of comity, finality, and federalism."); *Leal Garcia v. Quarterman*, 573 F.3d 214, 220 (5th Cir. 2009). To that end, its provisions greatly restrict the filing of second or successive petitions. *Tyler v. Cain*, 533 U.S. 656, 661 (2001) ("AEDPA greatly restricts the power of federal courts to grant writs of habeas corpus to state prisoners."). Section 2244 prevents the repeated filing of petitions that attack the prisoner's underlying conviction:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive

> to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b).

Not every second-in-time federal habeas petition is "second or successive" within the meaning of § 2244(b)(2). But most are. *See Panetti v. Quarterman*, 551 U.S. 930, 947 (2007) (stating that a later petition "not otherwise permitted by the terms of § 2244 will [usually] not survive AEDPA's 'second or successive' bar"); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (per curiam) (explaining that the "not-second-or-successive exception is generally restricted to two scenarios"). Later habeas petitions that attack the same judgment attacked in a prior petition tend to be labeled successive, while later habeas petitions that attack a distinct judgment or some other post- judgment matter tend to be nonsuccessive. *See Panetti*, 551 U.S. 930 (finding a challenge to the execution of a sentence nonsuccessive); *Magwood v. Patterson*, 561 U.S.

320, 332 (2010) (finding a challenge to a subsequent judgment nonsuccessive); *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018) ("It is now understood that a federal habeas petition *is* second or successive if the facts underlying the claim occurred by the time of the initial petition, . . . and if the petition challenges the same state court judgment as the initial petition.") (emphasis added); *Leal Garcia*, 573 F.3d at 222.

If there is a question regarding whether a petition is "second or successive" under § 2244(b), courts must look first to the statutory context. *Magwood*, 561 U.S. at 332. Where a given reading of the term would have perverse implications for habeas practice—for instance, where it would foreclose review of an entire category of claim or require petitioners to assert such claims before they ripen—an exemption may be appropriate. *Panetti*, 551 U.S. at 945. But before creating an exemption not provided in the statute itself, courts should confirm that the exemption is consistent with AEDPA's purpose and that the pre-AEDPA abuse-of the writ doctrine supports same. *Id.* at 945–47.

B. The lower court properly found that Halprin's second petition was "second or successive" under 28 U.S.C. § 2244(b).

Halprin asserts that his second federal habeas petition is not "second or successive" within the meaning of 28 U.S.C. § 2244(b) because he did not have a "fair opportunity" to raise his judicial bias claim in his initial federal petition.

Pet. 12–16. AEDPA recognizes no such exception to § 2244(b), and there is no basis for the courts to create one. Under Halprin's proposed "fair opportunity" exemption to § 2244(b), courts would not consider whether a petitioner was diligent in finding new evidence,[4] nor whether that evidence had any exculpatory value. Courts would simply authorize another round of federal habeas proceedings whenever a petitioner alleged that he could not previously have discovered the factual basis of his judicial-bias claim—or any other claim—regardless of whether it proved his innocence. To support this proposed exemption, Halprin asserts that Congress did not intend to foreclose review of late-discovered claims that implicate fairness. He is wrong. The lower court's conclusion that Halprin's judicial-bias claim is subject to § 2244(b) is consistent with AEDPA's text, AEDPA's purpose, and the abuse-of-the-writ doctrine that AEDPA supplanted.

1. The plain text of § 2244(b) requires treating petitions raising late-discovered fairness claims as successive.

Halprin's primary complaint is that the lower court "applied the law as written." Pet. 11 (quoting Pet. App'x 9). He urges this Court to take a different

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[4] Halprin alleges that he could not have discovered the claim previously, but his proposed exemption assumes that allegations of diligence would suffice. Notably, the Director contests Halprin's allegations of diligence, as the *Dallas Morning News* published two articles in 2006 reporting allegations of Judge Cunningham's "racial baggage," discriminatory selection of a jury, and long-standing connection to and admiration for Henry Wade, whose office Halprin asserts was "publicly notorious" for its discriminatory policies. *See* Petition for Writ of Habeas Corpus Supported by Points and Authorities; No. 3:13-cv-1535, at 34–35; ROA.1077–80, 1103–07.

