No. ____

IN THE

Supreme Court of the United States

In re KENNY BLANC,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Before federal prisoners may file a second or successive 28 U.S.C. § 2255 motion to vacate their conviction or sentence, the court of appeals must first find that they have made "a prima facie showing that the [motion] satisfies the requirements" in 28 U.S.C. § 2255(h). 28 U.S.C. § 2244(b)(3)(C). One those so-called "gatekeeping" requirements provides that the second or successive § 2255 motion must "contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2).

The question presented is:

To satisfy the gatekeeping requirements of 28 U.S.C. §§ 2244(b)(3)(C) and 2255(h)(2), must federal prisoners make a prima facie showing that their 28 U.S.C. § 2255 motion contains a new rule of law specified in § 2255(h)(2), or must they also make a prima facie showing that their § 2255 motion will succeed on the merits?*

* Along with this petition for a writ of mandamus, Petitioner has simultaneously filed a petition for a writ of habeas corpus. The petitions are substantively identical.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

- *United States v. Blanc*, No. 14-cr-60316 (S.D. Fla. May 15, 2015) (judgment of conviction imposing 15-year sentence of imprisonment);
- *United States v. Blanc*, No. 15-12589 (11th Cir. Nov. 30, 2015) (opinion affirming convictions and sentences on direct appeal);
- *Blanc v. United States*, No. 16-cv-61488 (S.D. Fla. Mar. 29, 2017) (order denying initial 28 U.S.C. § 2255 motion to vacate conviction);
- *Blanc v. United States*, No. 17-12394 (11th Cir. July 12, 2017) (order denying certificate of appealability from denial of 28 U.S.C. § 2255 motion to vacate);
- *In re Blanc*, No. 17-12893 (11th Cir. July 12, 2017) (order denying leave to file a second or successive 28 U.S.C. § 2255 motion to vacate);
- *In re Blanc*, No. 20-11701 (11th Cir. May 22, 2020 & Sept. 21, 2021) (order denying leave to file a second or successive 28 U.S.C. § 2255 motion to vacate, and order denying motion to certify question of law to U.S. Supreme Court);
- *Blanc v. United States*, No. 20-cv-61118 (S.D. Fla. Sept. 9, 2020) (order dismissing second 28 U.S.C. § 2255 motion to vacate conviction);
- *Blanc v. United States*, No. 19-cv-61047 (S.D. Fla. Oct. 5, 2020) (order denying writ of audita querela);
- *In re Blanc*, No. 20-14294 (11th Cir. Dec. 10, 2020) (order denying leave to file a second or successive 28 U.S.C. § 2255 motion to vacate conviction);
- *Blanc v. United States*, No. 20-13580 (11th Cir. Mar. 31, 2021) (order dismissing appeal of dismissal of second 28 U.S.C. § 2255 motion to vacate);
- *Blanc v. United States*, No. 20-13990 (11th Cir. Ap. 23, 2021) (opinion summarily affirming denial of writ of audita querela);
- *United States v. Blanc*, No. 21-12293 (11th Cir. Sept. 1, 2021) (order dismissing appeal of denial of habeas relief under 28 U.S.C. § 2241).

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IN THE
Supreme Court of the United States

In re KENNY BLANC

PETITION FOR A WRIT OF MANDAMUS

Kenny Blanc, a federal prisoner, respectfully petitions this Court for a writ of mandamus to the U.S. Court of Appeals for the Eleventh Circuit, comprised of Circuit Judges Beverly B. Martin (ret.), Gerald B. Tjoflat, and Frank M. Hull.

OPINIONS BELOW

The Eleventh Circuit's divided order of May 22, 2020 denying Petitioner's application for leave to file a successive 28 U.S.C. § 2255 motion to vacate his conviction is unreported but is reproduced as Appendix ("App.") A, 1a–13a. The Eleventh Circuit's divided order of December 10, 2020 denying Petitioner's renewed application for leave to file a successive 28 U.S.C. § 2255 motion to vacate his conviction is unreported but is reproduced as App. B, 14a–25a. The Eleventh Circuit's divided order of September 29, 2021 denying Petitioner's motion to certify a question of law to this Court is unreported but is reproduced as App. C, 26a–40a.

JURISDICTION

The Eleventh Circuit denied Petitioner's applications for leave to file a second or successive 28 U.S.C. § 2255 motion to vacate on May 22, 2020 and again on December 10, 2020. It denied his motion to certify a question of law to this Court on September 29, 2021. This Court has jurisdiction under 28 U.S.C. § 1651.

STATUTORY PROVISIONS INVOLVED

Section 2255(h)(2) of Title 28 of the U.S. Code provides:

> A second or successive motion [to vacate a conviction or sentence] must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> * * *
>
> a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Sections 2244(b) of Title 28 of the U.S. Code provides, in pertinent part:

> **(3)**
>
> **(A)** Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> **(B)** A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> **(C)** The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> **(D)** The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> **(E)** The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.
>
> **(4)** A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT PURSUANT TO RULE 20.3

Pursuant to this Court's Rule 20.3(a), Petitioner seeks a writ of mandamus to the U.S. Court of Appeals for the Eleventh Circuit, sitting as a panel comprised of Judges Beverly B. Martin (ret.), Gerald B. Tjoflat, and Frank M. Hull.

Pursuant to Rule 20.3(b), Petitioner has served a copy of this Petition on those Respondents, as well as on the Solicitor General of the United States.

Pursuant to Rule 20.3(a), Petitioner further states that he has not filed a petition for a writ of mandamus in any other court because he has no legal avenue for doing so. Petitioner twice sought leave to file a second or successive 28 U.S.C. § 2255 motion to vacate his conviction, but the Eleventh Circuit denied those requests. Only this Court may issue a writ of mandamus directing the Eleventh Circuit to grant Petitioner leave to file a second or successive § 2255 motion to vacate his conviction.

STATEMENT OF THE CASE

A. Legal Background

After their convictions become final on direct review, federal prisoners may move to vacate or set aside any conviction or sentence imposed in violation of the Constitution or the laws of the United States. 28 U.S.C. § 2255(a). However, as part of AEPDA, Congress strictly limited the ability of federal prisoners to file a second or successive § 2255 motion. Under § 2255(h), "[a] second or successive motion [under § 2255] must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" one of two so-called gatekeeping criteria. Relevant here is the second one, which requires that the second or successive § 2255 motion "contain

. . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2).

Incorporated into § 2255(h), § 2244(b) sets out the procedures governing the gatekeeping determination. As relevant here, it provides that "[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies" one of the two gatekeeping criteria. 28 U.S.C. § 2244(b)(3)(C). The question presented here—on which the circuits have divided for the last 15 years—is about the scope of that prima facie inquiry. To obtain leave to file a second or successive § 2255 motion, must a federal prisoner make a prima facie showing that his § 2255 motion contains a new rule of constitutional law made retroactive by this Court? Or must the prisoner *also* make a prima facie showing that such a claim will succeed on the merits?

If a federal prisoner does make the requisite prima facie showing, the court of appeals grants leave to file the second or successive § 2255 motion. The district court must then determine whether the § 2255 motion actually (as opposed to facially) satisfies the gatekeeping criteria. 28 U.S.C. § 2244(b)(4). But if a federal prisoner does not make the requisite prima facie showing, the court of appeals must deny leave to file the second or successive § 2255 motion. And that denial "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). Because certiorari review is unavailable, this Court has never interpreted the prima facie standard governing the courts of appeals' gatekeeping determination. The Court should use this case as the vehicle to do so.

B. Proceedings Below

1. In 2014, Petitioner was charged in the Southern District of Florida with several crimes, including: conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count 1); conspiracy and attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A) (Counts 2 and 3); and possessing a firearm in furtherance of a "crime of violence" (namely, the Hobbs Act conspiracy in Count 1), and possessing a firearm in furtherance of a "drug trafficking crime" (namely, the drug offenses in Counts 2 and 3), in violation of 18 U.S.C. § 924(c) (Count 5). (Case No. 14-cr-60316, Dist. Ct. ECF No. 21 at 1–4).

