No. 19-633

IN THE

Supreme Court of the United States

EDWIN ARTHUR AVERY,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government's opposition underscores why this Court should grant certiorari. The government concedes that this case presents a circuit split on an important question of federal law. Specifically, it "agrees" with Avery that the "Second, Third, Fifth, Seventh, and Eleventh Circuits" have all concluded in published decisions that Section 2244(b)(1) applies to a federal prisoner's second-or-successive Section 2255 motion, creating a "circuit conflict" with the Sixth Circuit's decision in *Williams* v. *United States*, 927 F.3d 427 (6th Cir. 2019). *See* Opp. 15.

The government also concedes that the majority of circuits, and the decision below, have erroneously interpreted Section 2244(b)(1) in a manner that contradicts the plain text of the statute and wrongly bars relief on potentially meritorious constitutional claims in many cases. Specifically, the government "agrees" with Avery that "Section 2244(b)(1) does not apply to Section 2255 motions and that the court of appeals erred in concluding to the contrary." Opp. 10. This is because "[b]y its terms, … Congress … limited Section 2244(b)(1) to successive habeas applications by state prisoners." Opp. 12.

The government nevertheless argues that certiorari should be denied because the circuit split is "shallow" and requires "additional percolation." Opp. 15-16. This argument might have merit if the government thought the Sixth Circuit's ruling in *Williams* was an erroneous outlier, but as discussed, the government agrees that it is the half-dozen other circuits (and the panel below) that have misinterpreted the statute's plain text. Those other circuits are deeply entrenched in their views, and there is no reason to expect them to reverse

themselves based on a single panel decision from another court. And even if there was no split, the fact that half of the U.S. Courts of Appeals have adopted a plainly incorrect interpretation of a federal statute that routinely has dispositive effect in a large number of cases is reason enough to grant review. *E.g.*, *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33 (1998) (reversing erroneous interpretation of multidistrict-litigation statute adopted by every federal court to consider the issue).

The government also argues that this case is not a good vehicle because the government believes that Avery is not entitled to relief on other grounds—grounds that the panel did not reach. The government is wrong, for reasons that were briefed extensively below. Regardless, there is no need for this Court to wade into ancillary legal issues that the panel below did not address. The alternative grounds the government cites pose no obstacle to the Court's consideration of the question presented and have no bearing on the analysis of that issue. This Court can and should follow its normal practice in habeas cases of resolving the legal question presented in the petition and remanding for consideration of any remaining issues. *E.g.*, *Magwood* v. *Patterson*, 561 U.S. 320, 342-343 (2010).

ARGUMENT

I. THE QUESTION PRESENTED DOES NOT REQUIRE FURTHER "PERCOLATION" BECAUSE SIX CIRCUITS ARE FIRMLY ENTRENCHED IN AN ERRONEOUS VIEW OF AN IMPORTANT FEDERAL STATUTE

As the government acknowledges, six circuits, like the panel decision below, wrongly interpret Section 2244(b)(1)'s reference to a "claim presented in a second

or successive habeas corpus application under *section 2254*" to reach applications filed under both Sections 2254 and 2255. Pet. 11-14 (emphasis added); Opp. 10-12, 15. This interpretation cannot be squared with Section 2244(b)(1)'s plain text, statutory context, or purpose, as the court of appeals explained in *Williams* v. *United States*, 927 F.3d 427 (6th Cir. 2019). Pet. 15-20. Moreover, the question of the proper interpretation of Section 2244(b)(1) recurs frequently; it is implicated every time a federal prisoner files a second or successive Section 2255 motion. Pet. 14-15.

The government's primary response is that it would be "premature" for this Court to review the split because the Sixth Circuit's decision in *Williams*, issued eight months ago, "may well prompt" the other circuits to reconsider their case law. Opp. 15-16. But as the petition points out, other circuits' views on the question presented are entrenched. The Seventh Circuit has reaffirmed its erroneous interpretation of Section 2244(b)(1) in at least four published opinions dating back to 2002. Pet. 13 n.6. And the Eleventh Circuit has declined to take the question en banc despite the fact that two judges pressed the same interpretation subsequently adopted in *Williams*. Pet. 13-14. The government has no answer.