approach—that is, to interpret § 2244(b)(2) by looking past its text in favor of the abuse-of-the-writ doctrine that preceded it. Pet. 12–15. To support his bypass-the-statute approach to statutory interpretation, Halprin elevates *Panetti*'s consideration of the abuse-of-the-writ doctrine above the text of the statute that supplanted it. He then synthesizes *Magwood*'s concurrence and dissent to say that the Court adopted the opportunity-based rule that, in fact, it explicitly rejected. Halprin's approach is both backwards and incomplete.

To determine the meaning of "second or successive," this Court "look[s] first to the statutory context." *Magwood*, 561 U.S. at 332. In so doing, it has warned that the statute's successiveness prohibition should not be construed in a manner that would render superfluous "the exceptions to dismissal set forth in § 2244(b)." *Id.* at 335. Under Halprin's proposed "fair opportunity" rule, "the phrase 'second or successive' would *not* apply to a claim that the petitioner did *not* have a full and fair opportunity to raise previously." *Id.* But this Court has already rejected that rule:

> This reading of § 2244(b) would considerably undermine—if not render superfluous—the exceptions to dismissal set out in § 2244(b)(2). The section describes circumstances when a claim not presented earlier may be considered: intervening and retroactive case law, or newly discovered facts suggesting "that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). In either circumstance, a petitioner cannot be said to have had a prior opportunity to raise the claim, so under [Halprin's] rule the claim would not be successive and § 2244(b)(2) would not apply to it at all. This would

> be true even if the claim were raised in a second application challenging the same judgment.
>
> . . . [Halprin's] rule would dilute [the exceptions under § 2244(b)]. Whereas the exception of dismissal of fact-based claims not presented in a prior application applies only if the facts provide clear and convincing evidence "that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," § 2244(b)(2)(B)(ii), under [Halprin's] rule, all that matters is that the facts, "could not have been discovered previously through the exercise of due diligence," § 2244(b)(2)(B)(i). We decline to adopt a reading that would truncate § 2244(b)(2)'s requirements.

Magwood, 561 U.S. at 335–36.

Halprin asks this Court to adopt the rule that it rejected nine years ago. Pet. 14 n.7.[5] But *Magwood* and its rationale stand. If a claim were exempted from the second-or-successive bar *because* it was discovered late or *because* it implicated fairness (as opposed to innocence), § 2244(b)(2)(B) "would be rendered surplusage." *Leal Garcia*, 573 F.3d at 221.

Taking a more traditional approach to statutory interpretation, the Fifth

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[5] Halprin asserts that seven justices—in the concurrence and the dissent—agreed that a petition is not second or successive if the petitioner had no "fair opportunity" to raise the claim in the initial petition. But in his attempt to weave these opposing viewpoints into one that supports his own, he misses something significant: the majority rejected his proposed reading of the statute. The concurring justices and the dissenting justices did not agree on the rule that the majority rejected. "Justice Kennedy made clear in his dissent—which was joined by three other justices and commanded a plurality of the Court—a petitioner 'had no fair opportunity to raise the claim in the prior application 'if '[1] the claim was not yet ripe at the time of the first petition, or [2] where the alleged violation occurred only after the denial of the first petition." *Brown v. Muniz*, 889 F.3d 661, 674 (9th Cir. 2018). In this case, the alleged violation was ripe at the time of the first petition and occurred seventeen years prior to the denial of the first petition.

Circuit looked to the statute's text. It found that an exemption for late-discovered claims would render § 2244(b) superfluous. Pet. App'x 6 n.3 ("Indeed, if "new facts" were enough to vitiate the need for permission to file a successive habeas application, there would be no need for § 2244(b)(2)(B)."). And it found that an exemption for structural-error claims would be inconsistent with subsection (B)(ii) because its clear-and-convincing evidentiary requirement applies to "constitutional error," of which structural error is a sort. Pet. App'x 8.

