No. 25-1003

In the Supreme Court of the United States

ERIC GUERRERO, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Petitioner,

v.

DEXTER JOHNSON,
Respondent.

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

BRIEF FOR THE STATE OF LOUISIANA AND 21 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*

The States of Louisiana, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, and West Virginia, respectfully submit this brief as *amici curiae* in support of petitioner.

Every day, *amici* States exercise their "residuary and inviolable sovereignty" to enact laws and punish violators. *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (citation omitted). This power means little if federal courts can prevent States from enforcing their laws through eternal federal review of convictions and sentences. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). That is why the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) exists. To prevent improper federal overreach, Congress imposed express, stringent limitations on a prisoner's ability to bring a second or successive habeas petition, replacing "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," *McCleskey v. Zant*, 499 U.S. 467, 489 (1991), with clear text found (among other places) in 28 U.S.C. § 2244. That statute bars a second or successive petition with a new claim unless, as relevant here, "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." § 2244(b)(2)(A).

Regrettably, the Fifth Circuit's decision below harkens back to the pre-AEDPA regime. Rather than

hew to § 2244(b)(2)(A)'s text, the Fifth Circuit looked to changing norms, new evidence, and whether various courts across the Nation have adopted a habeas petitioner's latest (and late-arriving) legal theory. This new approach is utterly bizarre and wrong—for under it, a holding of this Court announced years before a prisoner committed his offense can nevertheless be a "new rule" "previously unavailable" to the prisoner. *Cf. id.*

This maneuvering threatens the finality of countless criminal proceedings. A State has no assurance that a conviction and sentence are conclusively resolved if a prisoner is free at any time to cite new developments related to old precedents that had retroactive effect when first announced. Finality "is essential to the operation of our criminal justice system." *Edwards v. Vannoy*, 593 U.S. 255, 263 (2021) (citation omitted). "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality op.). And, once federal habeas relief has already been denied, "the State is entitled to the assurance of finality." *Calderon*, 523 U.S. at 556. Unsettling this expectation of finality "inflict[s] a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." *Id.* (internal citation omitted). AEDPA decrees that this profound injury cannot be inflicted upon *amici* States when a petitioner failed to press a claim that was neither new nor unavailable at the time of his original petition. *Amici* States thus have a profound interest in the reversal of the Fifth Circuit's contrary holding, thereby restoring all States' "sovereign power to punish offenders." *Id.* at 558 (citation omitted).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Since AEDPA's enactment, the States have benefitted from statutes like 28 U.S.C. § 2244(b), which "conserve judicial resources, reduce piecemeal litigation, and lend finality to state court judgments within a reasonable time." *Banister v. Davis*, 590 U.S. 504, 512 (2020) (cleaned up). The Fifth Circuit's reading of § 2244(b)(2)(A) ignores both the statutory text and AEDPA's purpose in favor of judicial notions regarding when a prisoner should be able to bring his claim. In so doing, the Fifth Circuit's holding frustrates States' ability to carry out just punishment for violations of their laws. Accordingly, *amici* States urge the Court to reverse the Fifth Circuit's judgment.

Under § 2244(b)(2)(A), a habeas petitioner may assert a new claim in a second or successive petition only if 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." These "new" and "previously unavailable" requirements establish two timing thresholds: The petitioner's claim must rest on a constitutional (and retroactive) decision of this Court that postdates both his direct appeal, making it "new," and his original federal habeas petition, making it "previously unavailable."

Yet, according to the Fifth Circuit, a "new rule of constitutional law … that was previously unavailable" encompasses decisions announced even before a defendant's conviction becomes final. *Contra Teague*, 489 U.S. at 301. On that view, all that is necessary is that, at some time, the rule was new and made retro-

active, and the petitioner identifies some post-rule development that makes his claim more viable than when he brought his original petition.

That is how the Fifth Circuit remarkably has allowed Respondent Dexter Johnson's new claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), to proceed. There is no dispute that *Atkins* was decided years *before* Johnson kidnapped, raped, and murdered Maria Aparece. *Atkins* was thus not "new" or "previously unavailable" to Johnson in any sense of the English language. And yet, the Fifth Circuit deemed Johnson to fall within § 2244(b)(2)(A) on the theory that his new *Atkins* claim rests on *new guidelines*—namely, the DSM-5 published in 2013—promulgated by the American Psychiatric Association (APA).