Pursuant to a plea agreement, Petitioner agreed to plead guilty to the Hobbs Act conspiracy (Count 1) and the § 924(c) offense (Count 5). (Dist. Ct. ECF No. 66 ¶¶ 1–2). As charged, the § 924(c) offense was predicated on both the Hobbs Act conspiracy in Count 1 *and* the drug offenses in Counts 2/3. But Petitioner pled guilty only to the former, not the latter. And the record is contradictory about whether the § 924(c) offense was predicated on just the former or on both the former and the latter.

On the one hand, the district court at the plea hearing repeated the language of the indictment, referring to the Hobbs Act conspiracy and the drug offenses as the § 924(c) predicates. (Dist. Ct. ECF No. 126 at 11). The written plea agreement did the same. (Dist. Ct. ECF No. 66 ¶ 1). And the district court referred to a "crime of violence" and a "drug trafficking crime" at the plea hearing when adjudicating Petitioner guilty of the § 924(c) offense in Count 5. (Dist. Ct. ECF No. 126 at 20).

On the other hand, the government referred to the Hobbs Act conspiracy alone as the predicate. At the plea hearing, the district court asked the government to set forth the offense elements. The prosecutor responded: "And as to Count 5, that the defendant did use and carry with his codefendants a firearm during the commission of a violent crime, that is the Hobbs Act robbery that is alleged in Count 1, and/or did possess a firearm in furtherance of that same crime of violence, which would be the conspiracy to commit a Hobbs Act robbery as to Count 1." (Dist. Ct. ECF No. 126 at 12–13). Without mentioning the drug offenses, the prosecutor concluded: "Those are the elements for both counts." (*Id*. at 13). When asked if Petitioner was "in agreement that the elements were correctly stated," he responded affirmatively. (*Id*.).

The district court ultimately sentenced Petitioner to 15 years in prison. That sentence consisted of 10 years on the Hobbs Act conspiracy, to be followed by a mandatory consecutive 5 years on the § 924(c) offense. (Dist. Ct. ECF No. 102 at 2; Dist. Ct. ECF No. 128 at 12). Petitioner's current projected release date is in 2028.

2. In 2016, Petitioner unsuccessfully moved to vacate his § 924(c) conviction under § 2255 in light of *Johnson v. United States*, 576 U.S. 591 (2015). (Case No. 16-cv-61488). The denial of that § 2255 motion placed him in the successive posture. To file another § 2255 motion, he would need to obtain the Eleventh Circuit's leave, pursuant to §§ 2244(b) and 2255(h). The Eleventh Circuit should have granted him leave after this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).

In *Davis*, this Court invalidated the residual clause in § 924(c)(3)(B) defining the term "crime of violence." The Eleventh Circuit later held that, for purposes of the

gatekeeping criteria in § 2255(h)(2), *Davis* announced a new rule of constitutional law that this Court had made retroactive. *In re Hammoud*, 931 F.3d 1032, 1037–40 (11th Cir. 2019). It also held that conspiracy to commit Hobbs Act robbery was no longer a "crime of violence" post-*Davis* because it did not satisfy the elements clause in § 924(c)(3)(A), the only remaining definition. *Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019). Thus, where a § 924(c) conviction is predicated solely on Hobbs Act conspiracy, the § 924(c) conviction must be vacated. *See id*. at 1073–76.

In May 2020, Petitioner sought leave from the Eleventh Circuit to file a second or successive § 2255 motion based in part on *Davis*. A divided panel denied his *pro se* application. App. A. It concluded that "Blanc cannot make a *prime facie* showing that his § 924(c) conviction and sentence is unconstitutional under *Davis*. *See* 28 U.S.C. § 2244(b)(3)(C)." App. 7a. It reasoned that, although the prosecutor said that "Count 5 related only to the Hobbs Act conspiracy charge in Count 1, the record otherwise consistently show[ed] that the § 924(c) charge was predicated on Counts 1 through 3." *Id*. Relying on *In re Navarro*, 931 F.3d 1298 (11th Cir. 2019), the panel further reasoned that, based on the factual proffer (Dist. Ct. ECF No. 67), the Hobbs Act conspiracy and drug offenses were "inextricably intertwined." Therefore, the panel reasoned, "Blanc's § 924(c) conviction falls outside of the scope of *Davis* because it can be independently supported" by the drug offenses. App. 8a.

Dissenting, Judge Martin would have granted authorization. "At this preliminary stage," she explained, Petitioner's *Davis* claim should proceed to the district court because "[t]he record is not clear-cut" with respect to the § 924(c)

predicate. App. 11a. She observed that the Eleventh Circuit had "not addressed the circumstance in which the record contains two different affirmative statements about the § 924(c)" predicate, and "Blanc deserves careful consideration of the conflicting descriptions of his guilty plea in the record." App. 12a–13a. After all, she explained, "[h]is consecutive five-year sentence . . . hangs in the balance. While it may well be that Mr. Blanc is bound by the terms of his written plea agreement," no precedent had "address[ed] the unique circumstances of his case." App. 13a. Thus, she would have "let the District Court consider his *Davis* claim in the first instance." *Id*.

3. Although § 2244(b)(3)(E) barred Petitioner from seeking rehearing or certiorari review of the denial of his successive application, he was undeterred. He subsequently filed another *pro se* successive application based on *Davis*. (11th Cir. Case No. 20-14294). A panel of the Eleventh Circuit again denied his application, reiterating that he "cannot make a *prima facie* showing that his § 924(c) conviction and sentence on Count 5 is unconstitutional under *Davis*." App. B, 21a–23a. The panel added that, under *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016), Petitioner's application was procedurally barred by 28 U.S.C. § 2244(b)(1) because it re-raised the same *Davis* claim that the panel had already denied on the merits. App. 23a.

Dissenting, Judge Martin "continue[d] to believe that we should have granted Mr. Blanc's prior application" as to his *Davis* claim. App. 24a. She also reiterated the view of herself and others that *In re Baptiste* was wrongly decided. App. 24a–25a. And she was "concerned that *Baptiste* is blocking relief to prisoners who ask us to take a second look at their case after we got it wrong the first time." App. 25a.

For the next several months, Petitioner tried other ways to get into court under *Davis*. Proceeding *pro se*, he filed another § 2255 motion (S.D. Fla. No. 20-cv-61118); he appealed the denial of a petition for a writ of audita querela (S.D. Fla. No. 19-cv-61047; 11th Cir. No. 20-13390); and he filed a habeas petition under 28 U.S.C. § 2241 (S.D. Fla. No. 14-cr-60316, Dist. Ct. ECF Nos. 175, 176). Those avenues were closed.

4. Out of options, and now with the assistance of counsel, Petitioner asked the Eleventh Circuit to certify the following question of law to this Court: in determining whether a federal prisoner has made the requisite "prima facie" showing under 28 U.S.C. §§ 2244(b)(3)(C) and 2255(h)(2), may the court of appeals deny authorization because it believes that the claim will fail on the merits? Petitioner argued that this question—which had led to the denial of his original application—had long divided the courts of appeals, but it could not be resolved by way of certiorari due to § 2244(b)(3)(E)'s prohibition on certiorari petitions. However, because § 2244(b)(3)(E) did not restrict this Court's certification jurisdiction under 28 U.S.C. § 1254(2), Petitioner urged the Eleventh Circuit to certify that question to this Court.

In another divided order, the Eleventh Circuit denied the motion. App. C. The panel emphasized that certification was discretionary and rarely used. App. 30a–31a. Disregarding Petitioner's efforts over the previous year to get back into court, the panel opined that his certification motion came too late. App. 30a–31a. It also observed that the circuits all used the "prima facie" standard articulated in *Bennett v. United States*, 119 F.3d 468 (7th Cir. 1997). App. 31a–32a. And, mischaracterizing

Petitioner's request, the panel opined that he improperly sought certification on a mixed question of law and fact rather than a pure question of law. App. 33a.