Halprin effectively asserts that when Congress enacted a statute barring late-discovered structural-error claims from review in successive petitions, its intention was not to bar late-discovered structural-error claims. Pet. 27. Not surprisingly, the circuits have found otherwise. *E.g.*, *Brown*, 889 F.3d at 667 (stating that claims based on a factual predicate not previously discoverable *are* successive) (citing *Panetti*, 551 U.S. at 945); *In re Hill*, 715 F.3d 284, 299 (11th Cir. 2013) (explaining that the "unequivocal and plain text" of § 2244(b) compels dismissal of successive claims whose factual predicate was previously unavailable if the claims are not exculpatory); *Pizzuto v. Blades*, 673 F.3d 1003 (9th Cir. 2012) ("[W]ithout minimizing [the petitioner's troubling] allegations, we must follow AEDPA's 'extremely stringent' requirements."); *Stewart v. United States*, 646 F.3d 856, 863 (11th Cir. 2011) ("[C]laims based on a factual predicate not previously discoverable are successive," unless the purported

defect did not arise or ripen until after the conclusion of the previous petition); *Leal Garcia*, 573 F.3d at 222 (same); *Melanson v. Colorado Dept. of Corr.*, No. 06-1181, 2006 WL 1207919 (10th Cir. 2006); *Hope v. United States*, 108 F.3d 119, 120 (9th Cir. 1997) (The statute "should . . . be interpreted literally": "The [innocence] exception in the new law is graven in statutory language that could not be any clearer."); *In re Webster*, 605 F.3d 256, 257 (5th Cir. 2010) (quoting *Hope*, 108 F.3d at 120); *cf. Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (noting the central concern for finality in criminal proceedings absent a "strong showing of actual innocence"). Based on the plain language of the statute, Halprin's petition is successive.

2. Treating petitions raising late-discovered judicial-bias claims as successive follows precedent and furthers AEDPA's purpose.

The reasoning of *Panetti* does not support Halprin because his judicial-bias claim does not arise in the same "unusual posture" as Panetti's competency-to-be-executed claim. *Panetti*, 551 U.S. at 945. A competency-to-be-executed claim does not challenge the underlying conviction or sentence, and it does not become ripe until after a prisoner's initial habeas petition has been denied. Considering the unique nature of the claim, this Court explained that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern . . . a § 2254 application raising a[n] incompetency[-to-be-executed] claim filed as soon as that claim is ripe." *Id.* at

943. And because competency-to-be-executed claims are not ripe until after the initial petition has been resolved, treating them as "second or successive" would have had perverse implications for habeas practice by forcing petitioners to bring unripe claims that could not be adjudicated—a practice that would not benefit petitioners or the courts. 551 U.S. at 943–47; *Magwood*, 561 U.S. at 341–42 (holding that a challenge to a "new judgment is not 'second or successive' at all"); *Leal Garcia*, 573 F.3d at 224 (finding a claim was not second or successive where the alleged "defect . . . arose . . . after his conviction").

Halprin argues that treating his claim as second or successive would have the same perverse effects, Pet. 25–26, but he is wrong again. The lower court properly found that Halprin's claim was ripe for review in 2003, even if the underlying facts were unknown to him then. Pet. App'x 6. Unlike competency-to-be-executed claims, judicial-bias claims challenge the underlying conviction or sentence, and they are commonly raised and resolved in initial habeas petitions. Ignoring this distinction, Halprin shoehorns his claim into *Panetti*'s rationale, asserting that treating judicial-bias claims as successive would require defense counsel to raise meritless claims in every petition. Pet. 25–26. The same slippery slope argument could be made for any potentially late-discovered claim. And for judicial-bias claims, petitioners would have no incentive to assert meritless claims in their initial petitions. Doing so would not preserve the claim (as was assumed for incompetency-to-

be-executed claims, *Panetti*, 551 U.S. at 943), but would instead leave any subsequent judicial bias claims subject § 2244(b)(1)'s absolute bar.