It is difficult to overstate how egregiously wrong the Fifth Circuit's decision is—not least because it turns a statute that requires a "new" and "previously unavailable" rule "*by the Supreme Court*," § 2244(b)(2)(A) (emphasis added), into a statute that asks whether *nonprofit organizations* have changed their standards.

Allowing "new diagnostic guidelines," *In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019), to transform decades-old precedent into a new and previously unavailable rule makes a mockery of the well-established meaning of a "new rule." As this Court has explained, "a case announces a new rule if the result was not dictated by precedent existing *at the time the defendant's conviction became final*." *Teague*, 489 U.S. at 301 (emphasis modified). A new rule of constitutional law is not really "new" if it predates the prisoner's crime and conviction. Just as once being young does not make us

forever young, so, too, a rule that was once "new" is not forever new.

By overriding § 2244(b)(2)(A)'s plain text, the Fifth Circuit's reading subjects States to perpetual relitigation of convictions and sentences. So long as a rule was once new and applied retroactively, a petitioner need only keep his claim in his back pocket until new developments make it more viable—and then he can launch his attack at the last minute (here, the eve of execution) when he has accumulated as much new information as possible. That makes a mockery of the AEDPA framework, which was intended to preserve and protect the finality of state court proceedings and foreclose abusive prisoner litigation.

The mayhem portended by this misreading of § 2244(b)(2)(A) is exemplified by *Atkins* claims, where constantly evolving standards issued by nonprofits inform the analysis. *Moore v. Texas*, 581 U.S. 1, 20 (2017). According to the Fifth Circuit, any update to the DSM or a new theory regarding IQ scores or adaptive functioning can authorize a second or successive petition. *In re Johnson*, 935 F.3d at 293; *In re Cathey*, 857 F.3d 221, 227–28 (5th Cir. 2017). A petitioner therefore has every incentive to delay raising an *Atkins* claim. For, if he waits until the eve of execution like Johnson did, he need not worry whether he was intellectually disabled "based strictly on legal rules that were clearly established in the decisions of this Court" at the time of earlier state and federal habeas proceedings. *Cf. Shoop v. Hill*, 586 U.S. 45, 52 (2019).

Beyond the *Atkins* context, the Fifth Circuit's approach spells trouble for any conviction and sentence where the legal landscape is unsettled. After any new

and retroactive decision from this Court holds that the Constitution bars States from criminalizing certain conduct, § 2244(b)(2)(A) authorizes only one new wave of second or successive petitions in the immediate aftermath. But under the decision below, the flood of new petitions will persist for decades as claims will be deemed newly available based on intervening cases interpreting this Court's decisions or discovery of new evidence—just consider the ineffective-assistance-of-counsel context or the Second Amendment context. And while a state prisoner can use this maneuver only once, *see* § 2244(b)(1), federal prisoners are not so bound, *Bowe v. United States*, 146 S. Ct. 447, 466 (2026).

AEDPA sought to end this constant relitigation and direct affront to the finality of state proceedings. The Fifth Circuit has instead enshrined it. This Court should reverse the judgment below.

ARGUMENT

I. CONSTITUTIONAL RULES PREDATING PRIOR HABEAS PETITIONS ARE NEITHER "NEW" NOR "PREVIOUSLY UNAVAILABLE."

Section 2244(b) sharply cabins the claims a state prisoner may bring in a second or successive federal habeas petition. He cannot reassert any claim presented in a prior petition. § 2244(b)(1). And for a claim not previously presented, he must show the claim either (A) "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) has a "factual predicate" that "could not have been

discovered previously through the exercise of due diligence" and, but for the constitutional error, he would not have been convicted. § 2244(b)(2).

Subclause (A) establishes two timing hurdles: the rule at issue must be both (1) "new" and (2) "previously unavailable." § 2244(b)(2)(A); *see Tyler v. Cain*, 533 U.S. 656, 662 (2001) (recognizing these are independent requirements).[1] A petitioner's claim cannot satisfy these requirements unless it relies on a constitutional decision of this Court that postdates both his direct appeal and original federal habeas proceeding. So when a petitioner's second or successive petition asserts a new claim based on a decision of this Court that predated his conviction, § 2244(b)(2)(A) is unavailable to him.

