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

RESPONDENT'S BRIEF

TOBIAS S. LOSS-EATON
JEFFREY D. DAVIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

TAYLOR A. MARCUSSON
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603

JEFFREY T. GREEN
THE CARTER G. PHILLIPS/
SIDLEY AUSTIN LLP
SUPREME COURT CLINIC
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611

JASON HAWKINS
Federal Public Defender
JEREMY SCHEPERS
Counsel of Record
JOE HAMRICK
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR
THE NORTHERN
DISTRICT OF TEXAS
525 South Griffin Street
Dallas, TX 75202
(214) 767-2746
jeremy_schepers@fd.org

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CAPITAL CASE

QUESTION PRESENTED

Whether a new, retroactive rule of constitutional law was "previously unavailable" under 28 U.S.C. § 2244(b)(2)(A) if a claim invoking that rule had no possibility of merit when the petitioner filed his prior habeas petition.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Eric Guerrero, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

Respondent is Dexter Johnson.

No corporate parties are involved in this case.

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INTRODUCTION

In drafting § 2244(b)(2)(A), Congress did not merely ask whether a constitutional rule was already on the books during a prior habeas proceeding. It asked whether the rule was "previously unavailable" to the petitioner whose new "claim relies" on it. That is an inherently practical inquiry. In ordinary usage and under this Court's precedents, something is "available" only if it is capable of being used by a person, for a purpose—not if it merely exists in the world. A remedy that can provide no relief is unavailable; and a constitutional rule under which a prisoner's claim has no possibility of merit is unavailable too.

Mr. Johnson's case shows why this distinction matters. Though *Atkins* had been decided before his first federal habeas petition, the governing diagnostic regime treated his IQ scores as dispositive, despite his major adaptive deficits. His own trial expert thus testified that Mr. Johnson was not intellectually disabled—even though he found that Mr. Johnson functioned intellectually like a ten-year-old. As the Fifth Circuit recognized, under that framework, an *Atkins* claim by Mr. Johnson was not merely difficult or unlikely to succeed—it had no possibility of merit.

Only later did the DSM-5 displace the rigid IQ threshold, replacing it with a standard focused more on adaptive functioning deficits. Under that framework, Mr. Johnson's trial expert withdrew the premise that had previously foreclosed a disability diagnosis, and two additional experts concluded that Mr. Johnson is intellectually disabled. Mr. Johnson did not change; his intellectual and adaptive characteristics are the same as always. What changed was the framework that made *Atkins* capable of protecting him. *Atkins* was not available to him before; now it is.

The Director's contrary reading clashes with the statutory text and structure. Section 2244(b)(2)(A) asks distinct questions: whether the petitioner relies on a new, retroactive rule, and whether that rule was previously available to him. On the Director's view, however, both "new" and "previously unavailable" turn on timing alone. That collapses separate statutory requirements into each other. And even as he resists a functional "availability" inquiry, the Director elsewhere concedes it, admitting that the availability of a new rule announced during a prior habeas proceeding is a "practical" question. That being so, he cannot dispute that the same is true here.

Nor does this case pose the floodgates concerns the Director asserts. Few rules are retroactive, so the issue rarely arises at all. And even then, a petitioner must show not just that an earlier claim would not have won, but that it had no possibility of merit. Only two prisoners have ever passed that threshold, and neither has yet obtained habeas relief.

Mr. Johnson seeks the one complete opportunity the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") preserves: a chance to present a constitutional claim once the rule on which it depends becomes capable of doing the work the Constitution requires. The judgment should be affirmed. Alternatively, because the Director keeps changing the question on which it seeks interlocutory review, the writ should be dismissed as improvidently granted.