Further, Halprin's hypothesis is refuted by reality: courts currently treat judicial-bias claims as successive (and have for some time), yet there is no indication that petitioners assert meritless judicial-bias claims in their initial petitions as a matter of course. *E.g.*, *United States v. Orr*, 643 Fed. App'x 680, 682 (10th Cir. 2016) (affirming district court's conclusion that Rule 60(b) motion was really a successive petition because it raised a judicial bias claim); *Pizzuto v. Blades*, 673 F.3d 1003, 1007–09 (9th Cir. 2012) (applying § 2244(b)(1) to judicial bias claim and § 2244(b)(2) to judicial misconduct claim); *In re Lambrix*, 624 F.3d 1355, 1366 (11th Cir. 2010) (applying § 2244(b)(2)(B) to judicial-bias claim); *Outlaw v. Sternes*, 233 F.3d 453, 454–55 (7th Cir. 2000) (applying § 2244(b)(2) to judicial bias claim); *Villafuerte v. Stewart*, 142 F.3d 1124, 1125–26 (9th Cir. 1998) (applying § 2244(b)(2) to judicial bias claim based on allegations of judge's racism); *Baker v. Duckworth*, 114 F.3d 1191, 1997 WL 267886, *1 (7th Cir. 1997) (applying § 2244(b)(2) to judicial bias claim); *Gallego v. McDaniel*, 124 F.3d 1065, 1079 (9th Cir. 1997) (dismissing judicial bias claim as an abuse of the writ); *Walker v. Lockhart*, 726 F.2d 1238 (8th Cir. 1984) (finding that the district court properly refused to consider judicial bias claim under 1976 version of § 2244); *cf. Porter*, 49 F.3d 1483, 1489 (11th Cir. 1995) (assuming abuse-of-the-writ bar applied to judicial

bias claim in considering whether petitioner could surmount it). Judicial bias claims remain rare.

But if this Court is persuaded by Halprin's hypothesis, the next step is to confirm that his proposed exception is consistent with AEDPA's purpose "to further the principles of comity, finality, and federalism." *Panetti*, 551 U.S. at 945. Halprin asserts that treating his claim as successive would offend all three. Pet Cert. 25–30. In the alternative, he asserts that principles do not matter because Congress intended to exempt judicial bias claims from finality rules. *See* Pet. 27–29 (arguing that ADEPA's concern for comity "stops where a state court has failed to provide a 'full and fair' opportunity to bring a claim"). Both arguments are unconvincing.

Halprin argues that the lower court's treatment of his claim as successive is "inconsistent with . . . the principle[] of finality" because finality rules *do not apply* to his claim. Pet Cert. 27. Logic is not the only flaw in his argument. Section 2244(b) furthers AEDPA's purpose of finality by prohibiting petitioners from filing repeated habeas petitions that attack an underlying conviction. *See Calderon*, 523 U.S. at 558. It sets out clear exceptions for the types of claims that trump the statute's finality concerns. *See id.*; *Magwood*, 561 U.S. at 335–36. In creating a single claim-based exemption to § 2244(b) in *Panetti*, this Court explained that competency-to-be-executed claims do not implicate AEDPA's concern for finality because the claims cannot be resolved

until an execution is imminent. *Panetti*, 551 U.S. at 947. Judicial bias claims can and in most cases are resolved before then, and unlike competency-to-be-executed claims, they are not inherently unsuited to consideration in an initial petition. In fact, petitioners do not typically raise judicial bias claims when their executions are imminent. But if such claims are deemed nonsuccessive, they almost certainly will. *See, e.g.*, *Murphy v. Collier*, 139 S. Ct. 1475, 1482 (2019) (Alito, J., dissenting) ("This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent."). Contrary to Halprin's assertion, exempting judicial bias claims from § 2244(b)(2) will undermine finality. *Cf. Evans v. Smith*, 220 F.3d 306, 324 (4th Cir. 2000) (explaining that AEDPA's purpose of achieving timely, final resolutions of claims . . . out of respect for state judicial processes would surely be eroded" if *Brady* claims were exempt from § 2244(b)(2)(B)). This is yet another reason why an exemption for judicial bias claims is inappropriate.

