No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2023

KEVIN KEITH

Petitioner,

v.

WARDEN, MARION CORRECTIONAL INSTITUTION,

Respondent.

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

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), imposes heightened requirements on a petitioner who attempts to file a "second or successive" habeas petition. 28 U.S.C. § 2244(b)(2). Whether petitioner Kevin Keith meets the heightened requirements is not the subject of this request for certiorari. Rather, the question presented is whether his habeas petition is "second or successive" as used in 28 U.S.C. § 2244(b)(2)—because only a "second or successive" petition must meet those heightened requirements.

This Court has made clear that "second or successive" is a term of art that must be defined in reference to the historical abuse-of-the-writ doctrine, which bars only those claims that could have been (but were not) raised in the first petition. The Court has also made clear that petitions raising newly ripened claims are not "second or successive," because requiring petitioners to file unripe claims in their initial habeas petition contravenes the purposes of AEDPA.

Here, both the District Court and the Sixth Circuit suggested that Keith has a viable *Brady* claim—because the State has repeatedly suppressed material exculpatory evidence in his case. Indeed, the State conceded during oral argument that *Brady* violations had been committed. But these courts nonetheless dismissed that claim, finding that his petition is "second or successive" and that he could not meet the heightened requirements of § 2244(b)(2). Accordingly, this case squarely presents the following question for review:

Are *Brady* claims "second or successive" under 28 U.S.C. § 2244(b)(2) when the suppressed evidence comes to light only after the dismissal of an initial federal habeas petition?

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Petitioner Kevin Keith respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, denying Keith's motion to retransfer/remand his petition and treat it as a first petition, is included in the Appendix at Appendix C, A-42.

The opinion of the United States District Court for the Northern District of Ohio, denying Keith's successor habeas petition, is included in the Appendix at Appendix B, A-22.

The opinion of the United States Court of Appeals for the Sixth Circuit, denying appeal of the denial of his successor habeas petition, is included in the Appendix at Appendix A, A-3.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its decision on August 15, 2023. Keith received an extension of time to file his brief on January 12, 2024. This petition timely invokes the Court's jurisdiction under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> (b)
>
> (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 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 [28 USCS § 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.
>
> (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.

28 U.S.C. § 2244

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STATEMENT OF THE CASE

I. Keith was convicted and sentenced to death on questionable evidence.

On May 31, 1994, Kevin Keith was sentenced to death for a triple murder. To convict Keith, the State primarily relied on: forensic testimony from Ohio Bureau of Criminal Investigation ("BCI") analyst Michele Yezzo that purported to link Keith to the scene via tire tracks and a license-plate snow imprint; two cross-racial eyewitness identifications; and the fact that Keith had motive because he was one of nine people previously arrested in a drug raid, and the victims' family member, Rudel Chatman, had been an informant for that raid.

This evidence was shaky from the outset. One of the eyewitnesses was in a neighboring apartment when she saw a man leaving the scene. She originally told police (on two occasions) that she would not be able to recognize the man if she saw him again, but then, weeks later, identified Keith after seeing him on television. Appendix D, A-54-59. The second eyewitness—surviving victim Richard Warren—told four different people immediately after the shooting that he did not know who the shooter was; it was simply a "masked man." Appendix E, A-60-67. But he then later "remembered" the name "Kevin" (though he admitted he did not know if it was he or the police who first mentioned that name) and picked Keith out of a highly biased photo line-up. Appendix F, A-68-75. And the motive evidence was weak too. Keith—with no gun-related criminal history—was ultimately charged with (but never tried for) selling less than three grams of crack cocaine. Appendix G, A-76.

Rudel Chatman, however, had served as an informant for far bigger investigations targeting individuals with far more extensive (and violent) criminal backgrounds. Appendix H, A-77-79.

Other evidence exculpated Keith. Two people provided strong alibi testimony at trial, and additional alibi witnesses have provided sworn statements in the years since. Appendix I, A-80-91. The State theorized that Keith had been driving a particular car, but it did not match the witness's description, nor did forensic testing reveal anything—blood, fingerprints, etc.—linking Keith to the car (or to the crime scene writ large). Appendix J, A-92-102. And the surviving seven-year-old victim told police that the shooter was her "Daddy's friend Bruce" and, when shown Keith's picture, confirmed Keith was *not* the shooter. Appendix K, A-103-109. The jury nonetheless convicted, largely based on the expert forensic testimony from analyst Yezzo linking Keith to the scene by "matching" tire tracks and a license plate snow imprint to the car the State alleged Keith was driving. Appendix L, A-110-122.