Start with the well-established meaning of a "new rule": a rule that "was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis omitted); *Williams v. Taylor*, 529 U.S. 362, 379–80, 380 nn.11–12 (2000) (recognizing AEDPA codifies *Teague*'s definition of a "new rule"). When deciding whether a rule is new, a court must "survey the legal landscape as of [the date that a defendant's conviction became final] to determine whether the rule later announced … was dictated by then-existing precedent." *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) (emphasis omitted). Logically, therefore, if the rule at issue was announced

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[1] While this Court in *Tyler* paraphrased the text as requiring the "claim" to be "previously unavailable," 533 U.S. at 662, the structure of the clause as well as other provisions of AEDPA make clear that "previously unavailable" modifies "rule." § 2244(b)(2)(A); *see also* § 2254(e)(2)(A)(i); § 2255(h)(2).

before a defendant's conviction became final, it unquestionably is not "new."

This timing element is central to the concept of a "new rule" "made retroactive." Any rule announced before a defendant's conviction becomes final automatically applies to his case. *Edwards*, 593 U.S. at 262 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). For that reason, a court does not need to ask whether a particular decision announced a new and retroactive rule where the defendant's conviction postdates the decision—the rule already automatically applies. It is only where a petitioner's conviction became final *before* an announcement of the relevant rule that the statute requires additional analysis. In that circumstance, the court must ask whether the rule properly may be construed as "new" and, if so, conduct a retroactivity analysis, *Lambrix*, 520 U.S. at 527, though for purposes of § 2244(b)(2)(A), the latter inquiry is simply whether this Court has already deemed it retroactive, *Tyler*, 533 U.S. at 664.

Assuming the petitioner can cross the "new rule" and retroactivity thresholds, he must also show the rule was "previously unavailable." § 2244(b)(2)(A). While the "new rule" inquiry looks to the timing of the conviction's finality, the "previously unavailable" inquiry looks to the timing of the original federal habeas petition. AEDPA requires a prisoner to "consolidate all of his claims in his initial application," rather than attack his conviction piecemeal by subsequently asserting "arguments that could have been but were not raised." *Banister*, 590 U.S. at 515–16. Accordingly, the "previously unavailable" inquiry asks whether the decision announcing the new rule (or the retroactivity of

that rule) was issued at a time that would have allowed the defendant to press his claim in his first § 2254 proceeding. *See Magwood v. Patterson*, 561 U.S. 320, 335 (2010) (referring to § 2244(b)(2)(A) as allowing a second petition based on "intervening and retroactive case law"); *In re Bowles*, 935 F.3d 1210, 1219 (11th Cir. 2019).

Focusing on the timing of the rule's announcement makes the "previously unavailable" inquiry straightforward. If the new rule predates his original petition, then the rule was available for the petitioner to assert. If issued after the original petition was adjudicated, then it was unavailable. And if issued while the original petition was pending, the question is whether he could have amended his petition to add the claim. *In re Bowles*, 935 F.3d at 1219. This simple inquiry, moreover, makes sense given the "stringent time limit" within which the courts of appeals must decide whether to authorize a second or successive petition. *Tyler*, 533 U.S. at 664; § 2244(b)(3)(D) (30-day deadline).

In sum, unless the rule was announced after the petitioner's conviction became final *and* he could not include a claim under the rule in his original federal habeas petition, § 2244(b)(2)(A) does not authorize a second or successive petition raising such a claim. *In re Bowles*, 935 F.3d at 1218–19; *In re Richardson*, 802 F. App'x 750, 756–57 (4th Cir. 2020).

II. REPLACING § 2244(b)(2)(A)'S TIMING PILLARS WITH FREE-FLOWING NOTIONS OF A CLAIM'S VIABILITY DISTORTS AEDPA.

The Fifth Circuit's reading of § 2244(b)(2)(A) eschews the two timing questions for a malleable inquiry into all facts and caselaw stemming from an allegedly new rule. *See In re Johnson*, 935 F.3d at 292–94; *see also Muñoz v. United States*, 28 F.4th 973, 977 (9th Cir. 2022) (adopting a "pragmatic approach" based on "real-world circumstances"). Instead of asking whether the rule was available for a petitioner to raise (either before his conviction became final or when he filed his original habeas petition), the Fifth Circuit asks whether the individual petitioner had a viable claim based on that rule at the time of his original petition. *In re Johnson*, 935 F.3d at 293. This involves a wide-ranging look at various post-conviction and post-petition facts, scientific developments, and legal decisions to determine whether a petitioner's claim would have had "some possibility of merit" at the time of his original proceedings. *Id.* at 292–93 (quoting *In re Cathey*, 857 F.3d at 232). That approach is utterly bizarre and wrong.