Halprin's alternative argument is difficult to understand. He faults the lower court for failing to consider AEDPA's purposes,[6] but then, at the same

[6] *See* Pet. 16 ("The Fifth Circuit's . . . approach does not consider whether allowing Halprin's judicial bias claim to proceed was consistent with the purposes of AEDPA . . . ."); Pet. 25 ("Yet the Fifth Circuit failed to consider AEDPA's purposes.").

time suggests that his claim trumps those purposes. Pet. 27–28. To support his proposition—that this Court rewrite the statute while disregarding its purposes—Halprin relies on a footnote from a 1967 dissent and a 1970 law review article. Pet. 27–28 (citing Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) and *Chapman v. Mississippi*, 386 U.S. 18, 56 & n.7 (Harlan, J., dissenting)). Whatever significance Justice Harlan and Judge Friendly may have attributed to judicial-bias claims, there is no indication that their opinions had any bearing on congressional intent in 1996. In the decades that followed Justice Harlan's dissent and Judge Friendly's article, "abusive writs threatened to undermine the integrity of the habeas corpus process." *See McClesky v. Zant*, 499 U.S. 467, 496 (1991). AEDPA followed, supplanting the unwieldy court-created exceptions to the abuse-of-the-writ doctrine with the clearer and more stringent standards set out in § 2244(b). Even if there were evidence that the late judges' opinions somehow influenced the 104th Congress (there is not), it does not follow that judicial bias claims ought to be categorically exempt from AEDPA's ban on second or successive petitions. In the article Halprin relies on, Judge Friendly provides a list of claim-specific exceptions to his proposed standard. *See* Henry Friendly, *Is Innocence Relevant? Collateral Attack on Criminal Judgments*, U Chi. L. Rev. 151–54 (1970). Significantly, judicial bias claims are not among them. *See id.*

Halprin goes on to assert that treating judicial bias claims as successive would offend comity because it would require defense counsel to conduct intrusive investigations into judges as a matter of course. Pet. 25. But again, judicial-bias claims are currently being treated as successive, and there is no indication that defense counsel routinely disregards the presumption of judicial impartiality. Further, Halprin's argument assumes that, if petitioners are permitted to file their judicial bias claims in a second (or later) petition, they would wait patiently for a news source to report allegations of their trial judge's bias. But petitioners with scheduled execution dates are unlikely to wait for happenstance. Rather, they would conduct the intrusive investigations, *see, e.g.*, ROA.1631 (federal district court indicating that Halprin's counsel called court several times to inquire into whether the court had complied with its ethical obligations), that give rise to Halprin's purported comity concerns.

So Halprin abandons his comity argument, asserting instead that AEDPA's concern for comity "stops precisely where a state court has failed to afford a 'full and fair' opportunity to bring a claim." Pet. 28. But his comity-does-not-matter argument stands on the erroneous assumption that no Texas court would hear his claim. In fact, the CCA stayed his execution and remanded his judicial bias claim to the trial court for review. Order Granting Stay and Remanding to Trial Court, *Ex parte Halprin*, No. WR-77,175-05 (Tex.

Crim. App. Oct. 4, 2019). Because Halprin has not been deprived of an opportunity to bring his claim in state court, his argument for disregarding comity would fail even if it were not fundamentally mistaken.

A petitioner's assertion that his claim is more important than AEDPA's purposes is not grounds for rewriting the statute. AEDPA's purposes matter. And the Fifth Circuit's decision not to extend *Panetti*'s ripeness exemption to late-discovered fairness claims is not only consistent with AEDPA's purposes, it is required by them.