II. Since his trial, and after Keith's initial habeas proceedings, Keith has repeatedly discovered material exculpatory evidence.

As the years passed, evidence favorable to Keith and suppressed by the State began to trickle out, further undermining the State's already dubious case. In 2007, about two months after Keith's first habeas proceedings ended, and in a casefile entirely unrelated to Keith's case, Keith's counsel learned that at the time of trial, the State had strong evidence implicating brothers Bruce and Rodney Melton—friends of the surviving child-victims' father. Among other things, Keith learned that

two weeks before the murders, Rodney had told a confidential informant that he had been paid money to "cripple" Rudel Chatman—the person who police theorized was the target of the killings in Keith's case. Appendix M, A-123-124. S*ee also Keith v. Hill*, 78 F.4th 307, 313 (6th Cir. 2023) ("In 2007, Keith discovered that the prosecution had withheld a second set of materials: the State Pharmacy Board's file on the investigation of Bruce and Rodney Melton. The file revealed that the Meltons had 'spread the word that anybody that snitches on them would be killed'; that Rodney wore a type of mask similar to the one described by Warren and Quanita; and that Rodney owned a yellow Impala and had previously had a license plate which included '043.' It also showed that Rodney Melton had bragged to a coconspirator that he had been paid $15,000 to 'cripple' or 'off' Rudel Chatman.").

In 2010, three years after the conclusion of Keith's initial round of federal habeas, he also discovered evidence thoroughly discrediting the State's theory of how Richard Warren recalled the name "Kevin." At trial, Warren's nurse testified that he had called the police to tell them that Warren had identified a shooter as a man named "Kevin" at 5:00 a.m. after Warren came out of surgery—critically, *before* police had questioned Warren and potentially tainted his memory. Appendix N, A-126-131. *See also* Keith Supp. Briefing, Appendix O, A-132-143. Accordingly, Keith's trial counsel had served a subpoena on the Bucyrus Police Department for "all records, including radio dispatch logs, of all call-ins" during the relevant time. Appendix P, A-144. Unbeknownst to Keith (and discovered only in 2017), the police deliberately refused to comply with that subpoena—they wrote "Ignore for now" on their copy. *Id.*

Then, in 2007 when Keith again requested the call records while he was sitting on death row, the Bucyrus Police Department told him "[n]o such daily phone log existed." Appendix Q, A-145. Keith would later learn through sworn testimony in another case, however, that the Bucyrus Police Department *does* prepare a "contemporaneous radio log" of all the police station's incoming phone calls, and in 2010 he was able to obtain the "radio log" for the relevant time period. Appendix R, A-146-154. That radio log revealed no call from Warren's nurse. *Id.* at A-152.

On September 2, 2010, then-Governor Ted Strickland commuted Keith's death sentence to life imprisonment, citing doubts about his guilt. But even after the commutation, more evidence leaked. In January 2016, nine years after Keith's initial round of habeas, Keith's counsel saw an article in the Cleveland Plain Dealer referencing BCI analyst Yezzo—the expert who had linked the car to the crime scene—and her work on a case involving a man named Jim Parsons. Appendix S, A-155. This prompted Keith's counsel to obtain Yezzo's BCI personnel file from Parsons' counsel. Appendix T, A-156. The file revealed a long history of mental instability and untrustworthy forensic analysis. In January 2009, Yezzo resigned after being reprimanded for her "interpretational and observational errors" "that could lead to a substantial miscarriage of justice." Appendix U, A-157-59. The problems with Yezzo's work were well known long before she testified at Keith's trial, however. For example, a 1989 memorandum documented the "consensus" within BCI that Yezzo's "findings and conclusions regarding evidence may be suspect. She will stretch the truth to satisfy a department." Appendix V, A-160. And an investigation of Yezzo in the