It also makes little practical sense for this Court to rely on the en banc procedures in six different circuits when a single ruling from this Court could resolve the issue definitively. The en banc process is time-consuming, complicated, and rarely successfully invoked even by sophisticated counsel. *See, e.g.*, Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 Fordham L. Rev. 2001, 2015 (2014) (in 2010, "circuit courts heard forty-five cases en banc out of more than 30,914 cases terminated on their

merits").[1] The likelihood that litigants could successfully convince each of these courts individually to reverse existing precedent is extremely low, particularly given that many second-or-successive Section 2255 motions are filed by inexperienced, pro se litigants—and particularly where the courts of appeals in question have already signaled an unwillingness to reconsider the issue en banc. *See Castro* v. *United States*, 540 U.S. 375, 381-382 (2003).

The government relatedly asserts (at 16) that its "agreement—in *Williams* and here—that Section 2244(b)(1) does not pose a bar" to Section 2255 motions may help convince the six circuits on the other side of the split to adopt the proper interpretation. But courts are not required to adopt the government's concessions; the panel below did not. Moreover, there is nothing to stop the government from changing its interpretation once again at some future point. For example, even though the government represented before this Court in 2010 that Section 2244(b)(1) does not apply to federal prisoners, it took the opposite tack in the district court in this case in 2016. *Compare* Brief in Opp. 14, *Webster* v. *United States*, No. 10-150 (U.S. Oct. 29, 2010), *with* Pet. App. 31a.

The government also suggests that granting review here would serve "little practical purpose"—both because the conflict between the panel and the *Wil-*

[1] The likelihood of en banc review shrinks even further when considering the specific circuits at issue here. For example, in the five-and-a-half year window between January 2011 and July 2016, the Third Circuit granted review in nine cases, the Eleventh Circuit granted review in seven cases, and the Second Circuit granted review in only two cases. *See* Flumenbaum & Karp, *The Rarity of En Banc Review in the Second Circuit* 3, New York Law Journal (Aug. 24, 2016).

liams Court is an "intra-circuit" split and because *Williams* is binding precedent for future Sixth Circuit cases. Opp. 10, 16. This misses the point. A ruling clarifying that Section 2244(b)(1) does not apply to Section 2255 motions would have enormous practical importance for courts outside of the Sixth Circuit and for Avery himself, who was denied the benefit of the *Williams* rule.[2]

Finally, the government appears to argue that this Court need not intervene to correct a clearly erroneous interpretation of a statute so long as almost all courts have adopted that same erroneous reading. Opp. 15 (noting that split is "shallow" and that the panel's decision below "accords" with a number of other courts). But the fact that an error is widespread makes it more important for this Court to intervene, not less. As this Court has explained, it has a duty to "give effect to th[e] plain command" of statutory text, "even if doing that will reverse the longstanding practice under the statute." *Lexecon*, 523 U.S. at 35. The United States has elsewhere agreed, explaining that even if there is a "substantial body of precedent" supporting a particular interpretation of a statute, "the courts have an obligation, when squarely faced with the issue, to interpret [a statute] in light of its plain terms." *See* U.S. Br. 26, *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, No. 02-1192 (U.S. Feb. 23, 2004). The Court should follow that basic

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[2] This disposes of the government's reliance (at 16) on this Court's half-century old ruling in *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). That case involved a narrow dispute between two Eighth Circuit panels over the meaning of an IRS regulation related to liquor taxes that the later-in-time panel asked the Supreme Court to resolve. *Id.* at 902. Here, the question presented involves a frequently invoked federal statute that has divided the Sixth Circuit from six other courts of appeal.

principle here and grant review to root out this widespread and consequential error of statutory interpretation.

II. THIS CASE PROVIDES A STRONG VEHICLE TO CLARIFY THAT SECTION 2244(b)(1) DOES NOT APPLY TO SECTION 2255 MOTIONS FILED BY FEDERAL PRISONERS

As explained, this case presents an excellent vehicle to definitively resolve whether Section 2244(b)(1) applies to Section 2255 motions. Pet. 21-23. The issue is cleanly presented, as Section 2244(b)(1)'s statutory bar was the only reason the panel identified for denying relief, Pet. 21, and resolving the question presented in no way depends on resolving the government's alternative arguments. This means that this Court could resolve the Section 2244(b)(1) issue alone and remand for the panel to consider whether any alternative grounds require affirmance. Pet. 22.