3. Late-discovered judicial bias claims have historically been subject to the abuse-of-the-writ doctrine.

Halprin's reliance on pre-AEDPA abuse-of-the-writ doctrine fares no better than his other arguments. In *Panetti*, this Court considered pre-AEDPA abuse-of-the-writ jurisprudence only as confirmation for its exemption for competency-to-be-executed claims. *Panetti*, 551 U.S. at 946–47. That jurisprudence indicated that neither this Court nor any of the circuit courts had *ever* denied a competency-to-be-executed claim as an abuse of the writ. *Panetti*, 551 U.S. at 947 ("Our research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ.") (citing *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994)). The same cannot be said for judicial bias claims. *See e.g.*, *Gallego v. McDaniel*, 124 F.3d 1065, 1079 (9th

Cir. 1997) (dismissing judicial bias claim as an abuse of the writ); *Walker v. Lockhart*, 726 F.2d 1238 (8th Cir. 1984) (finding that the district court properly refused to consider judicial bias claim under 1976 version of § 2244); *cf. Porter*, 49 F.3d 1483, 1489 (11th Cir. 1995) (assuming abuse-of-the-writ bar applied to judicial bias claim in considering whether petitioner could surmount it). The Director is unaware of any court that has exempted judicial bias claims from the abuse-of-the-writ bar. And tellingly, Halprin cites none.

Instead, Halprin attempts to reframe the issue by focusing on exceptions to the pre-AEDPA abuse-of-the-writ doctrine under less stringent court-created standards. He explains that prior to AEDPA, courts entertained judicial bias claims under the then-governing cause-and-prejudice and miscarriage-of-justice standards. *See* Pet. 21–24. He identifies two cases in which courts considered whether a petitioner could *surmount* the abuse-of-the-writ bar under either standard. Pet. 24–25 (citing *Porter v. Singletary*, 49 F.3d 1483, 1487 (11th Cir. 1995); *Walker v. Lockhart*, 763 F.2d 942, 961 (8th Cir. 1985). But implicit in the question whether the petitioners could surmount the bar is that the abuse-of-the-writ bar applied to their judicial-bias claims. Halprin's reliance on *Porter* and *Walker* confuses "§ 2244(b)'s threshold inquiry into whether an application is second or successive [with] its subsequent inquiry into whether a claim in a successive application must be dismissed." *See Magwood*, 561 U.S. at 337. Pre-AEDPA precedent may shed some light on

the former inquiry, while § 2244(b) answers the latter on its own. Section 2244(b) supplanted the cause-and-prejudice and miscarriage-of-justice exceptions for successive claims. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996); *In re Webster*, 605 F.3d 256, 258 (5th Cir. 2010); *Gonzalez v. Sec'y, Dep't of Corr.*, 366 F.3d 1253 (11th Cir. 2004) (explaining that the judicially created equitable rules set forth and applied in pre-AEDPA case law have since been largely superseded by the enactment of AEDPA); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997). That courts applied the judicially created exceptions until AEDPA supplanted them does not mean that AEDPA does not apply thereafter. Under Halprin's logic, § 2244(b) would not apply to any claim.

C. The circuits unanimously apply § 2244(b) to judicial-bias claims (and *Brady* claims raised after the final resolution of an initial petition).

Halprin contends that the circuit courts are "in substantial tension with *Panetti* and each other." Pet. 16. But every circuit that has confronted judicial-bias claims raised in a second petition has held them subject to § 2244(b). *E.g.*, *Orr*, 643 Fed. App'x at 682 (affirming district court's conclusion that Rule 60(b) motion was really a successive petition because it raised a judicial bias claim); *Pizzuto*, 673 F.3d at 1007–09 (applying § 2244(b)(1) to judicial bias claim and § 2244(b)(2) to judicial misconduct claim); *In re Lambrix*, 624 F.3d 1355 at 1366; *Sternes*, 233 F.3d at 454–55; *Villafuerte*, 142 F.3d at 1125–26 (applying § 2244(b)(2) to judicial bias claim based on allegations of judge's racism);