Judge Martin dissented from the denial of Petitioner's motion. As an initial matter, she noted that the majority was "wrong" to find any procedural barrier to certification, explaining that Petitioner's motion was not untimely, and that he sought certification "regarding the prima-face standard generally, not as applied to his case." App. 36a n.1. She then gave several reasons why she "firmly believe[d] this is one of the rare instances where certification is proper." App. 34a, 36a, 40a.

First, she said that she would certify that question to this Court "so that the Court can 'resolve a split among [the] circuits about how to perform the gatekeeping function.'" App. 37a (quoting *In re Williams*, 898 F.3d 1098, 1109 (11th Cir. 2018) (Martin, J., specially concurring)). In response to the majority, she noted that, while the Eleventh Circuit had "facially adopted the same prima-facie standard [from *Bennett*] adopted by other courts of appeals," the case law revealed that "the circuits are split over how to employ that standard." App. 37a n.2. While other circuits merely required prisoners to show that they plausibly relied on a new rule of constitutional law made retroactive by this Court, the Eleventh Circuit required them to further show a likelihood of success the merits of their new-rule claim. App. 37a. As a result, Judge Martin observed, "if Mr. Blanc's case was before another circuit court, he would have been allowed to file a second or successive § 2255 petition because, based on *Davis*, his claim '*relies on* a qualifying new rule of constitutional law.'" *Id*. (quoting *In re Hubbard*, 925 F.3d 225, 229 (4th Cir. 2016)).

"Second," Judge Martin "would certify th[at] question to the Supreme Court because the existing circuit split cannot be resolved on certiorari review" due to § 2244(b)(3)(E). App. 37a–38. She observed that "three justices, including one sitting justice, recognized that the Supreme Court retains jurisdiction to review certified questions concerning the gatekeeping stage, including if, as here, 'the courts of appeals adopted divergent interpretations of the gatekeeper standard.'" App. 38a (quoting *Felker v. Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring)).

"Finally," Judge Martin "would certify this question to the Supreme Court because the otherwise unreviewable circuit split raises two important issues. First, [the Eleventh Circuit's] practice of reaching the merits at the gatekeeping stage is prone to error and can create bad law." App. 38a–39a. She explained that such rulings were typically decided within 30 days, based on limited (and often *pro se*) briefing without adversarial testing or oral argument, and were immune from petitions for further review. Yet, she explained, those rulings constituted binding circuit precedent when published. App. 39a. And "[o]ne sitting justice has questioned whether this practice is consistent with due process," noting that it was "significantly out of step with other courts." *Id*. (quoting *St. Hubert v. United States*, 140 S. Ct. 1727, 1729 (2020) (Sotomayor, J., respecting the denial of certiorari)).

"Second," Judge Martin continued, "when this Court unnecessarily and prematurely reaches the merits at the gatekeeping stage, the result is that prisoners sentenced in Alabama, Florida, and Georgia may be serving illegal sentences for which they have no remedy." App. 40a (quotation omitted). Using Petitioner as an

example, she explained that had he been afforded leave to file a second § 2255 motion, "the District Court would have considered his petition on the merits. If the District Court denied relief, he could have appealed to this Court and ultimately petitioned for certiorari. That's three possible levels of review on the merits of Mr. Blanc's petition, which is appropriate for someone who may be serving an unlawful sentence." *Id*. However, "because the majority decided the merits at the gatekeeping stage, Mr. Blanc's petition was limited to only one level of review that was insulated from any further review by the Supreme Court or en banc scrutiny." *Id*.

In sum, Judge Martin concluded that certification was necessary to "provide for review of an otherwise unreviewable circuit split affecting the liberty of scores of prisoners." *Id*. But because the Eleventh Circuit declined to certify that question to this Court, and because certiorari review is otherwise unavailable, Petitioner is now left with no other option but to seek extraordinary relief in this Court. As explained below, this is one of those rare cases in which such relief is appropriate.

REASONS FOR GRANTING THE PETITION

Since 2007, the courts of appeals have been divided on the scope of their gatekeeping review. As a result, geography now determines whether many state and federal prisoners may challenge the legality of their convictions and sentences based on new retroactive decisions of this Court. But § 2244(b)(3)(E) precludes certiorari review of the gatekeeping determination. Thus, the only way for this Court to resolve the circuit split is by way of an extraordinary writ. The Court should use this case as the vehicle to resolve the split and ensure national uniformity in federal habeas law.

I. The Circuits Are Divided Over the Prima Facie Standard

Before authorizing a second or successive § 2255 motion, a court of appeals must find that the federal prisoner has "ma[de] a prima facie showing that the application [*i.e.*, the proposed § 2255 motion] satisfies the requirements of this subsection"—namely, that the § 2255 motion "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §§ 2244(b)(3)(C), 2255(h)(2).

Shortly after Congress enacted AEDPA, the Seventh Circuit interpreted the prima facie standard in *Bennett v. United States*, 199 F.3d 468 (7th Cir. 1997), though that case arose in the context of the other gatekeeping criteria involving newly discovered evidence of actual innocence. 28 U.S.C. § 2255(h)(1). Writing for the court, Judge Posner explained that, "[b]y 'prima facie showing' we understand (without guidance in the statutory language or history or case law) simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Id*. at 469.

Every numbered circuit has subsequently adopted *Bennett*'s formulation. *See United States v. St. Hubert*, 918 F.3d 1174, 1186 (11th Cir. 2019) (W. Pryor, J., respecting the denial of rehearing en banc) (collecting cases). But, as Judge Martin recognized below, "the circuits are split over how to employ that standard" in the context of a new rule of constitutional law made retroactive by this Court. App. 37a & n.2 (Martin, J., dissenting). Does *Bennett*'s "showing of possible merit" language refer only to the gatekeeping criteria in § 2255(h)(2)? Or does it go beyond the gatekeeping criteria and refer to the merits of the petitioner's new-rule claim?

A. Six Circuits Have Held That the Prima Facie Showing Is Limited to the Gatekeeping Criteria in § 2255(h)(2)

By Petitioner's count, six courts of appeals have adopted the former understanding of *Bennett*: the First, Third, Fourth, Ninth, Tenth, and D.C. Circuits.

1. The Tenth Circuit was the first to do so in *Ochoa v. Sirmons*, 485 F.3d 538 (10th Cir. 2007). There, a state prisoner sought leave to file a second or successive 28 U.S.C. § 2254 petition based on *Atkins v. Virginia*, 536 U.S. 304 (2002), which the State conceded was a new rule of constitutional law made retroactive by this Court. *Id*. at 541. "Nevertheless, the State oppose[d] authorization because, it contend[ed], Mr. Ochoa's 'prima facie showing' under § 2244(b)(3)(C) must also include a preliminary demonstration of mental retardation." *Id*. In a well-reasoned opinion, the Tenth Circuit found "no basis in the plain language and functional structure of the statute to expand our gatekeeping role to include such a merits review." *Id*.

As to the statutory text, the Tenth Circuit explained that § 2244(b)(3)(C) "does not direct the appellate court to engage in a preliminary merits assessment. Rather, it focuses our inquiry solely on the [gatekeeping] conditions specified in § 2244(b) that justify raising a new habeas claims." *Id*. at 541–42. Citing *Bennett*, the court acknowledged that "something akin to merits review" may be appropriate for claims relying on newly discovered evidence of actual innocence, but it emphasized that such merits review had no place for claims relying on a new rule of constitutional law made retroactive by this Court. *Id*. at 542 n.4. In that context, the court should "look solely to temporal issues relating to the *availability* of the constitutional authority invoked, not to any assessment of the strength of the petitioner's case." *Id*. at 542.

