No. _____

In the Supreme Court of the United States

Carl Henry Olsen III,

Petitioner,

v.

Renee Baker, et al.,

Respondents.

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

Petition for a writ of certiorari

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QUESTION PRESENTED

Mr. Olsen is a state prisoner litigating a federal habeas petition under 28 U.S.C. §2254. He previously filed Section 2254 litigation before Congress enacted substantial changes to the federal habeas framework in 1996 in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Among other things, AEDPA created more stringent restrictions on a petitioner's ability to file so-called second or successive federal habeas litigation. See 28 U.S.C. §2244(b) (1996).

After those statutory changes, Mr. Olsen filed the instant federal habeas petition. The Ninth Circuit's prior precedent holds that the new 1996 restrictions apply retroactively to petitioners who filed their earlier litigation before Congress passed AEDPA. Mr. Olsen challenged that precedent. As he explained, AEDPA would have an impermissible retroactive effect if it prevented a petitioner from pursuing second or successive habeas litigation that would've been appropriate under pre-AEDPA law. The Ninth Circuit rejected Mr. Olsen's challenge.

The circuit courts of appeals have developed a deep, 1-6-1 split over the rules that apply when a petitioner pursued pre-AEDPA federal habeas litigation and then attempts to file a second-in-time post-AEDPA petition.

The question presented is:

If a petitioner litigated a pre-AEDPA federal habeas petition, do AEDPA's new restrictions on second or successive petitions apply retroactively to that petitioner?

List of Parties

Carl Henry Olsen III is the petitioner. Renee Baker (the former warden of Lovelock Correctional Center), James Dzurenda (the former director of the Nevada Department of Corrections), and Aaron Ford (the Attorney General of the State of Nevada) are the respondents. No party is a corporate entity.

List of Prior Proceedings

This is a federal habeas case challenging a state court judgment of conviction. The underlying trial took place in *State* v. *Olsen*, Case No. C92356 (Nev. Eighth Jud. Dist. Ct.) (judgment of conviction issued May 10, 1990). The direct appeal took place in *Olsen* v. *Nevada*, Case No. 21163 (Nev. Sup. Ct.) (order issued June 27, 1991).

Initial state collateral review proceedings took place in *Olsen* v. *Nevada*, Case No. C92356 (Nev. Eighth Jud. Dist. Ct.) (order issued Feb. 22, 1991). An appeal took place in *Olsen* v. *Nevada*, Case No. 22140 (Nev. Sup. Ct.) (order issued June 27, 1991).

A second round of state collateral review proceedings took place in *Olsen* v. *Nevada*, Case No. C92356 (Nev. Eighth Jud. Dist. Ct.) (order issued May 24, 1993). An appeal took place in *Olsen* v. *Nevada*, Case No. 24483 (order issued Nov. 24, 1993).

A third round of state collateral review proceedings took place in *Olsen* v. *Nevada*, Case No. C92356 (Nev. Eighth Jud. Dist. Ct.) (order issued Sept. 1, 2006). An appeal took place in *Olsen* v. *Nevada*, Case No. 48096 (order issued Feb. 1, 2007).

The initial federal habeas proceedings took place in *Olsen* v. *Director*, Case No. CV-S-91-610 PMP RJJ (D. Nev.) (order issued Mar. 12, 1992).

A second round of federal habeas proceedings took place in *Olsen* v. *McDaniels*, Case No. CV-N-94-005-HDM (DWH) (D. Nev.) (order issued Feb. 21, 1996). An appeal took place in *Olsen* v. *McDaniels*, Case No. 94-15644 (9th Cir.). This Court denied certiorari in *Olsen* v. *McDaniels*, Case No. 96-6089 (order issued Feb. 21, 1996).

There are no other related federal proceedings besides the proceedings in the district court and the Ninth Circuit below.

TABLE OF CONTENTS

Table of Authorities

Federal Cases

Federal Statutes

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Carl Olsen respectfully requests the Court issue a writ of certiorari to review two judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

This case involves the question whether Mr. Olsen's current federal habeas litigation is second or successive within the meaning of 28 U.S.C. §2244(b). The district court concluded the litigation was second or successive and transferred the petition to the Ninth Circuit for consideration whether to authorize a second or successive petition. That transfer order is unpublished. Pet. App. 67-80.