Duckworth, 114 F.3d at *1; *Jenkins v. Stephens*, No. 3:15-cv-2786, 2015 WL 5637524, at *3 (N.D. Tex. Aug. 28, 2015); *cf. In re McFadden*, 826 F.3d 706, 708 (4th Cir. 2016) (adopting *Villafuerte*'s and *Sternes*'s rationale); *United States v. Winestock*, 340 F.3d 200, 208 (4th Cir. 2003) (same); *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999) (noting petitioner's assertions of judicial bias and "intent to by-pass the prior approval mechanism under § 2244(b)(3)").

Halprin's assertion of "tension" among the circuits is based entirely on the circuits' consideration of successive *Brady* claims. Even then, "tension" is not the right word, as every circuit that has confronted *Brady* claims has held them subject to § 2244(b). *E.g.*, *Evans v. Smith*, 220 F.3d 306, 324 (4th Cir. 2000); *Blackman v. Davis*, 909 F.3d 772, 778 (5th Cir. 2018); *In re Wogenstahl*, 902 F.3d 621, 627–28 (6th Cir. 2018); *Crawford v. Minnesota*, 698 F.3d 1086, 1089, 1091 (8th Cir. 2012); *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018); *In re Pickard*, 681 F.3d 1201, 1205 (10th Cir. 2012); *Tompkins v. Secretary, Dep't of Corrections*, 557 F.3d 1257, 1260 (11th Cir. 2009). It is true that the Tenth Circuit once recognized an exception to the rule and treated a second petition as a supplement to the initial petition, where the initial "petition had never been finally resolved," *Douglass v. Workman*, 560 F.3d 1156, 1195 (10th Cir. 2009)). But in a subsequent case, the court clarified that *Douglass* was the exception and that it aligned with its sister circuits in holding that petitions raising *Brady* claims are subject to AEDPA's second or successive bar. *In re*

Pickard, 681 F.3d 1201, 1205 (10th Cir. 2012). It is also true that a three-judge panel in the Eleventh Circuit expressed disagreement with the law it was bound by. But the panel applied it all the same. *Scott v. United States*, 890 F.3d 1239, 1258 (11th Cir. 2018).

There is no tension among the circuits. They have held unanimously that petitions raising judicial-bias and *Brady* claims after the resolution of an initial petition are second or successive petitions subject to § 2244(b).

D. Leal Garcia v. Quarterman, 573 F.3d 214 (5th Cir. 2009)passim Section 2244(b)'s "added restrictions" do not amount to a suspension of the writ.

Halprin asserts that if his claim is treated as successive, § 2244(b)'s restrictions may be unconstitutional, as it "might work as a suspension of the writ of habeas corpus." Pet. 30 (citing *Magwood*, 561 U.S. at 350 (Kennedy, J., dissenting); U.S. Const. art. I, § 9, cl. 2. But twenty-three years ago, this Court held that § 2244(b)'s restrictions did not suspend habeas corpus. *Felker*, 516 U.S. at 664. Nothing has changed since then.

Halprin acknowledges this Court's holding in *Felker*, but suggests that it left the door open to as-applied challenges. The difference, he says, is that his claim might meet an exception if reviewed under the statute's precursor. His argument appears to be grounded in the assumption that § 2244 merely codified the abuse-of-the-writ doctrine. But he is still wrong. Section 2244(b) "codifies the pre-existing limits on successive petitions, *and further restricts*

the availability of relief to habeas petitioners." *Felker*, 518 U.S. at 664 (emphasis added).

In *Felker*, this Court explained that "[j]udgments about the scope of the writ are 'normally for Congress to make.'" *Id.* Section 2244(b)'s "new restrictions" on the filing of second habeas petitions are "well within" the traditional authority of Congress and the courts to curb abuses of the writ and "do not amount to a 'suspension' of the writ." *Id.* Because § 2244(b)'s restrictions generally barring late-discovered non-innocence claims do not suspend the writ, the application of those restrictions to Halprin's claim does not, either.