As a practical matter, this inquiry compels judicial inefficiency because the parties must address a claim's prior and present viability. The federal appellate court then makes a "prima facie" inquiry as to whether the claim could have succeeded if pressed in the earlier habeas proceeding and if it would fare better now. *Id.* Assuming a petitioner clears this prima facie hurdle before the appellate court, the parties will then litigate this issue *again* with the district court "conduct[ing] its own independent and hypothetical review of

whether or not" the claim would have been meritless at the time of the prior federal habeas proceeding. *In re Cathey*, 857 F.3d at 233–34. In the present case, that meant the district court held an evidentiary hearing addressing his federal habeas attorney's justification for not pursuing an *Atkins* claim in the original proceeding. *See* Memorandum and Order at 8–10, 13–17, *Johnson v. Guerrero*, 4:19-CV-3047 (S.D. Tex. Oct. 28, 2022), ECF No. 78. The process from the initial authorization of the successive petition by the Fifth Circuit to the district court's completion of this counterfactual review marked *a three-year detour* dedicated to tangential questions rather than whether Respondent's conviction or sentence violated any constitutional right such that "law and justice require" granting relief. *See Brown v. Davenport*, 596 U.S. 118, 134 (2022) (quoting § 2243).

Given the wasteful judicial endeavor imposed by this rule, one would expect the Fifth Circuit's rule to have some textual footing. It does not. The plain text of § 2244(b)(2)(A) limits a second or successive petition to one development: a "new" and "previously unavailable" "rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." Section 2244(b)(2)(A) expressly and intentionally forecloses relief based on factual developments (which are the province of § 2244(b)(2)(B)) or "the decisions of the lower court[s]," *Tyler*, 533 U.S. at 663. Congress drew this line because it knew that concerns about "seriously undermin[ing]" finality guide this Court's retroactivity analysis. *See Teague*, 489 U.S. at 309–10; *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). By allowing only intervening, retroactive decisions by this

Court to open the door to a second or successive petition under § 2244(b)(2)(A), Congress guaranteed new petitions could arise only after this Court concluded the interests in applying the new rule justified the harm to the States. That special solicitude for the finality of State court proceedings cannot be unsettled by factual developments, guidance from nonprofits, and lower court decisions applying existing rules, yet these changes are the foundation of the Fifth Circuit's misguided § 2244(b)(2)(A) analysis.

Dexter Johnson's case illustrates the Fifth Circuit's profound error. He wants to press a new *Atkins* claim. But he kidnapped, raped, and murdered Maria Aparece four years *after* this Court decided *Atkins*. *Atkins* was not new, retroactive, or previously unavailable to Johnson. He could have pressed his new *Atkins* claim before his trial, on direct appeal, in state postconviction proceedings, and in earlier federal habeas proceedings. Proving the point, Johnson's original state and federal postconviction petitions relied on *Atkins* to argue mental illness should make him ineligible for the death penalty. *Johnson v. Stephens*, No. H-11-2466, 2013 WL 4482865, at *18–19 (S.D. Tex. Aug. 19, 2013). That he waited until the week of his execution to raise his new *Atkins* argument about intellectual disability betrays the gamesmanship afoot: His delay was not due to the "previously unavailable" nature of any constitutional rule, but rather was part and parcel of his serial efforts to prevent Texas from carrying out his death sentence.