summer of 1993 (almost a year before Keith's trial) revealed that Yezzo had a "reputation of giving dept. answer[s] [it] wants if [they] stroke her." Appendix W, A-161. During this time, other analysts reworked some of Yezzo's cases and seriously questioned the validity of her conclusions. *Id.* Other documents revealed that Yezzo was racially biased, as she used racial slurs in the workplace. Appendix X, A-162-165. Then in 1993—less than a year before she testified against Keith—Yezzo was placed on administrative leave for "threatening co-workers and failure of good behavior." Appendix Y, A-166-167. Less than two weeks before a hearing on her suspension, on May 12, 1994, Yezzo testified against Keith. She did so via deposition, which was allowed only for "material" and unavailable witnesses. Ohio R. Crim. Proc. 15(A). None of this information was disclosed to Keith's counsel, so none of it was used to impeach Yezzo at trial.

III. Keith has diligently litigated his *Brady* claims.

Keith has, over the years, filed three new-trial motions based on the newly discovered evidence from 2007, 2010, and 2016, pursuant to claims under *Brady v. Maryland*, 373 U.S. 83 (1963). The State has argued in response that Keith should have discovered the evidence sooner or that it was not material to his case. Each time, the state courts agreed with the State.

With respect to Keith's current claims, which involve Yezzo's personnel file and the deliberately ignored subpoena, the state court found Keith had not demonstrated the prejudice necessary to make out a *Brady* claim, though the court failed to evaluate the suppressed evidence as a whole, as required by this Court's precedent.

When Keith filed his federal habeas petition, the district court transferred the petition to the Sixth Circuit, over Keith's objection that his *Brady* claims should not be treated as "second or successive" under § 2244(b). Appendix Z, A-168-182.

Upon the transfer, the Sixth Circuit granted Keith's request to file a successive habeas petition, finding that Keith had "made a *prima facie* showing that no reasonable fact finder would have found him guilty" in light of "the evidence as a whole." *In re Keith*, No. 18-3544, 2018 WL 8807240, at *6-7 (6th Cir. Oct. 26, 2018). The court explained that "Keith has diligently pursued exculpatory and impeachment evidence" and that the "new evidence goes to the 'core' of the government's case." *Id.* at *6; *see also id.* at *7 ("The impeachment value of this evidence cannot be understated, particularly given that Yezzo's forensic analysis of the license plate was one of the 'core' elements of the government's case against Keith."); *id.* ("The evidence regarding the Bucyrus Police Department's deliberately ignoring the subpoena is also significant impeachment evidence; it undermines the government's theory that the police learned about Keith's identity as the shooter from a nurse who called the Bucyrus Police Department after Warren emerged from surgery."). Thus, Keith was permitted to file his petition.

The district court, however, dismissed Keith's petition. Appendix B. It held that Keith had not made the showing under § 2244(b)(2)(B)(ii) that no reasonable juror would have found him guilty beyond a reasonable doubt. *Id.* at A-35-39. It ended the opinion, however, by noting that "[t]his case, more than most, demonstrates the tragic result of subjecting Brady claims to § 2244(b)'s gatekeeping requirements." *Id.*

At A-39-40.

Keith appealed to the Sixth Circuit, and he again included the argument that his petition should not be treated as second or successive and subjected to the requirements of § 2244(b)(2)(B). The Sixth Circuit affirmed the district court. It found that "considering only the evidence at trial and the new evidence relied upon by Keith post-trial," "we think that only some—and perhaps most—jurors likely would find reasonable doubt." *Keith v. Hill*, 78 F.4th 307, 317 (6th Cir. 2023). But it nonetheless found that Keith had failed to meet the requirements of § 2244(b)(2)(B)(ii), and in doing so it relied on additional information in police reports that the State itself never introduced at trial, that the government itself has never relied on in contesting Keith's numerous petitions and appeals, and the reliability of which has never been tested. *See id.* at 319 (White, J., concurring).[1] The court did not address Keith's argument that his petition should not be subject to the requirements of § 2244(b)(2)(B)(ii) in the first instance.