That limited review was supported by the statutory structure as well. The Tenth Circuit explained that "[t]he typical authorization proceeding is an ex parte matter, with little if any factual record, that it is to be decided—conclusively, if denied—in thirty days." *Id.* (footnote omitted). "These parameters indicate a streamlined procedure with a narrow focus on a fixed set of pre-specified and easily assessed criteria, which would be disrupted by engaging the manifold merits issues raised by potentially complex, fact-bound constitutional claims." *Id.* "The distribution of judicial responsibility reflected in the plain language of the statute—by which the appellate court makes an expedited assessment of whether a new habeas claim falls within a formally defined category and, if it does, then leaves the adjudication of that claim to the district court in the first instance—is clearly in keeping with the respective roles of appellate and trial courts in our system." *Id.*

The Tenth Circuit rejected the State's argument that "the 'prima facie showing' required by § 2244(b)(3)(C) must refer to the merits of the underlying claim because there is nothing else it could refer to." *Id.* at 543. It explained that "[t]he point of the language is to make it clear that the authorization provided by an appellate court under § 2244(b)(3)(C) is only a preliminary determination that a claim satisfies the statutory conditions." *Id.* The gatekeeping assessment is "not meaningless simply because it precedes consideration of the merits of the claim." *Id.* Indeed, "the authorization of a new-rule-of-law claim . . . requires us to determine that (a) the rule relied on reflects a sufficient departure from precedent to entail a new rule; (b) the Supreme Court has made the rule retroactive to cases on collateral review (by no

means always a cut-and-dried matter . . .); and (c) the nature and timing of the new rule and the petitioner's procedural history show that the rule was 'previously unavailable' within the meaning of the statute." *Id*. at 543–44.

"In sum," the court concluded, "the plain language of the statute directs us to focus solely on the conditions Congress has designated as controlling with respect to the authorization of second or successive habeas petitions. And those conditions specified . . . for the pursuit of claims resting on new rules of constitutional law do not involve the appellate court in any preliminary assessment of the merit of the claims for which second or successive authorization is sought." *Id*. at 544.

In so holding, the Tenth Circuit expressly disagreed with decisions from the Fifth, Sixth, and Eleventh Circuits that had relied on *Bennett* to evaluate the merits of a proposed *Atkins* claim. *Id*. at 544–45. The court explained that "the *Bennett* formulation is misused if relied on in the [new rule of law] context as the premise for a preliminary merits inquiry" because that had "no basis" in the gatekeeping criteria. *Id*. at 545. And while the Eleventh Circuit worried that any prisoner could simply cite *Atkins*, the Tenth Circuit responded that "this is an argument for amendment of the statute, which is the province of Congress, not the courts." *Id*. And it was "not a very compelling point," as "the district courts already engage in a merits screening of all habeas petitions," and they were better equipped to perform that function. *Id*.

The Tenth Circuit has since re-affirmed *Ochoa*'s holding. In *Case v. Hatch*, 731 F.3d 1015 (10th Cir. 2013), that court formally adopted "*Bennett*'s understanding of what is required to make a 'prima facie showing.'" *Id*. at 1029. But the court was

still "careful to observe that adopting this standard does not modify our cautionary statement in *Ochoa*, where we noted that the phrase 'possible merit to warrant a fuller exploration by the district court' [in *Bennett*] does *not* refer to the underlying constitutional claim but to the petitioner's showing on the statutory requirements . . . ." *Id.* at 1029 n.4 (citing *Ochoa*, 485 F.3d at 542 n.4)

2. The Third Circuit has followed the Tenth Circuit's lead. Although it too has adopted the *Bennett* formulation, it grants authorization "where there is some reasonable likelihood that the motion satisfies the pre-filing requirements of Section 2255(h)(2). We do not consider the merits of the claim." *In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017) (quotation omitted); *see id.* ("we do not address the merits at all in our gatekeeping function") (citing *In re Pendleton*, 732 F.3d 280, 282 n.1 (3d Cir. 2013) and *Goldblum v. Klem*, 510 F.3d 204, 219 n.9 (3d Cir. 2007)).

Like the Tenth Circuit, the Third Circuit has explained that *Bennett*'s "'sufficient showing of possible merit' in this context does not refer to the merits of the claims asserted in the petition. Rather, it refers to the merits of a petitioner's showing with respect to the substantive [gatekeeping] requirements." *In re Pendleton*, 510 F.3d at 219 n.9. Despite initial confusion about *Bennett*, the Third Circuit agreed with the Fourth Circuit's "conclu[sion] that the 'prima facie showing' under section 2244 refers merely to the pre-filing substantive requirements," not to the merits of the claim. *Id.* (citing *In re Williams*, 330 F.3d 277, 282 (4th Cir. 2003)).

The Third Circuit applied that holding in both *In re Pendleton* and *In re Hoffner*. In *In re Pendleton*, the Third Circuit granted state prisoners leave to file a

successive § 2254 petition based on *Miller v. Alabama*, 567 U.S. 460 (2012). The court did so because, although the State argued otherwise, it "conclude[d] that Petitioners have made a prima facie showing that *Miller*" satisfied § 2255(h)(2). *In re Pendleton*, 732 F.3d at 282–83. The court noted that, "[a]t this early stage, we will not consider whether [Petitioner] actually qualifies for relief under *Miller*. We only determine whether [he] has made a prima facie showing that *Miller* created a 'new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" *Id*. at 282 n.1 (quoting § 2255(h)(2)).

Similarly, in *In re Hoffner*, the Third Circuit granted a federal prisoner leave to file a second § 2255 motion based on *Johnson v. United States*, 576 U.S. 591 (2015), a new rule of constitutional law made retroactive in *Welch v. United States*, 578 U.S. 120 (2016). Although *Johnson* declared unconstitutionally vague the residual clause of the Armed Career Criminal Act, the petitioner was sentenced under an identical clause in the then-mandatory Sentencing Guidelines. And although this Court in *Beckles v. United States*, 137 S. Ct. 886 (2017) had held that the advisory Guidelines could not be unconstitutionally vague, it had not addressed whether the same was true for the mandatory Guidelines. The Third Circuit granted authorization because it was undisputed that *Johnson* satisfied the gatekeeping requirements in § 2255(h)(2), and the prisoner had made a prima facie showing that his claim relied on *Johnson*. *See In re Hoffner*, 870 F.3d at 308–11. "It [is] for the district court to evaluate the merits" of his claim "in the first instance," including "whether the new rule should ultimately be extended in the way that the movant proposes or whether

his reliance is misplaced." *Id*. at 309 (quotation omitted) (citing *In re Hubbard*, 825 F.3d 225, 231 (4th Cir. 2016) and *In re Williams*, 759 F.3d 66, 72 (D.C. Cir. 2014)).

In so holding, the Third Circuit notably declined to follow *Donnell v. United States*, 826 F.3d 1014 (8th Cir. 2016), where the Eighth Circuit denied authorization for a similar claim because it believed that extending *Johnson* to the Guidelines would be a second new rule. *Id*. at 311–12. Finding that analysis "inconsistent with the text of Section 2255(h)(2)," as well as "the context of Section 2244(b)," the Third Circuit "decline[d] to adopt the *Donnell* approach and need not determine whether applying *Johnson* to Hoffner would create a 'second new rule.'" *Id*. at 312.

3. The Fourth Circuit has adopted the same approach as the Tenth and the Third Circuits. In *In re Williams*, the Fourth Circuit "adopt[ed] the *Bennett* standard," but made clear that it did not "require review of the merits during the pre-filing authorization stage." 330 F.3d at 281. In its view, "*Bennett* emphasize[d] that the § 2244(b) inquiry must be resolved before the district court may consider the merits of a claim within a successive application." *Id*. at 281–82. Thus, the court explained "that the 'showing of possible merit' alluded to in *Bennett* relates to the possibility that the claims in a successive application will satisfy the stringent requirements for the filing of a second or successive petition, not the possibility that the claims will ultimately warrant a decision in favor for the applicant." *Id*. at 282 (quotation omitted). While the court suggested that this "determination may entail a cursory glance at the merits" in the context of newly discovered evidence, "the focus of the inquiry must always remain on the [gatekeeping] standards." *Id*.