Resolving only the question presented is the normal course in cases like this one. When this Court "reverse[s] on a threshold question, [it] typically remand[s] for resolution of any claims the lower court's error prevented them from addressing." *See Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). This Court has followed precisely this practice in a number of habeas cases. *See* Pet. 22 (discussing *Magwood* and *Welch* v. *United States*, 136 S. Ct. 1257, 1268 (2016)).[3] Indeed, because courts have held Sec-

[3] *See also Castro*, 540 U.S. 375 (holding that Section 2255 motion did not qualify as second-or-successive and remanding for consideration of merits); *Massaro* v. *United States*, 538 U.S. 500 (2003) (holding that failure to raise ineffective assistance claim on direct appeal did not preclude claim from being raised in Section 2255 motion and remanding for consideration of the merits); *Clay* v. *United States*, 537 U.S. 522 (2003) (holding that Section 2255 mo-

tion 2244(b)(1) to be a threshold jurisdictional question, some substantive or procedural issues will remain to be resolved in virtually every case in which a court denies a Section 2255 motion on Section 2244(b)(1) grounds. Pet. 22-23. The government has no response to these points.

Regardless, the government's attempt to litigate issues before this Court that the panel below did not resolve is meritless.[4] First, the government repeats the same argument it made at length before the panel—that Avery's *Johnson* claim is procedurally barred under 28 U.S.C. § 2255(h)(2) because it was not "previously unavailable." Opp. 13-15, 17; *see also* Gov. C.A. Br. 16-20. As explained (Pet. 21 n.9), the only case the government relied upon below—*In re Watkins*, 810 F.3d 375 (6th Cir. 2015)—was a preliminary, inmate-specific ruling holding only that the prisoner in that particular case had made a "showing of possible merit" that *Johnson* had retroactive effect on collateral re-

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tion was timely filed and remanding for consideration of merits); *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (declining to reach the government's "various arguments for alternative grounds to affirm the Court of Appeals" and remanding for consideration of merits of Section 2255 motion).

[4] The government's suggestion (at 10, 16) that the en banc court's decision to deny rehearing means "it agreed that dismissal" of Avery's case "would be warranted even if Section 2244(b)(1) did not apply" is empty speculation. The en banc court gave no reason for its denial of rehearing, Pet. App. 47a-48a, and the government raised several different arguments in its response to the petition for rehearing, *see* C.A. Dkt. 51 at 6-7 (arguing, *inter alia*, that en banc court should wait to see whether *Williams* decision "engender[s] fuller consideration of the scope of § 2244(b)(1) by other courts").

view, 810 F.3d at 378-379. [5] It is well established in the Sixth Circuit that the district court reviewing a prisoner's second-or-successive motion has the power to subsequently disregard such preliminary rulings. *In re Embry*, 831 F.3d 377, 382 (6th Cir. 2016). Accordingly, *Watkins* was not binding on the district court in this case. Indeed, if the government's argument was correct, the district court in this case could not have disagreed with the Sixth Circuit's preliminary ruling that Avery had made a "prima facie showing that his … claim relies on a 'new rule of constitutional law, made retroactive to cases on collateral review, that was previously unavailable.'" Pet. App. 44a-45a.[6]

Second, the government raises another argument it briefly pressed before the panel—that Avery's *Johnson* claim cannot succeed because, at the time he was sentenced under the ACCA in 2008, his felonious-assault conviction might have qualified as an ACCA predicate

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[5] The government also (at 14) cites *Braden* v. *United States*, 817 F.3d 926, 931 n.3 (6th Cir. 2016), but as Avery explained below, that case simply mentioned the ruling in *Watkins* in a cursory footnote without further analysis, *see* Avery C.A. Reply Br. 17 n.6.