Ultimately, because of § 2244(b)(2)(B)(ii), neither the district court nor the Sixth Circuit ever reached the merits of Keith's *Brady* claims.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly explained that not all subsequent habeas petitions are considered "second or successive" for purposes of 28 U.S.C. § 2244. For example,

[1] Because the information relied on by the Sixth Circuit panel had never been the subject of briefing, Keith was unable to address that information—information that is provably unreliable.

in *Panetti* v. *Quarterman*, 551 U.S. 930 (2007), this Court held that a petition bringing a claim that was not ripe when the petitioner filed his first-in-time petition is not "second or successive." *Panetti* applies equally to *Brady* claims that are only discovered by a petitioner after he has concluded his first round of federal habeas.

Yet the United States Court of Appeals for the Sixth Circuit has determined that *Brady* claims ripen when the government suppresses the evidence, regardless of when the petitioner discovers it. While some responsibilities can be assigned to a petitioner, this Court's jurisprudence concerning *Brady* claims has always made clear that the rule is not that the prosecutor may hide and the defendant must seek.

The Sixth Circuit's rule also conflicts with this Court's precedent regarding the definition of "second or successive" petitions and would lead to absurd results that contravene the very purpose of 28 U.S.C. § 2244. This Court should therefore clarify that *Brady* claims demonstrably discovered post-habeas are not "second and successive." Keith's case is an ideal vehicle for doing so.

I. The Sixth Circuit's rule subjecting newly-discovered *Brady* claims to 28 U.S.C. §2244(b) contravenes this Court's precedent on the meaning of "second and successive" petitions.

"Although Congress did not define the phrase 'second or successive,' as used to modify 'habeas corpus application under section 2254,' §§ 2244(b)(1)-(2), it is well settled that the phrase does not simply refe[r] to all § 2254 applications filed second or successively in time." *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (internal citations omitted). Instead, the term "second or successive" "is a term of art" that is "given substance in [] prior habeas corpus cases," *Slack v. McDaniel*, 529 U.S. 473,

486 (2000), including those "predating AEDPA's enactment," *Banister v. Davis*, 140 S.Ct. 1698, 1705–06 (2020) (brackets omitted).

To determine what qualifies as "second or successive," courts "look[] for guidance in two main places." *Id.* First, courts consider "historical habeas doctrine and practice" and ask "whether a type of later-in-time filing would have constituted an abuse of the writ, as that concept is explained in [] pre-AEDPA cases." *Id.* (brackets and quotation marks omitted). A petitioner abuses the writ "by raising a claim in a subsequent petition that he could have raised in his first." *McCleskey v. Zant*, 499 U.S. 467, 489 (1991). If a petitioner raises a claim that would have been an abuse of the writ under this Court's pre-AEDPA cases "it is successive; if not, likely not." *Banister*, 140 S.Ct. at 1706. Second, courts must consider "the implications for habeas practice" given "AEDPA's own purposes" of "conserv[ing] judicial resources, reduc[ing] piecemeal litigation, and lend[ing] finality to state court judgments within a reasonable time." *Id.* (quotation marks omitted).

In *Panetti* v. *Quarterman*, 551 U.S. 930 (2007), this Court held that a petition bringing a claim that was not ripe when the petitioner filed his first-in-time petition is not "second or successive." This Court explained that requiring "unripe (and, often, factually unsupported) claims to be raised as a mere formality" in the first petition does nothing to "conserve judicial resources, reduce piecemeal litigation, or streamline federal habeas proceedings." *Id.* at 946–47 (brackets and quotation marks omitted). Nor would those claims be barred by the historical abuse-of-the-writ doctrine, as "claims of incompetency to be executed remain unripe at early stages of

the proceedings" and so could not have been brought earlier. *Id.* at 947. And the Court refused to interpret § 2244(b) "in a manner that would require unripe (and often factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Id*. As a result, § 2244(b)'s statutory bar does not apply to a "claim brought in an application filed when the claim is first ripe." *Id.*

Justice Sotomayor has highlighted that *Panetti*'s reasoning "applies with full force to *Brady* claims" where the "petitioner is not aware of that evidence until after the first-in-time petition." *Storey v. Lumpkin*, ___U.S.___, 142 S.Ct. 2576, 2578 (2022) (Mem.) (Sotomayor, J., concurring with denial of certiorari); *see also Bernard v. United States*, 141 S.Ct. 504, 505–07 (2020) (Mem.) (Sotomayor, J., dissenting from denial of certiorari).