The Fourth Circuit applied those principles in *In re Hubbard*, 825 F.3d 225 (4th Cir. 2016). At the authorization stage, the court emphasized, it "need not decide whether Hubbard will ultimately prevail on his claim, only whether he is entitled to pursue a successive claim." *Id*. at 229. To do so, "[a]ll Hubbard need show is that there is 'a new rule of constitutional law, made retroactive by the Supreme Court, that was previously unavailable.'" *Id*. at 231 (quoting § 2255(h)(2)). The Fourth Circuit held that he had made that showing by relying on *Johnson* to challenge a sentencing enhancement under the residual clause in 18 U.S.C. § 16(b) and the Guidelines. Although the government argued that *Johnson* invalidated only the residual clause in the ACCA, the Fourth Circuit determined that the government was "making a merits argument" about *Johnson*'s application, which was improper at the authorization stage. *Id*. at 231–32. Particularly given that the circuits were divided on that substantive question, the Fourth Circuit explained that it was "for the district court to make that determination following a more detailed briefing on this merits issue." *Id*. at 233. *See also In re Stevens*, 956 F.3d 229, 233 & n.2 (4th Cir. 2020) (explaining that prisoners must satisfy the gatekeeping requirements "[b]efore the district court may review the merits of a successive application").

4. The D.C. Circuit follows the same approach. In *In re Williams*, 759 F.3d 66 (D.C. Cir. 2014), that court granted leave for a federal prisoner to file a successive § 2255 motion based on *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012). As to the *Graham* claim, the government argued that the petitioner was "not entitled to relief on the basis of *Graham*" because his crimes

extended into adulthood. *Id*. at 70. But the court of appeals explained that the government's argument improperly "goes to the merits of the motion, asking us in effect to make a final determination of whether the holding in *Graham* will prevail for Williams." *Id*. While that was a merits "question for the district court in the first instance," the court of appeals' gatekeeping "inquiry [wa]s limited to whether Williams' motion has made a *prima facie* case that it 'contains . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" *Id*. (quoting § 2255(h)(2)).

Similarly, as to the *Miller* claim, the court reiterated that its "sole task is to determine whether Williams has made a *prima facie* showing that his *Miller* motion satisfies the necessary requirements of § 2255(h)." *Id*. at 71. Opposing authorization, the government again argued that the prisoner did "not actually rely on *Miller* because that case did not address life-without-parole sentences for defendants who entered a conspiracy in their juvenile years and exited in adulthood." *Id*. Again, the D.C. Circuit held that "whether the new rule in *Miller* extends to a prisoner like Williams . . . goes to the merits of the motion and is for the district court, not the court of appeals." *Id*. at 71–72. The court of appeals granted authorization for both claims.

5. Like the circuits above, the First Circuit too has adopted *Bennett*, yet stated that, at the authorization stage, "an applicant need only make a prima facie showing that a claim comports with" the gatekeeping requirements. *Rodriguez v. Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 273, 276 (1st Cir. 1998). In *Rodriguez*, for example, the court of appeals denied authorization because the

petitioner could not make a prima facie showing that this Court had made one of its decision retroactive, not because his claim would ultimately fail. *See id*. at 274–76.

In *Evans-Garcia v. United States*, 744 F.3d 235 (1st Cir. 2014), the First Circuit re-affirmed its adoption of *Bennett*, but reiterated that its "task is not to decide for certain whether the petition has merit, but rather to determine whether it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition." *Id*. at 237 (quotation omitted). The court explained there was "good reason to refrain from a full inquiry at this stage, even on a purely legal issue such as retroactivity," because it did not have the benefit of a district court decision and, "in ruling on certification requests, we often must strive to move more quickly than a full consideration of the merits might reasonably require." *Id*. at 237–28. *Accord Moore v. United States*, 871 F.3d 72, 78 (1st Cir. 2017).

6. The Ninth Circuit falls into the same camp. It too has adopted *Bennett*'s formulation. *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc). But, relying on decisions from the Third, Fourth, and D.C. Circuits, as well as a Judge Elrod dissent out of the Fifth Circuit (discussed further below), the Ninth Circuit has determined that the "controlling question" is whether the prison "has made a *prima facie* showing that his petition 'relies on'" a new rule of constitutional law made retroactive by this Court. *Henry v. Spearman*, 899 F.3d 703, 705–06 (9th Cir. 2018). That "limited" task requires "leaving the merits of the claim for the district court to address in the first instance." *Id*. at 708. In *Henry*, for example, a state prisoner claimed that *Johnson* rendered California's second-degree felony-murder rule

unconstitutionally vague. Opposing authorization, the State argued that the prisoner "lacks standing to bring a vagueness challenge, his claim is moot, and *Johnson* cannot possibly be extended to California's second-degree felony-murder rule." *Id*. But the Ninth Circuit concluded that, "although Henry's habeas corpus claim may ultimately fail for any number of reasons, those issues are not presently before us." *Id*. at 711.

B. The Eleventh Circuit and Others Have Held That the Prima Facie Showing Requires a Likelihood of Success on the Merits

By contrast, other circuits have required prisoners to make a prime facie showing as to the merits of their claim. The Eleventh Circuit has led the charge.

1. The Eleventh Circuit charted that course in *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003). After adopting the *Bennett* formulation, the court then held "that in order to make a *prima facie* showing that he is entitled to file a second or successive petition based on the Supreme Court's decision in *Atkins*, Holladay also must demonstrate that there is a reasonable likelihood that he is in fact mentally retarded," as "measured against the entire record in this case." *Id*. at 1173–74. Driven by policy concerns rather than the statutory text, the Eleventh Circuit reasoned: "Were it otherwise, then literally any prisoner under a death sentence could bring an *Atkins* claim in a second or successive petition regardless of his or her intelligence. No rational argument can possibly be made that this result is appropriate under § 2244(b)." *Id*. at 1173 n.1. Ever since *In re Holladay*, the rule in the Eleventh Circuit has been that "[a]n applicant must show a reasonable likelihood that he would benefit from the new rule he seeks to invoke in a second or successive petition." *In re Henry*, 757 F.3d 1151, 1161–62 (11th Cir. 2014).

The Eleventh Circuit repeatedly applied that rule after receiving numerous successive applications based on *Johnson*. Although this Court in *Welch* declared *Johnson* to be a new retroactive rule of constitutional law, the Eleventh Circuit denied numerous *Johnson*-based applications in 2016 because, in its view, the prisoner would not prevail on the merits of his claim. For example, and doing so in many published opinions, the Eleventh Circuit denied authorization because it determined that: particular offenses continued to trigger a sentencing enhancement even without the residual clause, *see St. Hubert*, 918 F.3d at 1207 (Martin, J., dissenting from denial of rehearing en banc) (collecting just a fraction of these decisions); *Johnson*'s rule did not apply to the Sentencing Guidelines, *see In re Griffin*, 823 F.3d 1350, 1354–56 (11th Cir. 2016); the prisoner could not show, based on the record, that the sentencing judge had actually relied on the residual clause, *see In re Thomas*, 823 F.3d 1345, 1349–50 (11th Cir. 2016); the prisoner would not "benefit" from *Johnson* due to the concurrent sentence doctrine*, In re Williams*, 826 F.3d 1351, 1356–57 (11th Cir. 2016), etc... Notably, "some of these opinions decided the merits of claims in the face of dissents . . . warning that the heavily abridged second or successive application procedures are ill-suited to answering such questions." *St. Hubert*, 918 F.3d at 1207 (Martin, J., dissenting from denial of rehearing en banc).