Nonetheless, the Fifth Circuit rewarded Johnson's gamesmanship. Notwithstanding the "obvious"—that

"*Atkins* was decided long before Johnson even committed his crimes"—the Fifth Circuit deemed *Atkins* a new and previously unavailable rule as to Johnson. *In re Johnson*, 935 F.3d at 292. In particular, the Fifth Circuit justified that reasoning on the ground that the APA promulgated the DSM-5 in 2013, "six years after Johnson's conviction" and "17 days before the denial" of his federal habeas petition—and Johnson's new *Atkins* claim is based on the DSM-5. *Id.* at 293. In assessing the timeliness of Johnson's petition, the court concluded "the publication of the DSM-5" was the "factual predicate" of Johnson's new *Atkins* claim. *Id.* at 296. That observation should have been a red flag for the Fifth Circuit—for the discovery of a new *factual* predicate for a claim falls squarely within the second avenue for a second or successive petition, § 2244(b)(2)(B). (Johnson could not successfully invoke § 2244(b)(2)(B) because it permits only a challenge to a conviction, not a sentence.) Undeterred, however, the Fifth Circuit turned the decades-old *Atkins* decision into a "new" and "previously unavailable" rule, and so blessed Johnson's end-run around AEDPA's carefully crafted limits on second or successive petitions.

This reeks of yesteryear. Prior to AEDPA, a court could "hear a second or successive petition if the 'ends of justice' warranted doing so," *Banister*, 590 U.S. at 514 (quoting *McCleskey*, 499 U.S. at 485)—an open-ended invitation for judges to administer their personally held notions of equity by looking at whether the petition presented a new ground for relief that was not deliberately withheld or constituted abuse-of-the-writ, *McCleskey*, 499 U.S. at 486–87. The abuse-of-the-writ test mirrored the cause-and-prejudice standard for

procedural default. *Id.* at 493. So, a petitioner needed only to show "some objective factor external to the defense" prevented him from asserting it earlier and thereby prejudiced him. *Id.* at 493–94 (citation omitted). "Congress passed AEDPA against this legal backdrop" and "made the limits on entertaining second or successive habeas applications more stringent than before." *Banister*, 590 U.S. at 515.

The Fifth Circuit's approach, however, functionally revives the old cause-and-prejudice standard. Once a petitioner points to a decision of this Court that previously established a retroactive rule of constitutional law (see, for example, *Atkins*), the squishiest of inquiries becomes (1) is this a new ground for relief (of course this one is), and (2) did some external factor reveal the "possibility of merit" of the new claim (allegedly the DSM-5 did) thereby excusing the petitioner's failure to raise the claim earlier. *In re Cathey*, 857 F.3d at 226, 232. That is no hurdle at all—and the Congress that passed AEDPA likely would be shocked to see that it accomplished nothing in § 2244(b).

To justify turning AEDPA on its head, the Fifth Circuit has worried that surely a federal habeas petitioner need not press all possible claims from the jump, given the perceived "fear that those claims would be later foreclosed even in light of developments in the law or facts." *In re Cathey*, 857 F.3d at 228. Exactly the opposite: AEDPA's entire structure demonstrates that Congress intended just that. AEDPA demands that a petitioner lodge all his claims and evidence in state court before filing *any* federal habeas petition. § 2254(b), (c), (d), (e); *Rhines v. Weber*, 544 U.S. 269, 276–78 (2005). And once the petitioner

raises his claims in state court, he is generally stuck with the state court record in federal habeas proceedings, *Cullen v. Pinholster*, 563 U.S. 170, 182 (2010), as well as the law that existed at the time of the state court's decision, *Hill*, 586 U.S. at 48. Time and again, this Court has emphasized that AEDPA is not concerned about a petitioner in postconviction proceedings who may not obtain relief that subsequent law and facts might support. *E.g.*, *id.* at 48–52; *Shinn*, 596 U.S. at 388–91; *Davenport*, 596 U.S. at 136; *Greene v. Fisher*, 565 U.S. 34, 38–39 (2011). Unsurprisingly, therefore, § 2244(b)(2)(A) similarly demands that a petitioner assert and develop any claim based on existing constitutional rules and facts or forever forfeit them. There is no "I think this is unfair" exception available to the judiciary.

Finally, consider the obviously erroneous consequences of the Fifth Circuit's decision by comparing the facts in *Hill*. In 2006—the same year Johnson murdered his victim—Danny Hill was unsuccessfully litigating his *Atkins* claim in state postconviction proceedings. *Hill*, 586 U.S. at 47. Hill then turned to federal court a year before Johnson filed his original federal habeas petition. *See id.* In the gap between Hill's state proceedings and the Sixth Circuit's decision, this Court decided *Moore*, which ordered state courts to focus on adaptive deficits rather than adaptive strengths like the state court had done in Hill's case. *Id.* at 47, 49–50. The Sixth Circuit relied on *Moore* to grant Hill relief, but this Court summarily vacated under § 2254(d)(1) because *Moore* was not clearly established at the time of the state court's decision. *Id.* at 51.