The Sixth Circuit noted that this Court "has carved out three circumstances when a petition is second in time but isn't 'second or successive.'" *In re Hill*, 81 F.4th 560, 568 (6th Cir. 2023). The first is when a second petition raises a claim that challenges a new state-court judgment. *Id.* (citing *Magwood*, 561 U.S. at 339). The second is a "petition containing a claim—whether presented or not in the first petition—that would have been unripe at the time of the filing of the first petition." *Id.* at 568 (citing *Panetti*, 551 U.S. at 943–45). The third is when a subsequent habeas petition "contains a claim that, though raised in the first petition, was unexhausted at that time and not decided on the merits." *Id.* at 568–69 (citing *Slack*, 529 U.S. 473).

Instead of including post-habeas *Brady* claims in the second, unripe category, the Sixth Circuit has rejected this approach and instead subjected petitions based on

a previously unknown *Brady* claim to §2244(b). *See In re Wogenstahl*, 902 F.3d 621, 627–28 (6th Cir. 2018). The Sixth Circuit has erroneously determined that *Brady* claims become ripe when the event giving rise to the claim occurs; thus, when the government suppresses the evidence at the time of trial. *Id.* When a petitioner has already filed a habeas petition, and he is now raising a *Brady* claim that he did not include in their original petition, he must pass through the gatekeeping mechanism of § 2244(b)(2)(B). *Id.* at 628.

In other words, it does not matter if the petitioner had no knowledge or indication that the government has suppressed exculpatory evidence at the time of trial. He is essentially tasked with the responsibility to raise factually unsupported *Brady* claims in the hopes that the claim will eventually bear fruit—all before his first habeas application is dismissed.

Several judges and panels of the Courts of Appeals are struggling with the question of how to treat *Brady* claims that are discovered after the first round of habeas. Many have determined that subjecting these claims to the second or successive standard is wrong. *See Long v. Hooks*, 972 F.3d 442, 486 (4th Cir. 2020) (Wynn, J., concurring, joined by Thacker, J. and Harris, J.) ("*Long concurrence*") (urging for the Fourth Circuit precedent to be overturned because "*Brady* claims, as a category, represent a good candidate for exclusion from the 'second or successive' requirements. After all, such claims relate to *suppression of material, favorable evidence by the state*."); *Brown v. Muniz*, 889 F.3d 661, 668 n.5 (9th Cir. 2018) ("[S]hould exculpatory evidence be discovered by the State *after* the first

habeas petition is filed, and is thereafter suppressed by the State over the course of post-conviction proceedings, [the second-or-successive rules would not apply because] . . . the new claim would not have been ripe at the time of the initial filing."); *In re Jackson*, 12 F. 4th 604, 611–16 (6th Cir 2021) (Moore, J., concurring) ("*Jackson concurrence*") (opining that *Wogenstahl* was wrongly decided); *Douglas v. Workman*, 560 F.3d 1156, 1193 (10th Cir. 2009) (declining to apply the §2244(b)(2) requirements where a prosecutor acted affirmatively to conceal the facts underlying the petitioner's *Brady* claim until after he filed his first habeas petition, since to do so "would be to allow the government to profit from its own egregious conduct," and "[c]ertainly that could not have been Congress's intent when it enacted AEDPA"); *see also Storey*, 142 S.Ct. at 2578; *Bernard*, 141 S.Ct. at 505–07. Indeed, the Eleventh Circuit recently stated that subjecting newly-revealed, actionable *Brady* violations to AEDPA's gatekeeping criteria for second-or-successive petitions "eliminates the sole fair opportunity for these petitioners to obtain relief." *Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018).

Brady claims that are discovered post-habeas are indistinguishable from *Ford* claims when determining whether they are "second or successive." In *Panetti*, the Court focused on three considerations: (1) the "implications for habeas practice" of treating the habeas petition as second or successive; (2) AEDPA's purposes; and (3) the abuse-of-the-writ doctrine. *See Panetti*, 551 U.S. at 942–48; *see also Bannister*, 140 S.Ct. at 1706 (noting that "historical precedents and statutory aims" guide this Court's determination as to what qualifies as second or successive). When it comes to

Brady claims, all of those factors counsel the same conclusion: *Brady* claims discovered post-habeas are not "second or successive" under 28 U.S.C. § 2244(b)(2).