In an abundance of caution, Mr. Olsen challenged the district court's transfer order in two separate proceedings in the Ninth Circuit. First, he filed a motion to remand in the transferred proceedings (Case No. 20-72428).[1] The court denied that motion. Pet. App. 65-66. Mr. Olsen then filed a motion for en banc reconsideration. Pet. App. 34-63. The court denied that motion. Pet. App. 2-3. The court's orders are unpublished.

Second, Mr. Olsen filed a notice of appeal from the district court's transfer order and sought a certificate of appealability from the Ninth Circuit (Case No. 20-16755).[2] The court denied a certificate of appealability. Pet. App. 64. Mr. Olsen then

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[1] See, e.g., *Howard* v. *United States*, 533 F.3d 472, 474 (6th Cir. 2008) ("Our court's practice in the case of second-or-successive transfer orders to this court is to treat the transfer order as non-appealable, and to consider in the transferred case whether such a transfer was necessary or appropriate.").

[2] See *In re Bradford*, 660 F.3d 226, 229 (5th Cir. 2011) (treating a transfer order as an appealable collateral order).

filed a motion for en banc reconsideration. Pet. App. 4-33. The court denied that motion. Pet. App. 1. The court's orders are unpublished.

Mr. Olsen is seeking review of either or both judgments. Because both judgments are from "the same court and involve identical or closely related questions," Mr. Olsen is filing "a single petition for a writ of certiorari covering [both] judgments." Sup. Ct. R. 12.4.

JURISDICTION

Mr. Olsen is seeking habeas relief and is challenging his state court judgment of conviction under 28 U.S.C. §2254. Pet. App. 81-82. He maintains his petition shouldn't be considered second or successive under the jurisdictional provisions of 28 U.S.C. §2244(b).

The Ninth Circuit issued orders denying Mr. Olsen's motion to remand and his request for a certificate of appealability on February 22, 2021. It denied timely motions for en banc reconsideration on May 26, 2021. This Court's March 19, 2020, standing order extended the time within which to file a petition for a writ of certiorari in this case to October 25, 2021. This Court's July 19, 2021, order leaves that same deadline in effect because the Ninth Circuit's orders denying en banc reconsideration predated the July 19, 2021, order.

This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(b) provides as follows:

(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.

INTRODUCTION

This petition raises the question whether the 1996 amendments to 28 U.S.C. §2244(b)—which made it more difficult for petitioners to pursue second or successive habeas litigation—retroactively penalize petitioners who previously filed federal habeas petitions before the amendments' effective date. Under the 1996 law, a petitioner who wants to file a so-called second or successive habeas petition must satisfy daunting requirements designed to prevent additional federal litigation in the ordinary course. In its decisions here, the Ninth Circuit adhered to its previous holding that the 1996 amendments apply retroactively to federal habeas petitioners who previously filed their petitions before the statutory changes took effect.

The circuit courts of appeals are intractably split about whether and how the 1996 amendments to Section 2244(b) apply retroactively to petitioners who previously pursued federal habeas litigation before the effective date. The Ninth Circuit takes an outlier position, holding the amendments apply to all such petitioners. The Third Circuit disagrees, refusing to give these amendments such a pernicious retroactive effect. At least six circuit courts take interim positions, concluding the amendments apply in some but not all cases where a petitioner's previous litigation predated the amendments.

This Court's review is necessary. The circuit courts have developed an entrenched 1-6-1 split, and additional percolation is unlikely to resolve the disagreement. The issue is both recurring and significant to litigants whose prior federal habeas petitions predate AEDPA. The Third Circuit's position is correct: the 1996

amendments shouldn't be read to apply retroactively. And this case poses an exceptional vehicle for resolving the question. The Court should grant certiorari.

STATEMENT

1. The underlying criminal case at issue in this habeas proceeding involves allegations Mr. Olsen sexually abused his ex-girlfriend's daughter. Mr. Olsen maintains his innocence. At trial, Mr. Olsen presented an alibi defense. The ex-girlfriend alleged she first became aware of the abuse after she witnessed two incidents on Thanksgiving Day. Mr. Olsen and his mother both testified Mr. Olsen was home that day. The trial attorney failed to call a third alibi witness who was dating Mr. Olsen's mother and was also home that day. That witness's potential testimony likely would've been material at trial and would've secured an acquittal. The trial attorney also failed to present evidence that either the ex-girlfriend or the alleged victim had previously lied about whether the alleged victim's biological father had sexually abused her in the past. That evidence likely would've been material as well.