STATEMENT OF THE CASE

A. Clinical definitions of intellectual disability are a fundamental premise of the *Atkins* rule.

In 2002, this Court held that the Eighth Amendment prohibits executing intellectually disabled people. *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002). This Court left to the States the "task of developing appropriate ways to enforce [this] constitutional restriction." *Id.* at 317 (internal quotation marks omitted) (quoting *Ford* v. *Wainwright*, 477 U.S. 339, 416–17 (1986)). While this Court did not provide definitive guidance regarding who qualified as intellectually disabled, *Atkins* referenced the diagnostic criteria in place at the time, *id.* at 308 n.3, 318, and observed that relevant state statutes "generally conform to the clinical definitions," *id.* at 317 n.22.

Later, in *Hall* v. *Florida*, this Court explained that "[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." 572 U.S. 701, 720 (2014). There, this Court held that *Atkins* determinations must be "informed by the medical community's diagnostic framework," and, relying on the DSM-5,[1] warned against overreliance on IQ scores to assess intellectual ability: "[i]ntellectual disability is a condition, not a number." *Id.* at 721–23; see Pet. App. 15a; JA 237–39.

Texas courts failed to follow the Eighth Amendment's command. They applied their judge-made *Briseno* factors until this Court struck them down in 2017. *Moore* v. *Texas*, 581 U.S. 1 (2017); see *Ex parte*

[1] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) [hereinafter DSM-5]. The courts below called this the "DSM-V," but this brief uses the APA's shorthand: "DSM-5."

Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004). *Moore* explained that *Atkins* and its progeny "cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus," as Texas courts had done. *Moore*, 581 U.S. at 5–6. This Court also repeatedly emphasized the importance of medical standards, explaining that "[e]ven if the views of medical experts do not dictate a court's intellectual-disability determination . . . the determination must be informed by the medical community's diagnostic framework." *Id.* at 13 (cleaned up). Though three Justices dissented, "all agreed about the impropriety of the *Briseno* factors." *Moore* v. *Texas*, 586 U.S. 133, 138 (2019).

On remand, Texas courts ostensibly adopted the DSM-5 as the governing standard for determining intellectual disability, but still denied relief. *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018), *rev'd*, 586 U.S. 133 (2019). Thus, this Court intervened again in 2019 to rectify Texas courts' continued "failure to adhere closely enough to the psychological profession's standards" captured in the DSM-5. Pet. App. 16a; *Moore*, 586 U.S. at 139–42.

B. Mr. Johnson could not raise an intellectual disability claim at trial.

In 2007, Dexter Johnson was convicted of capital murder and sentenced to death for the murder of Maria Aparece.

Dr. Dale Watson testified at trial that nineteen-year-old Mr. Johnson had intellectual functioning roughly equivalent to that of a ten-year-old child. Pet. App. 13a. Even so, based on Mr. Johnson's IQ scores, the American Psychological Association's then-current diagnostic guidelines—the DSM-IV-TR[2]—precluded an intellectual disability diagnosis. Pet. App. 15a. Because Mr. Johnson scored 78 and 88 on separate IQ tests, JA 13, Dr. Watson did not assess whether Mr. Johnson had adaptive deficits, Pet. App. 13a–14a.

Mr. Johnson's deficits are significant. Throughout his life, Mr. Johnson has lacked the capacity to perform basic skills like counting change, washing himself with soap daily, or following bus or walking directions. JA 172, 189, 200–01. He struggled to remember the rules of the simple card game Old Maid, could not operate a washing machine or a dishwasher, and could not learn how to use a cell phone. JA 200–01.

Mr. Johnson's severe language deficits place him "well below the lowest one-percentile" of the population. JA 192. He has "severe impairment in his ability to name common objects," uses nonsense words, and has a pronounced stutter. JA 189, 192, 196.

Mr. Johnson's deficits were apparent at school, where he failed grades despite receiving special education support. JA 172, 196. He was unable to complete even special education assignments. JA 197.

Perceiving his deficits, his peers called him "dumb," and ostracized and bulled him. JA 197–99. He could not hold a conversation, maintain eye contact, or understand jokes. JA 198. His immaturity and gullibility made him easy to take advantage of, and, when left out or humiliated, he cried easily, frequently, and publicly. JA 197–99.