Implications for habeas practice. Because undiscovered *Brady* claims are, in fact, undiscovered, they are unripe by definition. A *Brady* claim—like all claims—is "ripe" when the facts of the case demonstrate an existing "controversy 'ripe' for judicial resolution." *Reno v. Catholic Social Servs.*, 509 U.S. 43, 57 (1993) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)); *see also Abbott Laboratories,* 387 U.S. at 149 ("The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."). No controversy exists if the harmed party does not yet even know that their constitutional rights have been violated by the suppression of favorable, material evidence.

Moreover, "*Brady* claims almost necessarily will not be included in an initial petition" because "in most cases, the petitioner will have no way of knowing he has a Brady claim to raise until it is too late"—after all, he must file his initial petition within a year of the conclusion of direct review. *Long concurrence*, 972 F.3d at 487 (citing 28 U.S.C. § 2244(d)(1)). Subjecting *Brady* claims to § 2244(b) therefore creates several "perverse" incentives. *Panetti*, 551 U.S. at 943.

First, it "perversely rewards the Government for keeping exculpatory information secret until after an inmate's first habeas petition has been resolved." *Bernard*, 141 S. Ct. at 506–07. "Such an incentive structure promotes neither the interests of justice nor finality." *Long concurrence*, 972 F.3d at 488.

Second, it obliges "conscientious defense attorneys . . . to file unripe (and, in many cases, meritless) [*Brady*] claims in each and every" first petition to preserve then-hypothetical claims on the chance that a *Brady* violation will eventually be disclosed. *Panetti*, 551 U.S. at 943. That is unworkable. Rule 2(c) of the Rules Governing Habeas Corpus Cases requires that habeas petitioners plead their claims with particularity and "state the facts supporting each ground." Habeas Corpus Rule 2(c). A petitioner cannot plead with particularity a claim for which they have never obtained the evidence. And requiring them to do so runs counter to *Strickler v. Greene*, 527 U.S. 263, 286 (1999); *see infra* at 21-22. Moreover, if a petitioner with such a suspicion raises the claim in the hopes of developing it, they will then preclude themselves from even the possibility of having a *Brady* claim considered in a second habeas application. A petitioner cannot bring the same claim in a second petition that was "presented in a prior application." 28 U.S.C. § 2244(b)(1).

Consider the following scenario. The defendant suffers a *Batson* violation (known to the defendant) and a *Brady* violation (unknown to the defendant). The defendant must choose from the following: (1) file a timely petition asserting a *Batson* claim but omitting a *Brady* claim; (2) file a timely petition asserting a *Batson* claim and a (then-factually-baseless) *Brady* claim; or (3) decline to file any petition, thereby forfeiting his *Batson* claim, and wait to see if the State might disclose *Brady* evidence years down the road (after which he could rely on § 2244(d)(1)(D) to assert a timely Brady claim). Only in the first scenario would his *Brady* claim be subject to § 2244(b)(2)'s heightened requirements. Thus, the rule imposed by the Sixth Circuits

encourages options two and three: filing factually baseless claims or foregoing other important constitutional claims. That cannot be what Congress intended. This catch-22 strongly suggests that undiscovered *Brady* claims do not qualify as "second or successive."

AEDPA's purposes. Congress enacted AEDPA to advance "the principles of comity, finality, and federalism," and the Sixth Circuit's approach serves none of those. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). This Court considered those purposes and noted the following in *Panetti*:

> An empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies. *See Duncan, supra,* at 178, 121 S. Ct. 2120, 150 L. Ed. 2d 251. Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, "reduc[e] piecemeal litigation," or "streamlin[e] federal habeas proceedings." *Burton v. Stewart*, 549 U.S. 147, 154, 127 S.Ct. 793, 797, 166 L. Ed. 2d 628 (2007) *(per curiam)* (internal quotation marks omitted). AEDPA's concern for finality, moreover, is not implicated, for under none of the possible approaches would federal courts be able to resolve a prisoner's *Ford* claim before execution is imminent.