2. Mr. Olsen began pursuing federal habeas relief on or about August 21, 1991, in *Olsen* v. *Director, Nev. Dep't of Prisons*, Case No. CV-S-91-610-PMP (D. Nev.) ("the 1991 proceedings"). The district court dismissed the petition without prejudice on March 12, 1992. In the court's view, the petition included an unexhausted claim (i.e., a claim Mr. Olsen hadn't yet fairly presented to the Nevada state courts), so the court was accordingly required to dismiss the petition without prejudice. It's unclear whether Mr. Olsen appealed the decision.

3. Mr. Olsen instituted another round of federal habeas proceedings on or about January 3, 1994, in *Olsen* v. *McDaniels*, Case No. CV-N-94-005-HDM (D. Nev.) & Case No. 96-15644 (9th Cir.) ("the 1994 proceedings"). The pleadings and the orders from the 1994 proceedings aren't in the record, but a docket sheet is. Pet. App. 75-80. According to the docket, the district court denied the petition on February 21, 1996. Mr. Olsen appealed, but the Ninth Circuit denied a certificate of probable cause (the forerunner to a certificate of appealability). Mr. Olsen filed a petition for a writ of certiorari, which this Court denied. See *Olsen* v. *McDaniel*, 519 U.S. 997 (1996).

4. Mr. Olsen began a new round of federal habeas proceedings—the proceedings at issue in this petition—on or about July 15, 2015 ("the 2015 proceedings"). The district court summarily dismissed the petition as second or successive. As the district court observed, Mr. Olsen had previously challenged the same judgment in the 1991 proceedings. Thus, in the court's view, the 2015 proceedings were unauthorized second or successive habeas proceedings. It therefore dismissed the petition.

Mr. Olsen appealed. The Ninth Circuit granted a certificate of appealability and issued an order to show cause directed at the State. As the court observed, the district court previously dismissed the 1991 proceedings without prejudice for failure to exhaust state court remedies. But that type of procedural dismissal normally doesn't trigger the bar on second or successive petitions. See *Slack* v. *McDaniel*, 529 U.S. 473, 485-86 (2000). The court directed the State to address that issue. After the State filed its response, the Ninth Circuit vacated the lower court's order and remanded for further proceedings.

On remand, the district court appointed the Federal Public Defender, District of Nevada, as counsel for Mr. Olsen. Mr. Olsen filed a counseled amended petition. In compliance with the local rules, the counseled petition disclosed Mr. Olsen had filed previous federal petitions in the 1991 proceedings, as well as in the 1994 proceedings. The lower court and the Ninth Circuit hadn't mentioned the 1994 proceedings during the prior stages of the 2015 litigation.

The State filed a motion to dismiss Mr. Olsen's counseled amended petition. It didn't raise any issues about the petition being second or successive.

After the motion to dismiss was fully briefed, the lower court issued a sua sponte transfer order on August 13, 2020. Pet. App. 67-80. The court described how Mr. Olsen had pursued federal habeas relief in the 1994 proceedings. While "the exact nature of the claims Olsen presented in [the 1994 proceedings] is unknown, it appears certain that [the 2015 proceedings are] second or successive." Pet. App. 71. As the court noted, the docket sheet for the 1994 proceedings "reflects a merits decision in 1996." *Ibid.* Thus, the 1994 proceedings "raise serious doubt about whether [the 2015 proceedings] will be deemed second or successive." *Ibid.* Due to that "serious doubt," the court found "jurisdiction lacking." *Ibid.* The court didn't solicit briefing or argument from Mr. Olsen about whether the 2015 litigation was second or successive, even though the State hadn't raised the issue in its motion to dismiss.

After concluding it lacked jurisdiction over the proceedings, the district court transferred the litigation to the Ninth Circuit "for consideration as an application for leave to file a second-or-successive petition." Pet. App. 71.