[2] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2000).

C. An *Atkins* claim had no possibility of merit through the initial state and federal habeas proceedings.

The Texas Court of Criminal Appeals affirmed Mr. Johnson's conviction and sentence on direct appeal. Pet. App. 69a; *Johnson* v. *Texas*, 2010 WL 359018 (Tex. Crim. App. Jan. 27, 2010). It also denied his initial state habeas application. Pet. App. 69a; *Ex parte Johnson*, 2010 WL 2617804 (Tex. Crim. App. June 30, 2010). This Court denied review. *Johnson* v. *Texas*, 561 U.S. 1031 (2010).

In June 2011, Mr. Johnson filed his initial federal habeas petition. Pet. App. 14a–15a (*Johnson* v. *Stephens*, 4-11-cv-2466, Dkt. Entry No. 1). In August 2013, the district court entered an order denying a motion to amend that petition and denying relief on all but one claim. Pet. App. 29a; *Johnson* v. *Stephens*¸ 2014 WL 2882365, *1 (S.D. Tex. June 25, 2014). The district court later denied the remaining claim too. Pet. App. 15a, 27a; *Johnson*¸ 2014 WL 2882365 at *1. The Fifth Circuit affirmed, and this Court again denied review. Pet. App. 69a; *Johnson* v. *Stephens*, 617 F. App'x 293 (5th Cir. 2015) (per curiam), *cert. denied*, 577 U.S. 1121 (2016).

Mr. Johnson did not raise an intellectual disability claim in his direct appeal, state habeas, or initial federal habeas proceedings.

D. Changes to the diagnostic guidelines showed that Mr. Johnson might be intellectually disabled.

While Mr. Johnson's initial federal habeas petition was pending, the DSM-5 was published. The DSM-5 "significantly altered how clinicians viewed the relationship between IQ scores and intellectual disability." Pet. App. 15a; JA 236–37. These "new diagnostic guidelines included significant changes in the diagnosis of intellectual disability," reduced the focus on IQ scores, and increased the focus on adaptive deficits. Pet. App. 59a. The DSM-5 "recogniz[ed] that an individual with an IQ score over 70 may still qualify as intellectually disabled." Pet. App. 15a (quoting *In re Milam*, 838 F. App'x 796, 799 (5th Cir. 2020)). Since its announcement in *Atkins*, this Court has consistently looked to the medical community's diagnostic framework in the project of defining intellectual disability. *Atkins*, 536 U.S. at 308, n.3; see also *Hall,* 572 U.S. at 721–23; Pet. App. 15a; JA 237–39. Accordingly, the DSM-5's publication opened a door for Mr. Johnson to litigate intellectual ability that had previously been closed.

E. In 2019, Mr. Johnson raised an *Atkins* claim for the first time.

Mr. Johnson was set to be executed on May 2, 2019. Pet. App. 17a. On February 5, 2019, the district court appointed the Federal Public Defender's Office ("FPD") as co-counsel alongside Patrick McCann. Pet. App. 49a. The FPD eventually moved to remove Mr. McCann, due to a conflict of interest arising from his representation of Mr. Johnson in both state and federal habeas proceedings. *Id.*

On April 22, 2019, Mr. McCann filed a successive state habeas application asserting an *Atkins* claim for Mr. Johnson for the first time based on an evaluation performed by Dr. Greg Hupp on April 4. Dr. Hupp administered the WAIS-IV, obtained a full-scale IQ score of 70, and evaluated Mr. Johnson's adaptive functioning. Pet. App. 17a–18a. Dr. Hupp concluded that Mr. Johnson meets the DSM-5 criteria "as a person with an intellectual disability." *Id.*