Now borrow some of the facts in this case: Suppose that, like Hill, Johnson had tried to press his new *Atkins* claim in state proceedings and then his original federal habeas petition—all of which were filed around the time Hill lodged his own filings. Like Hill's claim, Johnson's new *Atkins* claim would have failed under § 2254(d)(1) because no clearly established Supreme Court decision would have permitted that claim. The Fifth Circuit's precedents, however, encourage litigants like Johnson to avoid that problem by lying in wait to assert a new claim years down the road, sidestep § 2254(d)(1) altogether, and glide into federal court via § 2244(b). Besides establishing a perverse incentive and thwarting AEDPA's entire purpose, the Fifth Circuit has created a deeply absurd situation: At least people like Danny Hill *tried* to litigate their claims in state court and lost; yet people like Johnson *did not even try*, and, by the Fifth Circuit's lights, they somehow get a fresh look in federal court under *Moore* and other new and recent diagnostic trends, including the promulgation of the DSM-5. *See In re Johnson*, 935 F.3d at 294–95. That absurdity makes no sense.

Nothing prevented Johnson from raising his new *Atkins* claim—that he is intellectually disabled despite an IQ score exceeding 70—prior to and in his original federal habeas petition. That is what other petitioners tried *before Johnson even committed his crime*, even though existing facts and precedents suggested those attempts would be unsuccessful. *See Hall v. Florida*, 572 U.S. 701, 724 (2014); *Moore*, 581 U.S.

at 13–14.[2] Johnson bore the same burden to try—he simply refused and opted to ambush the State of Texas and the federal judiciary on the eve of his execution. That gambit requires an admonishment, not a reward. There is no textual, structural, or policy rationale in AEDPA for the Fifth Circuit's preferential treatment of those like Johnson who "sandbag state courts by selecting a few promising claims for airing" only to construct a new claim years later based on old law "should [earlier] proceedings come up short." *Shinn*, 596 U.S. at 391 (cleaned up).

III. States Have No Assurance of Finality Under the Fifth Circuit's Approach.

AEDPA prioritized the States' need for, and entitlement to, finality. *Id.* at 377. A State first obtains an assurance of finality after a prisoner exhausts the direct review process. *Shea v. Louisiana*, 470 U.S. 51, 59–60 (1985). This interest in finality only continues to grow with each additional round of review. After the resolution of the original § 2254 petition, "the State's interests in finality are all but paramount." *Calderon*, 523 U.S. at 557. The petitioner "has already had extensive review of his claims in federal and state courts." *Id.* That is why absent a strong claim of new facts showing actual innocence or a new, retroactive,

[2] Hall started litigating his *Atkins* claim where he challenged Florida's 70 IQ cutoff in 2004, *see Hall v. State*, 109 So. 3d 704, 707 (Fla. 2012), *rev'd*, 572 U.S. 701 (2014), while Moore brought his claim in 2003, *Ex parte Moore*, 470 S.W.3d 481, 504 (Tex. Crim. App. 2015), *rev'd*, 581 U.S. 1 (2017).

and previously unavailable constitutional rule announced by this Court, AEDPA provides a prisoner no further federal refuge.

The Fifth Circuit's decision below tramples on this guarantee of finality. So long as a petitioner finds some new fact development or a new court opinion crediting his current theory, he can charge into federal court years after his prior habeas proceedings concluded and demand another attempt to set aside his conviction or sentence. *In re Johnson*, 935 F.3d at 292–93; *In re Cathey*, 857 F.3d at 230–34. In fact, he can even claim a nonprofit, rather than the Supreme Court, determines whether a constitutional rule is available to him.