5. Mr. Olsen took two steps to challenge the district court's transfer order. First, he filed a motion to remand in the newly opened transferred proceedings. Second, he appealed and sought a certificate of appealability. In his initial litigation on appeal, he argued the district court had erroneously transferred the proceedings notwithstanding the Ninth Circuit's 2017 mandate directing the district court to treat the proceedings as initial federal habeas proceedings. The Ninth Circuit rejected this argument and issued corresponding orders. Pet. App. 64-66.

Mr. Olsen sought en banc reconsideration of both orders. Pet. App. 4-63. As he explained, Congress had increased the restrictions on second or successive petitions in its 1996 amendments to Section 2244(b), and the court's prior precedent applied those changes retroactively to all petitioners who had filed their previous federal litigation before the effective date. Mr. Olsen urged the court to reconsider this issue en banc. The court denied reconsideration. Pet. App. 1-3.

REASONS FOR GRANTING THE PETITION

I. There's a deep split over whether amended Section 2244(b) applies retroactively.

The circuit courts of appeals have developed a wide, well recognized split about whether the AEDPA restrictions on second or successive habeas petitions apply retroactively to petitioners, like Mr. Olsen, who filed their previous federal habeas petitions before AEDPA's effective date. The split warrants this Court's intervention.

As background, federal law limits a petitioner's ability to file multiple rounds of federal habeas litigation. Prior to AEDPA, a petitioner could litigate a successive

petition by demonstrating cause and prejudice. See *Sawyer* v. *Whitley*, 505 U.S. 333, 338 (1992). A materially identical cause and prejudice test continues to apply to the post-AEDPA situation where a petitioner has procedurally defaulted a claim in state court. See generally *Murray* v. *Carrier*, 477 U.S. 478 (1986). As an alternative to cause and prejudice, a petitioner could litigate a successive petition under pre-AEDPA law (and can excuse a procedural default under current standards) by proving actual innocence. See *Sawyer*, 505 U.S. at 339. In other words, if petitioners could convince federal courts they're innocent, the courts could consider their successive petitions on the merits.

Congress amended Section 2244(b) in 1996 and created additional restrictions on a petitioner's ability to pursue second or successive litigation. First, Congress created a gatekeeping requirement: a petitioner must first seek authorization from the relevant court of appeals before filing a second or successive petition. Second, Congress created new substantive standards governing authorization: the petitioner (1) cannot have litigated the claim previously in federal court and (2) must show either that the claim relies on a new retroactive rule of constitutional law, or that it relies on a new factual predicate that was previously unavailable through the exercise of due diligence and would establish reasonable doubt by clear and convincing evidence.

The question here is whether the new substantive requirements Congress added in 1996 apply retroactively to petitioners, like Mr. Olsen, who filed their initial federal habeas petitions before the effective date. The circuit courts have split over this question.

At one end of the split, the Ninth Circuit applies amended Section 2244(b) in all post-1996 cases, even when a petitioner filed the earlier petitions before AEDPA. In the court's own words, "The mere fact that the new limitations on [the litigant's] filing of [a] second motion draw upon the antecedent fact that [the litigant] filed a pre-AEDPA motion does not make the application of the new provisions to [the litigant's] most recent motion retroactive." *United States* v. *Villa-Gonzalez*, 208 F.3d 1160, 1163 (9th Cir. 2000). Thus, if a Ninth Circuit litigant seeks to file a post-AEDPA petition (or motion) challenging a federal or state judgment, and if the litigant previously filed a prior petition (or motion) that predated AEDPA's effective date, the litigant must satisfy AEDPA's daunting restrictions on successive petitions.

At the other end of the split, the Third Circuit has rejected retroactivity. As it has explained, "in those cases where a prisoner in state custody had a right to prosecute a second or successive petition prior to AEDPA's passage, but would be deprived of that right by these new gatekeeping provisions, applying the AEDPA standard would have a genuine retroactive effect." *Goldblum* v. *Klem*, 510 F.3d 204, 217 (3d Cir. 2007) (cleaned up). That's because applying amended Section 2244(b) "would attach a new and adverse consequence to pre-AEDPA conduct—the prosecution of the original proceeding." *Id.* at 217 (cleaned up). Thus, the Third Circuit interprets the statutory amendments to avoid retroactivity: if a litigant "can show that he would have been entitled to pursue his second petition under pre-AEDPA law, then . . .