The Texas Court of Criminal Appeals dismissed Mr. Johnson's application as an abuse of the writ without reaching the merits. *Ex parte Johnson*, No. WR-73,600-02, 2019 WL 1915204 (Tex. Crim. App. April 29, 2019). The following day, the federal district court stayed Mr. Johnson's May 2 execution, as requested by the FPD. Pet. App. 50a. The court's order noted that "[t]he recent pleadings [] reveal troubling concerns about Johnson's current appointed legal representation which need resolution to preserve his rights before execution." JA 6. Mr. McCann withdrew two days later, and the State obtained a new execution date. ROA.472.[3]

The FPD filed a successive state habeas application asserting an *Atkins* claim. ROA.472; 2357–2626. The FPD also moved in the Fifth Circuit for authorization to file a successive federal habeas application. *In re Johnson*, 935 F.3d 284 (5th Cir. 2019); Pet. App. 47a–66a. Both filings cited Dr. Hupp's report and included a comprehensive forensic neuropsychological report from Dr. Daniel Martell, a declaration from trial expert Dr. Dale Watson, declarations regarding Mr. Johnson's adaptive functioning, and additional supporting records. Pet. App. 17a–18a.

Dr. Martell concluded that "it is clear that Dexter Johnson meets the criteria for a diagnosis of Intellectual Disability." ROA.2516. Dr. Martell found that Mr. Johnson has a frontal lobe impairment, right hemisphere brain dysfunction, and is "at or below the bottom two percent of the population" for verbal learning and memory. Pet. App. 61a–62a. He further opined that Mr. Johnson has "significantly subaverage intellectual functioning" and impaired functioning in all

[3] Citations to ROA refer to the Record on Appeal in the Fifth Circuit.

three adaptive domains, and that his intellectual and adaptive deficits originated in the developmental period. ROA.2516.

Dr. Watson's declaration explained the changes in the DSM standards and stated that the testing he administered "would not automatically preclude a diagnosis of Intellectual Disability," in contrast to his trial testimony under the prior standards. ROA.2531; Pet. App. 61a–62a.

Mr. Johnson's successive state application was dismissed. *Ex parte Johnson*, No. WR-73,600-03, 2019 WL 3812803 (Tex. Crim. App. Aug. 13, 2019).

F. The court of appeals authorized Mr. Johnson to proceed on his now-available *Atkins* claim.

A Fifth Circuit panel authorized Mr. Johnson's filing. Pet. App. 66a. Relying on *In re Cathey*, 857 F.3d 221 (5th Cir. 2017) (per curiam), the panel reasoned that § 2244(b)(2)(A) permitted Mr. Johnson to assert an *Atkins* claim because it was "previously unavailable" and the DSM-5's "significant change . . . in the medical methodology for evaluating the relevant disabilities" newly created "some possibility of merit." Pet. App. 58a–61a (reasoning it "is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*"). The panel emphasized the narrowness of *Cathey*'s rule: "To be clear, it was more than just a reassessment by medical professionals of this inmate's particular mental abilities. The significant change was in the medical methodology for evaluating the relevant disabilities and in courts' recognition of those changes." Pet. App. 59a.

The panel also found that Mr. Johnson's *Atkins* claim met the other requirements for authorization, including presenting a prima facie argument that *Atkins* "created a new rule of constitutional law . . . made retroactive to cases on collateral review by the Supreme Court." Pet. App. 57a (quoting *In re Campbell*, 750 F.3d 523, 530 (5th Cir. 2014)).

In March 2022, the district court held an evidentiary hearing to determine whether Mr. Johnson satisfied AEDPA's successive-petition requirements and whether his claim was timely. Pet. App. 7a, 19a. The court found that Mr. Johnson "had met the statutory requirements which would allow his *Atkins* claim to proceed to adjudication." Pet. App. 7a. It held that "*Atkins* unquestionably created a new rule of constitutional law" and "was made retroactive on federal habeas review." Pet. App. 23a. It recognized that "because earlier psychological standards made *Atkins* relief inapplicable to Johnson, raising an *Atkins* claim would have been futile until the DSM-V issued." Pet. App. 27a. The court further concluded that prior counsel's multi-year delay in bringing an *Atkins* claim after the DSM-5's publication was an "extraordinary circumstance that warrants equitable tolling" of the statute of limitations. Pet. App. 43a.