This all came to a head in *St. Hubert*, where six of the court's active judges wrote separately from the denial of rehearing en banc to address the court's handling of successive applications. As relevant here, Judge Martin argued that the "language of th[e] statute simply does not authorize the courts of appeal to make merits

decisions about the correctness of an inmate's sentence," and the court was "not empowered by the statute to decide in the first instance whether an inmate is entitled to relief." *Id*. at 1203. Yet, she lamented, "[i]n considering hundreds of applications . . . , this Court has denied authorization to prisoners who plainly made out a prima facie case that they could meet the requirements of the statute, based on the panel's view that the prisoner would later lose on the merits anyway." *Id*. at 1204. In her view, that was a "direct violation of the text of § 2244(b)(3)(C)," *id*., and so the court had "routinely exceeded its statutory mandate," *id*. at 1206. She observed that "[o]ther courts agree that the standard for allowing a second or successive petition should be interpreted permissively and should not involve a merits analysis of the claim." *Id*. at 1206 (citing *In re Hoffner*, 870 F.3d at 308 and *Ochoa*, 485 F.3d at 541).

Concurring in the denial of rehearing en banc, Judge (William) Pryor wrote a lengthy opinion "defend[ing] our commonsense practice of denying prisoners' applications to file doomed collateral challenges that cannot possibly bring them relief." *Id*. at 1184. In his view, the prima facie standard "is not blind to the merits. On the contrary, it *requires* a reasonable likelihood of success on the merits." *Id*. at 1185 (quotation omitted). That was the standard required "[un]der *Holladay*'s sensible regime." *Id*. at 1187. And, although the Tenth Circuit had "disagree[d] with *Holladay*," Judge Pryor emphasized that it remained "binding precedent" and, in his view, properly "executed [the court's] statutory mandate." *Id*.

With Judge Pryor's view prevailing, the Eleventh Circuit continued making merits rulings on *Davis*-based applications. In *In re Navarro*, 931 F.3d 1298 (11th

Cir. 2019), for example, that court denied a *pro se* successive application because, based on its preliminary review of the record, the § 924(c) conviction was clearly predicated not just on Hobbs Act conspiracy (which was no longer a "crime of violence") but also on drug offenses (which remained viable predicates). As a result, the court concluded, the petitioner had "not made a prima facie showing that his § 924(c) conviction may be unconstitutional in light of *Davis*." *Id.* at 1302–03 & n.4. As explained above, that Eleventh Circuit relied on *In re Navarro* to deny Petitioner's *Davis*-based applications, even though the record in his case was not at all clear.

2. Although not as frequent or consistent as the Eleventh Circuit, other circuits have also occasionally decided merits questions at the authorization stage. In the *Atkins* context, for example, the Fifth and Sixth Circuits required prisoners to make a prima facie showing that they were in fact mentally retarded. *See In re Bowling*, 422 F.3d 434, 436 (6th Cir. 2005); *In re Morris*, 328 F.3d 739, 740–41 (5th Cir. 2003). These circuit decisions, along with the Eleventh Circuit's decision in *In re Holladay*, were later expressly rejected by the Tenth Circuit. *Ochoa*, 485 F.3d at 545.

The circuits also divided in considering whether to authorize *Johnson*-based § 2255 motions in cases that arose in the context of the Guidelines. For example, in *Donnell*, the Eighth Circuit denied authorization because it believed that *Johnson*'s application to the Guidelines would have created a second new rule. 926 F.3d at 1017. In so doing, the Eighth Circuit declined to follow a contrary Tenth Circuit decision, *id.* at 1017 (citing *In re Encinias*, 821 F.3d 1223 (10th Cir. 2016)), and the Third Circuit later declined to follow *Donnell*, *In re Hoffner*, 870 F.3d at 311–12.

The Fifth Circuit issued a similar merits decision in *In re Arnick*, 826 F.3d 787 (5th Cir. 2016). Although the circuits were then divided over *Johnson*'s application to the Guidelines, the Fifth Circuit denied authorization because this Court had not yet addressed that issue. *Id*. at 788. Supported by five other judges, *id*. at 789 n.1, Judge Elrod dissented, emphasizing that the prisoner's prima facie burden was merely to show that his claim "plausibly relie[d]" on *Johnson*—in other words, whether *Johnson* "substantiates the movant's claim—not whether it conclusively decides his claim" or "whether his reliance is misplaced," *id*. at 789–91.

A divided panel of the Seventh Circuit likewise issued a merits ruling in *Dawkins v. United States*, 809 F.3d 953 (7th Cir. 2016). That court denied authorization for a *Johnson*-based § 2255 motion because, although an issue of first impression, it determined that a prior burglary conviction would remain a "crime of violence" even without the residual clause. *Id*. at 54–56. Judge Ripple dissented because that substantive question was an "important question . . . that we ought to address more carefully than the time constraints statutorily imposed on our consideration of motions under § 2244(b)(3)(D) permit." *Id*. at 956. The court, he explained, had previously "demonstrated great caution by permitting those who present a plausible claim to file their actions in the district court to ensure that the matter is carefully examined. Today, the court deviates from that approach," even though that case "presents significant questions of fact and law and the stakes are high in terms of the human costs to Mr. Dawkins." *Id*. at 958. *See also Reyes v. United States*, 998 F.3d 753, 760–61 (7th Cir. 2021) *(*stating, in dictum, that "after an

applicant 'has made a prima facie showing that his application satisfies § 2244(b)'s requirements,' the screening panel 'may not plod along any further,' and the merits determination is up to the district court notwithstanding the screening panel's thoughts on the case") (quoting *In re Stevens*, 956 F.3d at 233–23; brackets omitted).

* * *

In short, the circuits are hopelessly confused and divided on the scope of their gatekeeping review. In light of the conflicting authority above—which dates back to the Tenth Circuit's 2007 decision in *Ochoa*—several lower courts and commentators have recognized this circuit split. *See, e.g.*, App. 37a (Martin, J. dissenting) (noting the "split among circuits about how to perform the gatekeeping function") (quoting *In re Williams*, 898 F.3d at 1109 (Martin, J., specially concurring)); *Evans-Garcia*, 744 F.3d at 240 (1st Cir. 2014) ("The habeas statute does not specify what inquiry, if any, we should make into the merits of a petitioner's reliance on a new constitutional rule at the certification stage. Other circuits have taken divergent approaches."); Lee Kovarsky, Original Habeas Redux, 97 Va. L. Rev. 61, 116 (2011) (noting the "increasingly stark divisions over the authorization protocol in federal appeals courts," "includ[ing] whether Section 2244(b)(3) permits merits consideration of successive petition claims invoking new and retroactively applicable constitutional law"); *see also* Brian R. Means, Federal Habeas Manual § 11:85 (May 2021) ("Courts of appeals differ over whether the prima facie standard is an exacting requirement or a relatively lenient one."). Only this Court can resolve this longstanding and intractable conflict about the meaning and scope of the prima facie standard.

II. Extraordinary Relief Is Warranted Because the Question Presented Is Important and Certiorari Review Is Unavailable

The question presented is an important and recurring one in federal habeas law. And an extraordinary writ is the only avenue for this Court to resolve the split.

1. When this Court issues a new rule of constitutional law with retroactive effect, the stakes are inevitably high. Such rules, by very definition, implicate "a conviction or sentence that the Constitution deprives the State of power to impose." *Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016); *see Edwards v. Vannoy*, 141 S. Ct. 1547, 1555 n.3, 1559–60, 1562 (2021). In the Eighth Amendment context, for example, they call into doubt the legality of capital/LWOP sentences. And, here, *Davis* called into doubt the legality of § 924(c) convictions mandating a five-year consecutive sentence. Despite the gravity of such rules, they are not self-executing. To benefit from them, state and federal prisoners in the successive posture must obtain leave from the court of appeals before they can file a § 2254 petition or § 2255 motion. As a practical matter, then, the prima facie decision determines whether they can get into court to challenge the legality of their convictions and sentences.