AEDPA's new substantive gatekeeping provisions [cannot] bar his claims." *Ibid.*[3]

At least six circuit courts take an interim approach. Most of these circuits analyze whether the petitioner could have reasonably relied (or did, in fact, rely) on the possibility of filing a second petition when the petitioner filed the initial pre-AEDPA petition. If so, then the detrimental reliance may preclude applying amended Section 2244(b) retroactively. See, e.g., *Graham* v. *Johnson*, 168 F.3d 762, 786 (5th Cir. 1999) ("[T]he focus of our retroactivity inquiry should be on the detrimental reliance [the petitioner] placed on pre-AEDPA law and the extent to which the statutory changes upset his settled expectations.").[4]

The split is well recognized. For example, in *In re Jones*, the Fifth Circuit explicitly rejected both the Third Circuit's and the Ninth Circuit's bright-line standards, and it surveyed the varying inconsistent approaches to detrimental reliance

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[3] The 1996 amendments to Section 2244(b) involved new procedural requirements (getting pre-filing authorization from the court of appeals) and new substantive requirements (onerous standards for receiving authorization). Although the Third Circuit declines to apply the new substantive requirements to petitioners whose initial petitions predated AEDPA, the court nonetheless applies the new procedural requirements and directs such petitioners to receive authorization from the court of appeals before filing a successive petition in the district court.

[4] See also, e.g., *In re Jones*, 226 F.3d 328, 332 (4th Cir. 2000) (noting the petitioner failed to "establish reliance under any formulation"); *Pratt* v. *United States*, 129 F.3d 54, 60 (1st Cir. 1997) (noting the petitioner failed to provide a sufficient "basis for a finding of detrimental reliance"); *Alexander* v. *United States*, 121 F.3d 312, 314 (7th Cir. 1997) (noting the petitioner failed to show he omitted issues from a prior petition under "a plausible belief" he'd be able to litigate "a successive collateral attack"); *In re Magwood*, 113 F.3d 1544, 1552 (11th Cir. 1997) ("Petitioner has not relied to his detriment upon pre-AEDPA law."). Cf. *In re Byrd*, 269 F.3d 544, 553 (6th Cir.), amended, 269 F.3d 561 (6th Cir. 2001) (interpreting prior case law as prohibiting the application of amended Section 2244(b) to petitioners who filed an initial pre-AEDPA petition, but only if the litigant's post-AEDPA petition relies on a change in law).

adopted by other circuits. 226 F.3d at 331-32 & n. 1. Likewise, at least one leading treatise has documented the split. See Brian R. Means, Federal Habeas Manual § 11.7 (2021) ("Circuit courts disagree on what circumstances, if any, the pre-AEDPA 'abuse of the writ' standard (as opposed to the AEDPA second or successive restrictions) applies where the initial habeas petition was filed pre-AEDPA, and the successive petition was filed after AEDPA's enactment date of April 24, 1996."). The well recognized nature of the split provides even more reason to grant certiorari.

II. The issue is recurring and significant.

This Court should intervene to resolve this split because the issue arises frequently and is an important procedural question. Since AEDPA's effective date, at least eight of the regional circuit courts of appeals have weighed in on this issue, which illustrates the recurring nature of the question presented. The issue is vitally important to federal habeas petitioners like Mr. Olsen who have substantial constitutional claims and could've presented those claims in a successive petition under pre-AEDPA standards, but who can no longer litigate those claims under AEDPA's daunting restrictions. Similarly situated litigants in the Third Circuit would be able to litigate such a petition; Mr. Olsen cannot; and litigants in other circuits might or might not be able to pursue such litigation, depending on whether they could satisfy different circuit-specific reliance standards. The Court should weigh in to ensure all these would-be petitioners have a fulsome opportunity to litigate their claims based on the appropriate pre-AEDPA rules.

III. The decision below is incorrect.

The Third Circuit has taken the correct view of the law: the AEDPA amendments to Section 2244(b) are impermissibly retroactive when applied to petitioners who filed their initial petitions before the amendments. This Court should grant certiorari and take the same view.

A. There's a presumption against retroactivity.

This Court issued a seminal decision involving the retroactivity of statutory amendments in *Landgraf* v. *USI Film Prod.*, 511 U.S. 244 (1994). Many circuits that have analyzed the retroactive effect of amended Section 2244(b) rely on *Landgraf* as a lodestar. See, e.g., *Goldblum*, 510 F.3d at 217 (citing *Landgraf*); *Villa-Gonzalez*, 208 F.3d at 1163 (same).