The Director moved the district court to stay the case and certify three questions for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 8a–9a. The district court certified only one: "Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)?" Pet. App. 8a.

The Fifth Circuit conclusively resolved the certified question in a July 2025 nonprecedential opinion: "The answer is no." Pet. App. 5a. The Fifth Circuit explained that it did not create an equitable exception to the jurisdictional requirements contained in § 2244(b)(2)(A), but instead interpreted the statute. Pet. App. 5a–6a. The panel maintained that *Cathey* supplied the correct interpretation of "previously unavailable:" a claim "is not automatically considered previously available simply because it was technically available;" it must have had "some possibility of merit to be considered available." *Id.* (quoting *Cathey*, 857 F.3d at 232).

The Fifth Circuit denied rehearing en banc. Pet. App. 67a–68a.

G. This Court granted review of the Director's evolving challenge.

This Court granted the Director's certiorari petition, which sought interlocutory review of a different question than in the lower courts. The district court first certified the question: "Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)." Pet. App. 5a. After the Fifth Circuit answered that question with a resounding "no," the Director focused in his certiorari petition on whether a petitioner "could [previously] have asserted a claim based on the rule," Cert. Pet. i, and pivoted in his merits briefing to "when this Court announced the rule," Pet. Br. i.

Nearly four years after the district court determined that Mr. Johnson's *Atkins* claim could proceed to adjudication, this case remains stayed at the Director's request. Mr. Johnson's *Atkins* claim has not yet been adjudicated on the merits, and no final judgment has been entered.

ARGUMENT

I. Section 2244(b)'s "previously unavailable" threshold is a practical one.

A. A rule was "previously unavailable" to a habeas petitioner if it was of no practical use to him.

"This case turns on the meaning of 'previously unavailable.'" Pet. Br. 16. Section 2244's controlling language requires that a habeas petitioner's claim "rel[y] on 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)(2)(A) (emphasis added). Mr. Johnson agrees that the phrase "previously unavailable" modifies "rule," not "claim." See Pet. Br. 17–19. The Fifth Circuit agrees too—though it sometimes used a shorthand to ask whether a "claim" was available, it correctly recognized that the statute asks "whether *a rule of constitutional law* was 'previously unavailable.'" *E.g.*, *Cathey*, 857 F.3d at 229 (emphasis added); *id.* at 234. But that does not help the Director because his position contradicts the ordinary meaning of "available," which turns on an object's utility to someone, for some purpose.

When AEDPA was enacted, "available" ordinarily meant (and still means) "capable for use." Black's Law Dictionary defined "available" in 1990 as "[s]uitable; useable; accessible; obtainable; present or ready for immediate use. Having sufficient force or efficacy; effectual; valid." *Available*, Black's Law Dictionary (6th ed. 1990). The 1989 Oxford English Dictionary defined "available" as "[c]apable of producing a desired result; of avail, effectual, efficacious" and as "[c]apable of being employed with advantage or turned to account." *Available*, Oxford English Dictionary (2d ed., J.A.

Simpson & E.S.C. Weiner ed., 1989). Webster's agrees, having defined "available" in 1993 as "having sufficient power or force to achieve an end," "immediately utilizable," and "personally obtainable." *Available*, Webster's Third New International Dictionary (Philip Babcock Gove ed., 1993).

As these definitions reflect, availability is relational. Something is available *to someone* for some purpose: a rental car is available *to a driver* for use on vacation; a medication is available *to a patient* for treatment. "Availability" is a null concept until it is anchored to one or more people who might use the thing and an end for which it might be used. The Director implicitly concedes this: He offers an example—a "carpenter . . . likely has a hammer 'available,' even when working on a task for which a hammer would not be necessary"—in which the hammer is available *to the carpenter for his work*, not where the hammer simply exists in the world. Pet. Br. 19. No one would say the hammer was available to the carpenter if it were locked in a toolbox he couldn't open.