But the happenstance of geography now determines whether state and federal prisoners will be able to seek the benefit of new substantive rules. Prisoners in Denver, Philadelphia, Baltimore, Boston, and Los Angeles need only plausibly rely on a qualifying rule of law to make the prima facie showing. Meanwhile, prisoners in Miami, Atlanta, and Mobile must *also* show a reasonable likelihood of prevailing on the merits of such a claim. The arbitrariness of geography should not affect, let

alone determine, whether prisoners can challenge the legality of their convictions and sentences under new rules of constitutional law that this Court has made retroactive.

In addition to these heightened stakes, national uniformity is needed because the courts of appeals make these gatekeeping decisions all the time. In the Eleventh Circuit alone, the court of appeals issued nearly 5,000 such rulings between April 1, 2013 and April 1, 2018. *St. Hubert*, 918 F.3d at 1179 & n.5 (Tjoflat, J., concurring in the denial of rehearing en banc). Those applications flood the courts of appeals any time this Court issues a new rule of constitutional law. For example, in the Eleventh Circuit, there were 2,282 applications from federal prisoners just in 2016, the year this Court made *Johnson* retroactive. *Id*. at 1179. Other circuits were similarly engulfed by a wave of successive applications. The Court should take this opportunity to ensure a uniform prima facie standard—in advance of the next big new rule.

2. Uniformity on the question presented is also important because "reaching the merits at the gatekeeping stage is prone to error and can create bad law." App. 38a–39a (Martin, J., dissenting). And that is true most all in the Eleventh Circuit, which is "out of step with other courts in how it approaches" its gatekeeping determination. *St. Hubert*, 140 S. Ct. at 1729 (Sotomayor, J., respecting the denial of certiorari). Justice Sotomayor recently summarized those practices, which several members of the Eleventh Circuit have criticized over the past five years.

Three practices in particular highlight the dangers of reaching the merits at the gatekeeping stage. First, the vast majority of successive applications are submitted by *pro se* prisoners, and the Eleventh Circuit requires non-capital

prisoners to use a form with limited space for legal argument. 11th Cir. R. 22-3(a). Second, the applications are almost always resolved without hearing from the government or holding oral argument. Finally, the Eleventh Circuit almost always rules on the application within 30 days of the filing, even though every circuit has interpreted § 2244(b)(3)(D)'s deadline to be hortatory. *See St. Hubert*, 140 S. Ct. at 1727, 1729 (Sotomayor, J., respecting the denial of certiorari); App. 39a (Martin, J., dissenting). That truncated decision-making process "can result in mistakes." *St. Hubert*, 918 F.3d at 1191 (Jordan, J., concurring in the denial of rehearing en banc).

But if an applicant receives a mistaken merits rulings at the gatekeeping stage, there is no way for him to remedy that error due to § 2244(b)(3)(E)'s prohibition on rehearing and certiorari petitions. "*Sua sponte* rehearing appears to be the only practically conceivable remedy for a mistake," but that "is not much of a failsafe" in reality, *St. Hubert*, 918 F.3d at 1198 n.4 (Wilson, J., dissenting from the denial of rehearing en banc), and it is "certainly not the norm in appellate procedure," *id.* at 1191 (Jordan, J., concurring in the denial of rehearing en banc). The upshot is that state and federal "prisoners in Alabama, Florida and Georgia may [wind up] serving illegal sentences for which they have no remedy." App. 40a (Martin, J., dissenting).

That danger, however, is minimized where the district court is permitted to assess the merits in the first instance. If the district court denies relief, the prisoner can appeal to the court of appeals. And if the court of appeals denies relief, the prisoner can seek certiorari review in this Court. "That's three possible levels of review on the merits" of a new-rule claim, "which is appropriate for someone who may

be serving an unlawful sentence." *Id.* But where the court of appeals issues an adverse merits ruling at the gatekeeping stage, that's it: "only one level of review that [is] insulated from any further review by the Supreme Court or en banc scrutiny." *Id.*

3. In light of the importance of the question presented, there must be some way for this Court to ensure that the courts of appeals are uniformly applying the prima facie standard. An extraordinary writ is the only avenue available because, as explained, § 2244(b)(3)(E) strips this Court of its primary certiorari jurisdiction.

In *Felker v. Turpin*, 518 U.S. 651 (1996), the Court held that the § 2244(b)(3)(E)'s bar on certiorari review did not violate the Constitution because this Court retained the ability to entertain original habeas petitions. *See id.* at 660–62. Three Justices wrote separately to emphasize that § 2244(b)(3)(E) also did not restrict this Court's jurisdiction to resolve certified questions or to issue extraordinary writs under the All Writs Act. *Id.* at 666 (Stevens, J., concurring); *id.* at 667 (Souter, J., concurring). But, they emphasized, "if it should later turn out that [those] statutory avenues . . . for reviewing a gatekeeping determination were closed, the question whether [§ 2244(b)(3)(E)] exceeded Congress's Exceptions Clause power would be open"; and that "question could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard." *Id.* at 667 (Souter, J., concurring).

That divergence has now come to pass. And because the Eleventh Circuit has refused to certify the prima facie question to this Court, an extraordinary writ is the only way for this Court to resolve the circuit conflict. If such writs were unavailable, the constitutional problems identified in *Felker* would be revived. Thus, if *Felker*

meant what it held, the Court should use an extraordinary writ to ensure uniformity in the gatekeeping standard. The circuits have been divided on what is required to make a prima facie showing for 15 years; the time has come to resolve the confusion.

The requirements for extraordinary relief are otherwise satisfied. For the reasons above, Petitioner has shown that "exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. It is also clear that mandamus relief would "be in aid of the Court's appellate jurisdiction." *Id*. By directing the Eleventh Circuit to grant Petitioner leave to file a successive § 2255 motion, this Court would "confine [that] inferior court to a lawful exercise of its prescribed jurisdiction" and "compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Mandamus also requires that such relief be "clear and indisputable." *Cheney v. U.S. Dist. Court of D.C.*, 542 U.S. 367, 381 (2004) (quotation omitted). As explained below, it is here.

III. The Eleventh Circuit's Merits-Based Approach Is Clearly Wrong

The Eleventh Circuit's merits-based approach to the prima facie determination contravenes the text, structure, and purpose of 28 U.S.C. §§ 2244(b) and 2255(h)(2).

1. The plain text resolves the issue. Section 2255(h)(2) requires a second or successive § 2255 motion to "contain" a qualifying rule of law. And § 2244(b)(3)(C), as incorporated by § 2255(h), requires the prisoner to "make[ ] a prima facie showing that [the § 2255 motion] satisfies the [gatekeeping] requirements" in § 2255(h)(2). Read together, then, §§ 2244(b)(3)(C) and 2255(h)(2) require a federal prisoner to

make a "prima facie showing" that his § 2255 motion "contains" a qualifying rule of law. Critically, the sole object of the prima facie showing is the gatekeeping criteria itself. Nothing in the statutory text requires prisoners to make a further showing that their new-rule based claim will likely succeed on the merits.

Moreover, the lower courts have agreed that a § 2255 motion "contains" a new rule of law where it "relies on" such a rule. That reliance language comes from the otherwise-identical gatekeeping criteria for state prisoners in 28 U.S.C. § 2244(b)(2)(A). *See, e.g.*, *In re Arnick*, 826 F.3d at 789 n.2 (Elrod, J., dissenting) (explaining that §§ 2244(b)(2)(A) and 2255(h)(2) are interpreted interchangeably); *In re Hoffner*, 403 F.3d at 162 n.3 (same); *In re Encinias*, 821 F.3d at 1225 n.2 (same). Inherent in that reliance requirement is a minimal connection between the prisoner's case and the new rule of law; the rule must have some bearing on the prisoner's case. But as long as the § 2255 motion "plausibly relies" on the new rule, such that the "qualifying new rule substantiates the movant's claim," *In re Arnick*, 826 F.3d at 789–90 (Elrod, J., dissenting), the prisoner has made the requisite prima facie showing entitling him to proceed to the district court. No merits showing is required.