In *Landgraf*, a former employee unsuccessfully sued her former employer under Title VII for harassment. While an appeal was pending, Congress amended the statute in part to make the damages provisions more employee-friendly. The employee argued the court of appeals should remand for further proceedings based on the statutory amendments. The court of appeals declined.

This Court affirmed. It began with notes of caution about retroactive statutory amendments. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence," because "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. As a result, "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Ibid.* Applying legislation retroactively can

often be "a means of retribution against unpopular groups or individuals." *Id.* at 266. The Court therefore generally requires a "clear" statement from Congress before concluding a statutory amendment applies retroactively. *Id.* at 268.

The Court proceeded to sketch out the situations when a statutory amendment might have a "genuinely 'retroactive' effect" and therefore trigger a presumption against retroactivity. *Landgraf*, 511 U.S. at 277. "[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70. When evaluating the question, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* at 270. Put another way, "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Ibid.*

Given that rubric, the Court concluded the statutory amendments to Title VII's damages provisions triggered the presumption. If the new amendments applied retroactively, they would "attach an important new legal burden to [previous] conduct." *Landgraf*, 511 U.S. at 283. Said differently, they would impose "a new disability in respect to past events." *Ibid.* (cleaned up). The Court therefore applied the presumption against retroactivity, found no clear statement from Congress that the changes should apply retroactively, and therefore concluded the amendments applied prospectively only.

The Court resolved a similar statutory retroactivity issue in *Lindh* v. *Murphy*, 521 U.S. 320 (1997). *Lindh* raised the question whether the AEDPA amendments to

28 U.S.C. § 2254(d) applied to cases that had been filed before (and were pending on) the effective date. The Court concluded the amendments didn't apply retroactively, in part because unlike with Section 2254(d), Congress specified for *other* statutory amendments in the same legislation that the amendments would apply to pending cases. *Id.* at 327. As the Court noted, those latter amendments "change[d] standards of proof and persuasion in a way favorable to a State, [so] the statute goes beyond 'mere' procedure to affect substantive entitlement to relief." *Ibid.* Because those amendments would trigger retroactivity concerns, Congress specified its intent to apply those changes to pending cases. Likewise, the amendments to Section 2254(d) "govern[] standards affecting entitlement to relief," so if Congress wanted to apply those amendments to pending cases as well, it probably would've said so. *Id.* at 329.

B. The amendments in Section 2244(b) trigger the presumption against retroactivity.

Viewed under these standards, the amendments in Section 2244(b) would have a genuine retroactive effect if applied to petitioners who filed initial pre-AEDPA petitions. Because the statutory language lacks a clear statement the amendments apply retroactively, background principles of statutory interpretation require prospective application only.

The amendments to Section 2244(b) implicate the concerns the Court identified in *Landgraf*. As the opinion explains, "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." 511 U.S. at 265. Likewise, inmates who filed federal petitions before AEDPA's effective date should've

had an opportunity to know whether and how the filing of an initial petition would preclude additional litigation in the future. Similarly, "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Ibid.* The same is true here: the legal effect of filing an initial petition, and the potential preclusive effects on successive petitions, should be assessed under the law that existed when an inmate filed a first petition.

The Court in *Landgraf* also instructed courts to consider "fair notice, reasonable reliance, and settled expectations." 511 U.S. at 270. Inmates who filed petitions before AEDPA's effective date lacked fair notice Congress would amend the federal habeas framework to create daunting standards for filing successive petitions. The Court also stressed "the unfairness of imposing new burdens on persons after the fact." *Ibid.* It's unfair to punish inmates for filing initial petitions by establishing onerous new rules on successive petitions and applying those rules retroactively.

Applying these considerations, the Court in *Landgraf* concluded the relevant statute triggered the presumption against retroactivity. If applied retroactively, the statutory changes would "attach an important new legal burden to [previous] conduct." 511 U.S. at 283. So too here. Applying the 1996 amendments retroactively would attach important new legal restrictions to past conduct. In other words, retroactive application would impose "a new disability" (additional restrictions on successive petitions) "in respect to past events" (having previously filed an initial petition). *Ibid.* (cleaned up).