"Available" works the same way in the law. Here, too, "the ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" *Ross* v. *Blake*, 578 U.S. 632, 642 (2016) (cleaned up). Thus, courts routinely speak of the remedies "available to" a plaintiff, or defenses "available to" a defendant, rather than simply "available" in the abstract. *E.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 651 (2010) ("As we have discussed . . . the court-created 'discovery rule' exception . . . is not generally available to plaintiffs who fail to pursue their claims with reasonable diligence."); *Perry* v. *New Hampshire*, 565 U.S. 228, 237 (2012) ("Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel.").

A rule that exists but supplies no basis for relief—a rule under which the petitioner's claim has *no* possibility of merit—is not available to him. Put differently, a procedure that cannot possibly lead to relief is not "available to" a prisoner just because he can fill out a form requesting the relief. *Booth* v. *Churner*, 532 U.S. 731, 737–38 (2001); *Ross*, 578 U.S. at 642. Rather, the word "available" "requires the possibility of some relief for the action complained of." *Booth*, 532 U.S. at 738.

This Court so held in *Booth* and *Ross*, interpreting "available" in the Prison Litigation Reform Act ("PLRA") of 1995. The PLRA required prisoners to exhaust "such administrative remedies as are available" before suing over prison conditions. *Booth*, 532 U.S. at 736. *Booth* noted approvingly that both parties pointed to Webster's definition of "available:" "capable of use for the accomplishment of a purpose." *Id.* at 737–38. *Ross* then explained that a procedure may be "unavailable when"—despite being "on the books"—"it operates as a simple dead end." 578 U.S. at 643 (citing *Booth*, 532 U.S. at 736, 738). That is, "some redress for a wrong is presupposed by the statute's requirement of an 'available' remedy; where the relevant administrative procedure lacks authority to provide any relief," those procedures are unavailable within the meaning of the PLRA. *Id.* (cleaned up). This reading does not "engraft an unwritten 'special circumstances' exception"; it simply recognizes a limitation "baked into [the] text." *Id.* at 648.

The Director says *Booth* and *Ross* engaged in a "different inquiry." Pet. Br. 19. But those cases analyzed the ordinary meaning of this straightforward term. And while surely "context matters," *id.*, the PLRA context is not materially different. AEDPA and the PLRA were enacted *two days apart*, and they serve similar purposes: Both erect procedural barriers to stem a perceived flood of litigation by incarcerated people. *Booth* and *Ross* thus illuminate how Congress used the same term here. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* ch. 25, at 170–73 (2012) (discussing how the presumption of consistent usage can apply to statutes that are "enacted at the same time, and deal[] with the same subject"). Indeed, the Director does not try to explain how any supposed contextual differences would point toward a different usage of "available" here. Nor does he try to square his own view—that available just means existing—with the ordinary meaning he acknowledges. Whether the object of "available" is a "remedy" or a "rule," the word carries the same meaning: capacity for use, not existence.

What's more, this Court has also construed the statutory phrase "capable of being used"—which is nearly verbatim the dictionary definition of "available"—in similarly practical terms. See *Stewart* v. *Dutra Const. Co.*, 543 U.S. 481, 493 (2005). This phrase, as used in the definition of a "vessel" for federal maritime purposes, asks whether a vehicle is "*practically* capable of being used to transport people, freight, or cargo from place to place." *Id.* Thus, "a watercraft is not 'capable of being used' for maritime transport *in any meaningful sense* if it has been permanently moored or otherwise rendered *practically incapable* of transportation or movement." *Id.* at 494 (emphasis added). In other words, "the phrase 'capable of being used' . . . encompasses 'practical' possibilities, not merely theoretical ones." *Lozman* v. *City of Riviera Beach*, 568 U.S. 115, 118 (2013) (cleaned up).