[6] The government wrongly suggests (at 15) that the district court "expressly" adopted the *Watkins* analysis. In fact, the district court simply adopted the magistrate's report without discussion. *See* D. Ct. Dkt. 46, at 1. The magistrate, in turn, cited *Watkins* in a passing footnote with no independent analysis and no indication that the magistrate would have independently reached the same conclusion. *See* D. Ct. Dkt. 45, at 7 n.1. In contrast, when other district courts in the Sixth Circuit have conducted independent retroactivity analyses in the habeas context, they have engaged in more detailed discussion. *E.g.*, *United States* v. *Mosley*, 2014 WL 3908166, at *3-4 (E.D. Ky. Aug. 11, 2014) (concluding that this Court's *Alleyne* decision does not apply retroactively); *Porter* v. *Stewart*, 2015 WL 4617468, at *3 (E.D. Mich. July 31, 2015) (concluding that this Court's decisions in *Frye* and *Lafler* do not apply retroactively).

under the elements clause (rather than the now-invalid residual clause). Opp. 17-18; *see also* Gov. C.A. Br. 45 & n.10. But the court of appeals rejected that argument in *United States* v. *Burris*, 912 F.3d 386 (6th Cir.) (en banc), *cert. denied*, 140 S. Ct. 90 (2019). It held both that (1) the relevant felonious-assault statute did not qualify as an ACCA predicate under anything other than the residual clause and (2) Ohio courts had made this clear well over a decade before Avery was sentenced in 2008. *See* Pet. 9; *see also Burris*, 912 F.3d at 398-399 (citing Ohio state court decisions from 1995, 1995, and 2000); *Williams*, 927 F.3d at 442-443 (applying *Burris* and noting that "the categorical shortcomings of [the felonious-assault statute] should have been just as identifiable in 2006 as they are today").[7]

The government's related position that the benefit of the *Burris* holding is not available to prisoners pursuing second-or-successive Section 2255 motions cannot be squared with the subsequent ruling in *Williams* v. *United States*, 924 F.3d 922, 923 (6th Cir. 2019) (en banc) (per curiam). Mr. Williams, like Avery, was pur-

[7] The government's assertion (at 17) that the 2016 district court "found" that the 2008 sentencing court did not rely on the residual clause is simply incorrect. The only support in the cited page range for this point appears to be a single sentence in the magistrate's report, which states that "[n]one of [Avery's predicate ACCA] convictions were found by this Court at sentencing to be predicate offenses on the basis of the residual clause." Pet. App. 16a. The magistrate did not provide any analysis for this statement, which appears to be a short-hand reference to the fact that the 2008 court made no affirmative findings one way or the other as to whether Avery's convictions fell under the residual clause (or any other ACCA predicate). Indeed, the magistrate suggested as much a few pages later, noting that the district court had "no occasion to make a finding on whether [Avery's convictions] qualified under the residual clause or the elements clause. Pet. App. 19a-20a.

suing a second-or-successive Section 2255 motion. If *Burris* were inapplicable to such litigants, the en banc court would have denied Mr. Williams relief rather than remanding in light of *Burris*. Indeed, following the remand, the panel awarded Mr. Williams relief on the very felonious-assault theory that Avery has pressed. *See Williams*, 927 F.3d at 443, 445.

Finally, the government briefly repeats its baseless assertion that whether or not the felonious-assault conviction falls under the residual clause is a question of statutory interpretation that cannot be the basis of a Section 2255 claim. Opp. 17-18; *see also* Gov. C.A. Br. 44-45. The *Williams* Court, however, necessarily rejected this argument when it awarded Mr. Williams relief based on the *Burris* rule. *See* 927 F.3d at 445-446 (assessing whether felonious-assault conviction fell under the elements clause or only under the residual clause). And that ruling makes sense. Avery's Section 2255 claim is predicated on *Johnson*'s invalidation of the residual clause on constitutional grounds. A *Johnson* claim is necessarily a constitutional claim; the statutory issue is simply a fact relevant to determining whether Avery's sentence violated his constitutional rights.

In sum, under circuit precedent, Avery is entitled to relief on his constitutional claim under *Johnson*—relief that would result in his release from prison. The panel's sole basis for denying relief was its reliance on an interpretation of Section 2244(b)(1) that the government concedes is both erroneous and the subject of an entrenched circuit split. The Court should grant review to resolve the split and correct the error.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2019