Panetti, 551 U.S. at 946. Similarly, requiring the filing of unripe and unsupported *Brady* claims does not conserve (and in fact wastes) judicial resources. *See, e.g., In re Jones*, 54 F.4th 947, 950 (6th Cir. 2022) ("But applying § 2255(h)'s gatekeeping requirements to claims like Jones's could well *deplete* judicial resources and increase piecemeal litigation if, say, prisoners responded by packing their first § 2255 petitions with speculative or unripe claims."). And no court—state or federal—can resolve a prisoner's *Brady* claim until the suppressed evidence is discovered and presented.

This Court has repeatedly explained why the standard for habeas relief is so difficult to meet, and one oft-repeated reason for this is because it "disturbs the State's significant interest in repose for concluded litigation." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (internal citations omitted); *see also Shinn v. Ramirez*, 596 U.S. 366 (2022); *Shoop v. Twyford*, 596 U.S. 811, 820 (2022). But the problem with subjecting *Brady* claims to §2244(b) is that it undermines that interest. If the government has a significant interest in concluding the litigation, then it undermines its own interest by keeping exculpatory information secret until after an inmate's first habeas petition has been resolved.

The abuse-of-the-writ doctrine. In defining "second or successive", the Court has asked "whether a type of later-in-time filing would have constituted an abuse of the writ, as that concept is explained in our pre-AEDPA cases. If so, it is successive; if not, likely not." *Banister*, 140 S.Ct. at 1706 (2020) (internal citations omitted). A petitioner abuses the writ "by raising a claim in a subsequent petition that he could have raised in his first." *McCleskey v. Zant*, 499 U.S. 467, 489 (1991). Conversely, petitioners who raise claims that they could not have raised in a prior habeas petition have not abused the writ. *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005); *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003); *Crouch v. Norris*, 251 F.3d 720, 724 (8th Cir. 2001).

After considering this doctrine, this Court has made clear that AEDPA's "second or successive" bar did not preclude Panetti's second-in-time petition raising a *Ford* claim. *Panetti*, 551 U.S. at 947. As the Court explained, "We are hesitant to

construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Id*. Thus, *Panetti* outlined the ripeness test and requisite analysis for determining whether a claim is second or successive.

An exception for *Brady* claims "aligns with the historical abuse-of-the-writ doctrine." *Jackson concurrence*, 12 F.4th at 614. Under that doctrine "a numerically second petition is 'second' when it raises a claim that could have been raised in the first petition but was not so raised, either due to deliberate abandonment or inexcusable neglect." *Bowen*, 436 F.3d at 704. That does not describe Keith's *Brady* claims. He "had no fair opportunity to raise [them] in his first habeas petition" and so his "petition is not 'second or successive.'" *Magwood*, 561 U.S. at 343 (Breyer, J., concurring in part and concurring in judgment).

II. Evidence concealed by the prosecution is fundamentally different than evidence discovered from a neutral source, and putting an additional burden on the defense is inconsistent with *Brady* and its progeny.

A *Brady* exception would constitute "a limited carve-out for claims that could not be brought sooner because of prosecutorial misconduct, leaving the gatekeeping provisions in place for claims based on other types of newly discovered evidence (for example, a claim of ineffective assistance of trial counsel predicated on counsel's failure to investigate an eyewitness)." *Jackson concurrence*, 12 F.4th at 615–16.

Indeed, the Supreme Court has long recognized a constitutionally significant difference between evidence "available to the prosecutor and not submitted to the defense" and evidence "discovered from a neutral source after trial." *United States v. Agurs*, 427 U.S. 97, 111 (1976). In *Agurs*, this Court determined what standard of materiality that should govern *Brady* claims by looking at it through that lens:

> [T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

Id. at 111.

This distinction abounds in historical habeas practice—for example, "the 'cause' inquiry" for procedural default "turns on events or circumstances 'external to the defense,'" *Banks v. Dretke*, 540 U.S. 668, 696 (2004), and thus "an actual *Brady* violation is itself sufficient to show cause and prejudice" to overcome procedural default. *Jones v. Bagley*, 696 F.3d 475, 486-87 (6th Cir. 2012).