A practical, relational reading of "available" also tracks AEDPA's goal of giving each habeas petitioner only one bite—but a complete bite—at the apple. If a legal rule was of no use to a petitioner before, invoking that rule after it becomes available is not an improper second bite. Congress crafted restrictions on second or successive petitions to curb abuse of the writ—piecemeal litigation, sandbagging, and needless delay. Congress meant to restrict petitions filed by prisoners who had a full and fair opportunity to present a claim and squandered it or strategically held it in reserve. *Banister* v. *Davis*, 590 U.S. 504, 514–15 (2020). The Court has understood AEDPA's "gatekeeping provision" in just these terms, treating "second or successive" not as requiring a literal count, but as a term of art that draws from the pre-AEDPA abuse-of-the-writ doctrine. See *id.* (citing *McCleskey* v. *Zant*, 499 U.S. 467, 487 (1991)); *id.* at 513 (citing *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000); *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007))). If a rule was of no possible use during a prisoner's first habeas proceeding, he could not have made a strategic decision to engage in piecemeal litigation, thus abusing the writ.

B. The Director's contrary reading of "available" is inconsistent and creates surplusage.

The Director agrees that "available" ordinarily means "capable of use for the accomplishment of a purpose" and "accessible or may be obtained." Pet. Br. 19. Even so, his reading of "previously unavailable"—like the cases that adopt his preferred rule—turns entirely on whether a legal rule existed during prior habeas proceedings, regardless of whether it had any use to the petitioner. *Id.* at 21–22; *e.g.*, *Slusser* v. *Vereen*, 36 F.4th 590, 596 (4th Cir. 2022); *In re Bowles*, 935 F.3d 1210, 1219 (11th Cir. 2019). That view is internally inconsistent and clashes with the statute's plain language.

1. The Director's reading creates surplusage. Section 2244(b)(2)(A) refers to a claim that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." This language is naturally read to pose distinct inquiries: The retroactivity of the new rule and its practical availability in prior habeas proceedings. See infra § II.

On the Director's reading, however, whether a rule is "new" depends on its existence "at the time the prisoner's conviction became final on direct appeal," and whether a rule is "previously unavailable" depends on its existence "at the time of the prisoner's previous federal habeas application." Pet. Br. 21–22. That reading swallows "new" entirely: Every rule that was announced after the last federal habeas litigation would also, by default, be after the direct appeal was final. So the Director's reading leaves "new rule" without effect, violating a "cardinal principle of statutory construction." See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citation omitted).

2. Despite resisting a practical reading of "available," Pet. Br. 18–19, the Director elsewhere concedes it. He acknowledges that if a new rule appears while a first federal habeas petition is already pending, unavailability turns on "whether, practically, the prisoner could have amended the pending application to assert a claim relying on the rule." *Id.* at 17; see *id.* at 22. In other words, in this situation, the Director *agrees* that availability turns on whether a habeas petitioner can in fact make real use of a legal rule—not just whether that rule is in the books. But a rule cannot be both (i) available merely because it exists, and (ii) unavailable, despite its existence, whenever practical circumstances prevented a prisoner from invoking it.

This concession gives the game away. There is no plausible meaning of "available"—and certainly no ordinary one—that *includes* the feasibility of amendment but *excludes* whether a rule offers any possibility of relief. If a new rule is adopted too late during prior proceedings to be of use to a petitioner, it was not available to him in those proceedings. By the same token, if a rule existed but did not apply to him, it was not available to him either.

3. Equating existence with availability, as the Director does, also raises serious concerns for habeas practice. If a rule exists but a claim under it has no possibility of merit, petitioners will be forced to include such frivolous claims in their filings or risk losing them forever. This Court has already discouraged such a practice. *Panetti*, 551 U.S. at 947 ("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.").