Notwithstanding, Halprin complains that if applied to his claim, § 2244(b) will deprive him of any remedy in any court for his constitutional claim. To avoid that, he asks this Court to invoke the savings clause, as it did in *INS v. St. Cyr*, 533 U.S. 289, 299-301 (2001). Pet. 30–32. But this Court invoked the savings clause in *St. Cyr* to avoid interpreting the statue as categorically repealing jurisdiction over deportation proceedings, where Congress had not clearly expressed an intent to do so. Here, the Director is not advocating for this Court to interpret § 2244(b) to categorically repeal jurisdiction over any proceedings or claims. She is asking it to apply the modified version of res judicata that Congress unambiguously enacted in § 2244(b). *See, e.g.*, *Hope*, 108 F.3d at 120 ("The [innocence] exception in the

new law is graven in statutory language that could not be any clearer."); *Felker*, 518 U.S. at 664 (explaining that § 2244(b)(2) codifies a modified version of the res judicata rule).

Halprin has not been deprived of a forum in which he may litigate his claim. To obtain review in federal court, Halprin was required to raise his claim in his first petition or to demonstrate (1) that he could not have discovered it previously, and (2) that it proves him not guilty of capital murder by clear and convincing evidence. *See* 28 U.S.C. § 2244(b). He failed to do any of those things. Yet still, avenues of relief remain, including state habeas proceedings, clemency, and this Court's great writ. Section 2244(b)'s restrictions do not amount to a suspension of the writ—not in any case, *Felker*, 516 U.S. at 664, or this one.

II. Because the Execution Warrant Expired, Halprin's Application for a Stay is Moot.

Halprin also seeks a stay of execution. App. Stay Execution, *Halprin v. Davis*, No. 19-6156 (Oct. 3, 2019). But after Halprin filed an application for a stay in this Court, the CCA stayed his execution pending resolution of his judicial-bias claim. Order Granting Stay and Remanding to Trial Court, *Ex parte Halprin*, No. WR-77,175-05 (Tex. Crim. App. Oct. 4, 2019). Accordingly, the stay component of this case is now moot.

"A case becomes moot . . . 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). When a party challenges a law that has been repealed by the time the issue reaches the Court, the case is moot. *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414–15 (1972) (per curiam). Also moot is a challenge to a bill that expires by its own terms prior to landing on the Court's docket. *Burke v. Barnes*, 479 U.S. 361, 363–64 (1987). And this rule applies to self-expiring executive orders losing effect before the Court can issue an opinion on the merits. *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353, 353 (2017). This case presents a similar situation.

In Texas, after the completion of postconviction review, a trial court must enter an order setting an execution date to effectuate a capital sentence. Tex. Code Crim. Proc. art. 43.141(a). That order, in turn, triggers the issuance of a warrant of execution authorizing TDCJ to carry out the sentence. *Id*. art. 43.15. Both of these statutes are cabined by another, which provides that an inmate may not be executed before 6:00pm or after 11:59pm on the date chosen by the trial court. *Id*. art. 43.14.

By operation of Texas law, TDCJ lost the power to execute Halprin pursuant to the October execution order at midnight on October 10, 2019. Like the orders in *Trump* and *Burke*, the October execution order "expired by its

own terms." *See Nelson v. Campbell*, 541 U.S. 637, 648 (2004) (declining to address issues related to a prior stay of execution because "the execution warrant has now expired"). When the October execution order expired, so did any live controversy about the lawfulness of that order. *See Trump*, 138 S. Ct. at 353; *Burke*, 479 U.S. at 363. The Court should deny Halprin's application for stay because "federal courts may not 'give opinions upon moot questions or abstract propositions.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

CONCLUSION

The petition for a writ of certiorari and application for a stay of execution should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

/s/ Jennifer Morris
JENNIFER MORRIS
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1800
Fax: (512) 320-8132
e-mail: Jennifer.morris@oag.texas.gov

Counsel for Respondent