In addition, the resulting obligation on "conscientious defense attorneys . . . to file unripe (and, in many cases, meritless) [*Brady*] claims in each and every" first petition to preserve then-hypothetical claims runs counter to this Court's case law. *Panetti*, 551 U.S. at 943. This Court has stated that "mere speculation that some exculpatory material may have been withheld" is unlikely to rise to the level even to

merit discovery. *Strickler*, 527 U.S. at 286. It went on that "[p]roper respect for state procedures counsels *against* a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them." *Id.* (emphasis added). Certainly, the same respect counsels against raising a *Brady* claim when the facts supporting it have not been discovered.

All of this is why judges around the country have recognized that *Brady* claims are not subject to the heightened requirements of § 2244(b). *See Bernard*, 141 S. Ct. at 504–07; *Storey*, 142 S.Ct. at 2577–78; *Jackson concurrence*, 12 F.4th at 611-616; *Long concurrence*, 972 F.3d at 485–88; *Scott*, 890 F.3d at 1254–57.

III. This case is an ideal vehicle for establishing that post-habeas *Brady* claims are not "second or successive."

This issue is an important one to resolve, and this case is the perfect vehicle to address it. Despite the issue's importance, it will not often make its way to this Court because of the restrictions in § 2244(b)(3)(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." A significant number petitioners with post-habeas *Brady* claims, subjected to "second or successive" status, will fail to make a prima facie showing that they meet the requirements in § 2244(b)(2)(B) and will thus have no further recourse.

Keith's case is unique in that he has preserved this issue in his briefing below, and he was also granted authorization to litigate his claim in district court. That means the record includes findings of his diligence. S*ee Keith*, 78 F.4th at 317 ("Keith

has met the diligence requirement."). It also demonstrates with a full record that he uncovered the exculpatory evidence post-habeas.

Perhaps most significantly, Keith's case perfectly illustrates why applying § 2244(b)(2)(B) to *Brady* claims severely undercuts the constitutional guaranty in *Brady* itself. In determining that Keith could not meet the high bar of § 2244(b)(2)(B)(ii), the panel majority relied upon evidence in the record that the State did not even rely upon at trial. It then stated:

> We thus agree with our concurring colleague—considering only the evidence at trial and the new evidence relied upon by Keith post-trial—that Keith cannot show that every reasonable juror would have reasonable doubt about his guilt. Considering that evidence alone, rather, we think that only some—**and perhaps most—jurors likely would find reasonable doubt.**

Id. (emphasis added). Judge White stated, in her concurrence:

> There is no question that Keith would have had a better chance of acquittal had the *Brady* material been known to his defense team. But that is not the test. Rather, Keith must show that the withheld evidence, 'if proven and viewed in light of the evidence as a whole,' would establish 'by clear and convincing evidence' that, had the evidence been disclosed, 'no reasonable factfinder would have found [him] guilty of the underlying offense.'

Id. at 318 (White, J., concurring).

What this shows is that if Keith had uncovered the suppressed evidence before the completion of his first round of habeas, he would have prevailed in obtaining a new trial, because the evidence "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Instead, simply because the government was successful at hiding exculpatory evidence long enough to outlast his appeals,

Keith was required to meet a much higher burden—one only met by a handful of litigants since AEDPA was enacted—and was unsuccessful. In other words, "perhaps most jurors [] likely would find reasonable doubt" if the State had not violated Keith's constitutional rights. So this case exemplifies why the Sixth Circuit's rule, in practice, forecloses an entire subset of constitutional claims—meritorious *Brady* claims.

CONCLUSION

Numerous judges on various circuit courts of appeals have now found themselves bound by precedent that they feel is wrongly decided. *Brady* violations discovered after the first federal habeas review should not be subjected to "second or successive" status. In the words of the Eleventh Circuit:

> Establishing the correct rule and framework for determining whether any particular second-in-time collateral motion based on a *Brady* claim is cognizable is critically important to maintaining the integrity of our judicial system. No conviction resulting from a fundamentally unfair trial should be permitted to stand. And when a petitioner could not have reasonably been expected to discover an actionable *Brady* violation before filing his first federal collateral-review motion, precluding the filing of a second-in-time petition addressing the newly discovered violation is doubly wrong. It rewards the government for its unfair prosecution and condemns the petitioner for a crime that a jury in a fair trial may well have acquitted him of. This not only corrodes faith in our system of justice, but it undermines justice itself, and it cannot be allowed.

Scott, 890 F.3d at 1243–44.

This Court should grant this petition for certiorari.