The Court's decision in *Lindh* supports the same conclusion. There, the Court noted Congress made a point of specifying certain AEDPA amendments would apply to pending cases—even though they "govern[ed] standards affecting entitlement to relief"—but Congress declined to do so for other similar provisions. 521 U.S. at 329. Likewise, the amendments to Section 2244(b) affect a petitioner's "entitlement to relief," because they create onerous preconditions on filing successive petitions. If Congress intended for those changes to apply retroactively, it probably would've said so.

The Third Circuit correctly applied this law and concluded the amendments to Section 2244(b) trigger genuine retroactivity concerns if applied to petitioners whose initial petitions predated AEDPA. As it explained, the substantive changes to the statute—which make it harder for petitioners to file successive petitions—could "extinguish[] any right the petitioner may have to relief." *In re Minarik*, 166 F.3d 591, 600 (3d Cir. 1999). If the amendments applied retroactively to limit a petitioner's ability to litigate meritorious claims, the provisions "would impermissibly attach new legal consequences to events completed before the statute's enactment." *Id.* at 601.

The Ninth Circuit's contrary precedent is flawed. According to the court, the amendments to Section 2244(b) aren't impermissibly retroactive because they don't "impose a new duty or disability with respect to the resolution of" a petitioner's first petition. *Villa-Gonzalez*, 208 F.3d at 1163. But the statutory changes do in fact impose a new disability—they prevent petitioners from litigating successive petitions that would've been authorized under pre-AEDPA standards.

The court also reasoned that as a general matter, statutory changes don't necessarily have a genuine retroactive effect simply because they place "new limitations" on litigants based on an "antecedent fact." *Villa-Gonzalez*, 208 F.3d at 1163 (citing *Landgraf*, 511 U.S. at 269 n. 24). But although *Landgraf* does includes language along those lines, the opinion explains the ultimate question is "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. Here, amended Section 2244(b) attaches new legal consequences (a heightened bar on successive petitions) to events completed before its enactment (the filing of an initial petition).

The circuits that take a middle ground approach—recognizing Section 2244(b) can be unduly retroactive in certain circumstances but requiring a petitioner to show varying forms of detrimental reliance (see, e.g., *Graham*, 168 F.3d at 786)—are likewise unpersuasive. Those circuits wrongly place undue weight on reliance interests. In their view, *Landgraf* occasionally references reliance interests; thus, they conclude, the question whether Section 2244(b) has a genuine retroactive effect is a case-by-case issue that turns on whether a specific petitioner can demonstrate detrimental reliance on pre-AEDPA law. See, e.g., *id.* at 783. But nothing in *Landgraf* suggests retroactivity should turn on detrimental reliance. While the opinion twice mentions "reliance" in an offhand manner (511 U.S. at 270, 275), those brief references fall far short of requiring a case-by-case detrimental reliance inquiry. Nor does it make sense to conduct statutory interpretation in this manner; rarely does a court conclude a

statute has a different meaning (or triggers different canons of construction) based on the specific litigant's own unique circumstances.

In sum, the Third Circuit has correctly concluded the amendments to Section 2244(b) would create genuine retroactivity concerns if they precluded a petitioner from litigating a successive petition that would've proceeded under pre-AEDPA law. The Third Circuit has therefore properly applied the presumption against retroactivity. Without a clear statement from Congress the amendments to Section 2244(b) apply retroactively, courts should read those amendments as applying prospectively only. This Court should grant certiorari and adopt the same view.

IV. This case is an exceptional vehicle.

This petition presents an excellent opportunity to resolve the retroactivity issue. Mr. Olsen in an abundance of caution pursued two avenues for challenging the district court's transfer order, which ensures jurisdiction on appeal is proper. He presented counseled briefing in the Ninth Circuit that properly presented this issue. He has therefore preserved it for the Court's review.

This petition is also an ideal vehicle because while Mr. Olsen is unable to meet the gatekeeping requirements in amended Section 2244(b), he would be able to litigate his successive petition under pre-AEDPA standards.

The pre-1996 standards allowed a petitioner to pursue a successive petition if the petitioner demonstrated innocence. See *Sawyer*, 505 U.S. at 339. The post-1996 standards differ in part because they preclude litigation of previously raised claims and in part because they impose a diligence requirement for innocence-based

claims—the petitioner must've been unable to locate the relevant evidence earlier despite exercising due diligence. See Pet. App. 71 (suggesting this requirement would bar Mr. Olsen from litigating a successive petition under post-AEDPA standards).