The perils of this approach are best evidenced in *Atkins* claims. This Court's decisions dictate that "current medical standards" "[r]eflecting improved understanding over time" inform whether a petitioner is intellectually disabled and ineligible for the death penalty. *Moore*, 581 U.S. at 20; *accord Hall*, 572 U.S. at 721–23. Importing that reasoning into § 2244(b), the Fifth Circuit "precedentially determined" it must "equate legal availability" of an *Atkins* claim "with changes in the standards for psychiatric evaluation" of intellectual disability. *In re Johnson*, 935 F.3d at 294; *see Johnson v. Guerrero*, 164 F.4th 398, 400 (5th Cir. 2026) (Ho, J., dissenting from denial of rehearing en banc) (noting Fifth Circuit precedent "delegat[es] the judicial power to interpret the law to scientists"). More simply, any update to the DSM or new theories of how to consider IQ scores authorizes a petitioner to bring a new *Atkins* claim in a second or successive petition. *See In re Johnson*, 935 F.3d at 293; *In re Cathey*, 857

F.3d at 227–28. AEDPA's statute of limitations also poses no bar because the petitioner can cite these same updates as new factual predicates creating new one-year windows to bring his claims. *In re Johnson*, 935 F.3d at 296.

That is a recipe for eternal *Atkins* claims and zero finality. Medical standards surrounding intellectual disability are "constantly evolv[ing]," *Bourgeois v. Watson*, 141 S. Ct. 507, 508–09 (2020) (Sotomayor, J., dissenting from the denial of certiorari), with a trend towards broadening those arguably within the scope of the diagnosis, *see Hall*, 572 U.S. at 732 (Alito, J., dissenting). Start with the changes to the intellectual functioning component. The American Association on Intellectual and Development Disabilities (AAIDD) formerly established a "baseline 'intellectual functioning cutoff'" at an "IQ of 70 or below," before raising it to "approximately 70 to 75 or below" in 1992. *Id.* (citation omitted). Moving the cut-off from 70 to 75 "double[d] the number of people from the given population that are potentially eligible for consideration."[3] And with the DSM-5-TR released in 2022, the APA allows even IQs above 75 to qualify. DSM-5-TR at 42; *cf.* DSM-5 at 37.

The adaptive functioning and age of onset requirements likewise continually change. The AAIDD's 12th edition of its manual, released in 2021, moved the manifestation period from age 18 to 22.[4] *Cf. Atkins*, 536 U.S. at 318 (noting "clinical definitions" requiring

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[3] Daniel J. Reschly et al., *Mental Retardation: Determining Eligibility for Social Security Benefits* 211 (2002).

[4] AAIDD, *FAQ on Intellectual Disability*, https://perma.cc/J2N6-K23Z.

intellectual disability to "manifest before age 18"). And while the DSM-5 noted that, "[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directedly related to the intellectual impairments," DSM-5 at 38, the DSM-5-TR eliminated this requirement, DSM-5-TR at 42–43.

According to the Fifth Circuit, these changes all "open[] the door" to second or successive petitions. *In re Johnson*, 935 F.3d at 293–94. But the Fifth Circuit's theory of what can make an *Atkins* claim newly available is not limited to only new scientific evidence or changes in the diagnostic guidelines. Shifts in courts' consideration of IQ scores or other scientific theories can also make claims newly available, such as when state courts "first mention[ed]" or discussed "phenomenon [like] the Flynn Effect" under the guise that the absence of specific cases on the theory suggests "any *Atkins* claim premised on that effect [was] unviable." *In re Cathey*, 857 F.3d at 231–32. In other words, a petitioner could choose to raise his claim when a new study emerges, or he could instead wait to see what courts think about it after others first press those arguments—at either point, the claim is still newly available so long as at least some of this postdates the original habeas petition. *See id.* at 231–32, 233 n.75.

This "sweeping argument that a fresh intellectual-disability claim arises every time the medical community updates its literature" ensures "a never-ending series of reviews and re-reviews"—exactly what AEDPA was intended to prevent. *Bourgeois v. Watson*, 977 F.3d 620, 636, 638 (7th Cir. 2020) (citation omitted), *overruled on other grounds*, *Agofsky v. Baysore*,

160 F.4th 857 (7th Cir. 2025). To be sure, a state petitioner ultimately has only one chance to raise his claim, § 2244(b)(1), but he is highly incentivized to wait until the brink of execution to assert the claim. There almost always will be some new study or lower court decision he may cite as a changing circumstance leading him to think his claim is newly (or more) viable, especially as future editions of the DSM will be a "living document" with regular "updates occurring in step with scientific advances."[5] Why bring a borderline *Atkins* claim in an initial petition and risk forfeiting the chance to cite the newest favorable literature and caselaw at the eleventh hour?