To be sure, prisoners who cannot make the prima facie showing would also necessarily lose on the merits. But the inverse is not true; those who *can* make such a showing will not necessarily prevail on the merits. A similar dynamic arises in the context of a certificate of appealability ("COA"), which requires prisoners to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Unlike §§ 2244(b)(3)(C) and 2255(h)(2), the COA statute *does* require a preliminary

showing on the merits of the claim. Even so, "this Court has cautioned that the threshold inquiry is 'not coextensive with a merits analysis' and that any court that 'justifies its denial of a COA based on its adjudication of the actual merits is in essence deciding an appeal without jurisdiction.'" *St. Hubert*, 140 S. Ct. at 1729 n.3 (Sotomayor, J., respecting the denial of certiorari) (quoting *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (cleaned up)). "This principle provides yet another reason . . . to doubt the Eleventh Circuit's practice[ ]" of deciding the merits at the gatekeeping stage. *Id.*

2. The statutory structure confirms that prisoners need not make a prima facie showing as to the merits of their new-rule claim. Congress prescribed a "streamlined procedure with a narrow focus on a fixed set of pre-specified and easily assessed criteria, which would be disrupted by engaging the manifold merits issues raised by potentially complex, fact-bound constitutional claims." *Ochoa*, 485 F.3d at 542. Indeed, this Court has recognized that § 2244(b)(3)(D)'s 30-day "time limit suggests that the courts of appeal do not have to engage in [a] difficult legal analysis." *Tyler v. Cain*, 533 U.S. 656, 664 (2001). Requiring appellate courts to decide thorny merits questions in the first instance—within 30 days and often without counsel, briefing, adversarial testing, oral argument, or the record even—is inconsistent with the decision-making process that Congress devised and the role of appellate courts.

Two additional statutory features confirm that Congress did not foresee merits rulings by the court of appeals. First, after a court of appeals grants leave to file a second or successive motion, § 2244(b)(4) then requires the district court to dismiss the motion "unless the applicant shows that [his] claim satisfies" the gatekeeping

requirements. In other words, the district court must independently determine that the prisoner actually (not just facially) satisfies the gatekeeping requirements before it can proceed to the merits. *See Tyler*, 533 U.S. at 661 n.3 (noting this distinction). It would make little sense for Congress to require the district court to conduct that additional pre-merits gatekeeping review had Congress already charged the court of appeals with conducting a merits review as part of its earlier prima facie inquiry.

Second, § 2244(b)(3)(E)'s prohibition on further review counsels strongly against merits rulings at the gatekeeping stage. Congress envisioned a quick-and-easy screening review by the courts of appeals. And Congress did not want to overburden the courts of appeals and this Court with requests for further review of such rulings. But prohibiting further review of full-blown, error-prone merits rulings—made under a frenzied decision-making process—would be a radical departure from our hierarchal three-tiered system of adjudication. Nothing in the text or structure of §§ 2244(b) and 2255(h)(2) created such an anomalous procedure.

3. Finally, the Eleventh Circuit's merits-based approach upsets Congress's objectives. Although Congress prioritized finality in AEDPA, it still recognized two narrow circumstances in which state and federal prisoners should be permitted to file successive petitions. It determined that, in addition to newly discovered evidence of actual innocence, certain new rules of law should also trump the strong interests in finality. But Congress limited such rules to those that: (1) are constitutional, not statutory; (2) are a clear break from precedent, and thus constitute "new" rules; (3) are made retroactive by this Court, not the lower courts; and (4) were "previously

unavailable" to the petitioner. That stringent gatekeeping criteria itself was supposed to limit successive petitions, as few rules will satisfy that criteria.

The Eleventh Circuit, however, has significantly altered Congress's careful calibration by grafting a merits requirement onto the gatekeeping determination. Not only must a prisoner make a prima facie showing that his § 2255 motion relies on a rare qualifying rule of law; he must also make a prima facie showing that his § 2255 motion will succeed. That additional merits showing makes it much harder for prisoners to get into court to challenge the legality of their convictions and sentences based on the decisions of this Court that Congress prized above all others.

IV. This Case Is an Excellent Vehicle

This case squarely tees up the question presented. In considering whether to grant Petitioner leave to file a successive § 2255 motion, the Eleventh Circuit acknowledged that *Davis* satisfied the gatekeeping criteria in § 2255(h)(2). App. 6a. And the Eleventh Circuit did not dispute that Petitioner's § 2255 motion plausibly relied on *Davis*. Nor could it: his motion sought to challenge the legality of his § 924(c) conviction, and that conviction was based at least in part on an offense (Hobbs Act conspiracy) that all agree is no longer a "crime of violence" in light of *Davis*.

Nonetheless, the Eleventh Circuit denied Petitioner leave to file the successive § 2255 motion because, in its view, he "cannot make a *prima facie* showing that his § 924(c) conviction and sentence is unconstitutional *Davis*." App. 7a; *see* App. 21a (repeating this holding in denying Petitioner's renewed *Davis* application). In other words, the Eleventh Circuit held that he could not make a prima facie showing that

his *Davis* claim would succeed on the merits. That merits ruling directly implicates the circuit split. After all, "[i]f Mr. Blanc's case was before another circuit court, he would have been allowed to file a second or successive § 2255 petition because, based on *Davis*, his claims relies on a qualifying new rule of constitutional law." App. 37a (Martin, J., dissenting) (quotation and emphasis omitted).

This is also an ideal vehicle to resolve the split because Petitioner's *Davis* claim is neither frivolous nor guaranteed to succeed. Where a claim does not even plausibly rely on the new rule, no circuit will authorize it. And where a claim is plainly meritorious, every circuit will authorize it. The circuit split matters most in cases where the claim plausibly relies on a qualifying rule, but there are questions about whether the claim will prevail on the merits. That is this case: Petitioner's § 2255 motion plainly relied on *Davis*, but it also involved "unique circumstances" that the Eleventh Circuit "ha[d] not addressed" before. App. 12a–13a (Martin, J., dissenting). Indeed, no case had addressed a situation where the "the record contain[ed] two different affirmative statements about" the § 924(c) predicate. App. 12a. Here, while parts of the record indicated that the § 924(c) offense was based on both the Hobbs Act conspiracy and the drug-trafficking offenses, the prosecutor affirmatively stated at the plea hearing that the § 924(c) offense was based only on the Hobbs Act conspiracy. Thus, the facts of this case neatly implicate the circuit split regarding the role that the merits should play in the court of appeals' prima facie determination.

Finally, this is an excellent vehicle because Petitioner has done everything in his power to challenge the legality of his § 924(c) conviction based on *Davis*. He filed

two *Davis*-based successive applications with the Eleventh Circuit, an unauthorized § 2255 motion in the district court, a habeas petition under § 2241, and a writ of audita querela. And when all of those avenues were closed, he asked the Eleventh Circuit to certify the prima facie issue to this Court. Because it refused to do so, an extraordinary writ in this Court is the only avenue for Petitioner to obtain relief. And it is the only way for this Court to ensure national uniformity in federal habeas law.

* * *

In sum, the circuits have been divided for the last fifteen years over the "prima facie showing" that state and federal prisoners must make. And although Congress enacted that legal standard twenty five years ago, this Court has never before interpreted it. This case is an ideal vehicle for the Court to resolve the circuit split, and, in doing so, provide much-needed guidance and clarity to the courts of appeals.

CONCLUSION

The Court should set this case for briefing and argument.

Respectfully submitted,

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