To establish innocence, "a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of [] new evidence.'" *McQuiggin* v. *Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995)). "[O]r, to remove the double negative," the petitioner must establish it's "more likely than not any reasonable juror would have reasonable doubt." *House* v. *Bell*, 547 U.S. 518, 538 (2006).

Mr. Olsen is innocent, so he would've been able to litigate a successive petition based on pre-AEDPA law. This case involves false allegations Mr. Olsen sexually abused his ex-girlfriend's daughter. The abuse supposedly came to light on Thanksgiving 1989. According to Mr. Olsen's ex-girlfriend and the alleged victim, Mr. Olsen came over to their house at about 7:00 a.m. on Thanksgiving, then immediately stripped down to his underwear and ordered the girlfriend to go buy him cigarettes; she complied. That's a strange account; it's bizarre Mr. Olsen would stop by so early, then take off all his clothes, then tell his ex-girlfriend to go get him cigarettes (even though he'd just come over and could've picked some up on the way), and that she would then agree. A reasonable jury would've been confused by this scenario from the very start.

The alleged victim testified Mr. Olsen abused her while the ex-girlfriend was out getting cigarettes. The ex-girlfriend came back and supposedly saw Mr. Olsen

with the alleged victim in the living room; he was erect, and there was a wet spot on his underwear. But the ex-girlfriend apparently didn't think anything was amiss. To the contrary, she claims she had sex with Mr. Olsen about half an hour later. It's implausible she would've caught Mr. Olsen in a compromising position with her daughter, decided to let it slide, and chosen to be intimate with Mr. Olsen anyway.

Next, Mr. Olsen allegedly took the victim upstairs and abused her again. That would've been three sexual encounters in a single day, which seems unlikely.

After Mr. Olsen left for work that afternoon, the ex-girlfriend said she decided to ask the alleged victim what was going on, and the alleged victim disclosed a pattern of abuse. The ex-girlfriend supposedly went outside to confront Mr. Olsen. But according to her, Mr. Olsen had already left for work, which is inconsistent with her claim that she confronted him.

Later that day, the ex-girlfriend and the alleged victim went to the police to report the alleged abuse. They described an initial assault in the morning but suspiciously declined to mention the second alleged incident that occurred later in the day.

At trial, Mr. Olsen's attorney presented an alibi defense for the alleged events on Thanksgiving. At the time, Mr. Olsen was living with his mother and her boyfriend. Both Mr. Olsen and his mother testified Mr. Olsen was home during Thanksgiving until he left for work in the afternoon. That was inconsistent with the allegations of abuse that supposedly took place Thanksgiving morning.

Although the trial attorney put on an alibi defense, he presented an incomplete version of the defense. The jury learned the mother's boyfriend was also home on

Thanksgiving. But the boyfriend didn't testify, even though the boyfriend would've backed up the alibi. The jury likely wondered why the defense didn't call the third potential alibi witness and likely drew negative inferences from the omission. Had the jury heard alibi testimony from all three potential alibi witnesses, it's more likely than not the jury would've returned a different verdict.

The attorney also failed to present significant impeachment information regarding the ex-girlfriend and the alleged victim. The alleged victim testified no one had ever sexually abused her aside from Mr. Olsen, and she specifically denied her biological father ever hurt her. But the ex-girlfriend previously told the authorities the alleged victim's biological father had sexually abused the alleged victim. One of them must've been lying. The defense attorney didn't impeach these witnesses with this information.

Had the jury received this new evidence—alibi testimony from the third potential alibi witness, along with evidence about at least one of the State's key witnesses having previously lied about other alleged abuse—it's more likely than not the jury would've acquitted Mr. Olsen. In turn, because Mr. Olsen can show innocence, he would be able to litigate his successive petition were the Court to apply pre-AEDPA case law. But he's unable to litigate his successive petition under post-AEDPA standards. The differing standards are outcome-determinative, so this case presents a perfect vehicle to resolve which standard applies.

CONCLUSION

The Court should issue a writ of certiorari.

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Respectfully submitted,

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/s/Jeremy C. Baron
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