This issue is not limited to state prisoners. If anything, the issue may be worse as to federal prisoners, for they face no do-over bar like the one found in § 2244(b)(1). *Bowe*, 146 S. Ct. at 466. And since the federal-prisoner counterpart—§ 2255(h)(2)—uses identical language to § 2244(b)(2)(A) in authorizing a second or successive petition, a federal petitioner in the Fifth Circuit may bring his *Atkins* claim again and again (and again), claiming new developments make the current version of his claim available for the first time. Ironically, the past repeated failures would only prove that *Atkins* was "previously unavailable" to the petitioner. *In re Johnson*, 935 F.3d at 294.

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[5] *E.g.*, Dost Öngür et al., *The Future of* DSM*: A Report from the Structure & Dimensions Subcommittee* 8, Am. J. Psychiatry In Advance (Jan. 28, 2026), https://perma.cc/2VGV-XH4A; Deborah Brauser, *APA Unveils Early Plans for the Next DSM*, Medscape (June 2, 2025), https://perma.cc/235L-B93U.

These problems, moreover, are not limited to *Atkins* claims but apply with full force to any claim based on a retroactive constitutional rule. Take ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984), was once a new and retroactive rule.[6] New cases or ABA guidelines are often invoked to refine requirements for effective performance of counsel. *Williams*, 529 U.S. at 396; *Wiggins v. Smith*, 539 U.S. 510, 522, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005). Undoubtedly, some prisoners may not believe they have viable *Strickland* claims prior to developments such as these. *See Wiggins*, 539 U.S. at 542–43 (Scalia, J., dissenting) ("There was nothing in *Strickland* … to support *Williams*' statement that trial counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" (citation omitted)). Yet the Fifth Circuit's approach to § 2244(b)(2)(A) threatens to unleash a wide swath of new *Strickland* claims. And it certainly will do so the next time any *Strickland* modification arises, whether in this Court or elsewhere. *See In re Cathey*, 857 F.3d at 231 (concluding Cathey had a new claim because Texas courts first discussed the "Flynn Effect" after his original habeas petition).

Second Amendment challenges to firearms convictions also loom large. If and when this Court recog-

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[6] *Strickland* itself was a habeas case and resulted in vacaturs and remands of other then-pending habeas petitions from state prisoners. *E.g.*, *Solomon v. Harris*, 467 U.S. 1211 (1984); *Burger v. Zant*, 467 U.S. 1212 (1984).

nizes the retroactivity of its recent Second Amendment decisions,[7] any follow-on applications of the history and tradition test could suggest a petitioner's claim is now available, even for those convicted long after *District of Columbia v. Heller*, 554 U.S. 570 (2008), *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Hemani*, 146 S. Ct. 1677 (2026). And again, any federal prisoner will be able to litigate and relitigate his challenge based on each new development.

Finally, consider the immense costs to the States caused by the Fifth Circuit's rule. Misconstruing § 2244(b)(2)(A) to authorize these outcomes inflicts "profound injur[ies]" to the States' "powerful and legitimate interest in punishing the guilty." *Calderon*, 523 U.S. at 556 (citation omitted). By failing to raise a claim based on an existing constitutional rule, a petitioner signals to the State that this claim is not at issue. Allowing a petitioner to resurrect a forfeited claim years (or decades) after earlier proceedings both "disturbs the State's significant interest in repose for concluded litigation and undermines the States' investment in their criminal trials" and in prior postconviction proceedings. *Shinn*, 596 U.S. at 377 (citation omitted). A petitioner may know he plans to hold his *Atkins* (or other purportedly newly available) claim in his back pocket to assert on the eve of his execution

[7] Since such decisions address whether "particular conduct can[] constitutionally be criminalized," once the question reaches this Court, these rules would likely be deemed substantive and retroactive. *See Edwards*, 593 U.S. at 264 n.3.

and start developing a record for that purpose. Meanwhile, the State is led to believe such evidence will not be needed. With each passing year, finding relevant records and witnesses becomes increasingly challenging, and some could be lost altogether. Encouraging a petitioner to deliberately withhold a claim and weaken the State's opportunity to subsequently contest it does not prevent "extreme malfunctions in the state criminal justice systems"—it perpetrates them. *Cf. id.*

CONCLUSION

For the foregoing reasons, the Court should reverse the Fifth Circuit's decision.

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