C. A practical reading of "previously unavailable" preserves the statutory structure.

Contrary to the Director's claim, the Fifth Circuit's functional approach does not collapse § 2244(b)(2)'s two prongs. See Pet. Br. 24–26, 30–32. The Director's structural objection rests on a false dichotomy: that every successive claim can be assigned to one of two mutually exclusive boxes depending on whether "law" or "facts" changed. But the text contains no "legal developments"/"factual developments" dichotomy. Contra Pet. Br. 25. Paragraph (b)(2) instead states two alternative sets of conditions under which a claim may proceed. Subparagraph (A) allows claims resting on "a new rule of constitutional law, made retroactive . . .

that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). Subparagraph (B) allows claims whose "factual predicate . . . could not have been discovered previously through the exercise of due diligence" and whose facts "as a whole" show that, "but for constitutional error, no reasonable factfinder would have found [the petitioner] guilty." *Id.* § 2244(b)(2)(B). Neither provision states that any claim involving any factual component must proceed under subparagraph (B) or not at all.

Nor would such a stark division make sense. Every prong of subsection (b) refers to a "claim"—and a claim is law applied to fact. A *claim* is "[a] cause of action," *i.e.*, "[t]he fact or facts which give a person a right to judicial redress or relief." *Claim*, Black's Law Dictionary (6th ed. 1990); *Cause of Action*, Black's Law Dictionary (6th ed. 1990). Even the United States' chosen authority recognizes that "claims for relief" are based on "facts and legal theories." *Hensley* v. *Eckerhart*, 461 U.S. 424, 434–35 (1983); see U.S. Amicus Br. 19. Thus, a claim cannot be classified as purely "legal" or "factual." It will always involve a combination of the two.

That point has particular force under subparagraph (A). Constitutional rules made retroactive on collateral review are substantive rules, including rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery* v. *Louisiana*, 577 U.S. 190, 198 (2016) (citation omitted). Applying such a rule necessarily requires facts showing whether the petitioner falls within the protected class. A *Roper* v. *Simmons*, 543 U.S. 551 (2005), claim depends on the petitioner's age at the time of the offense. An *Atkins* claim depends on intellectual functioning, adaptive functioning, and developmental onset. Those claims do not cease to "rely on" the underlying constitutional rules just because facts determine whether those rules apply.

The Director's position thus ignores the language immediately surrounding the operative phrases. Subparagraph (A) requires a petitioner to show that his claim "relies on" a qualifying constitutional rule. A claim can (indeed, must) rely on a previously unavailable rule *and* on facts showing the rule's application. The phrase "relies on" does not mean "relies exclusively on," and subparagraph (A)—unlike subparagraph (B)—does not ask courts to examine whether the facts underpinning the claim are new or old. That only makes sense: A newly available rule may alert a petitioner to the import of facts not previously presented. Indeed, Congress recognized as much elsewhere. See 28 U.S.C. § 2254(e)(2) (positing a petitioner who "has failed to develop the factual basis of a claim" and then asks, as one alternative, whether that same claim "relies on" a new, retroactive, previously unavailable rule).

The Director's reliance on *Jones* v. *Hendrix* fares no better. *Jones* establishes that the two statutory gateways are collectively exhaustive: a successive claim must satisfy one of the conditions Congress enumerated rather than proceed through an atextual third route. 599 U.S. 465, 477–480 (2023). It does not establish that the two routes are mutually exclusive or that the presence of a factual development disqualifies a claim that satisfies subparagraph (A). Unlike in *Jones*, Mr. Johnson invokes no third gateway. He invokes subparagraph (A).

At most, § 2244(b)(2)'s structure supports a more modest "negative inference," see Pet. Br. 25: that a petitioner cannot raise *newly discovered evidence going to guilt or innocence* under subparagraph (A), since that is subparagraph (B)'s domain. But Mr. Johnson is doing no such thing: What changed between his two petitions was the DSM-5, not the existence or discovery of any facts about Mr. Johnson or his offense. This is the kind of "significant change . . . in the medical methodology for evaluating the relevant disabilities" that removes a rule from the category of the merely "technically" available. Pet. App. 59a.

But even if the Director's simplistic taxonomy had merit, the DSM-5 would still belong under subparagraph (A), not (B). As the Fifth Circuit noted, changes in the medical diagnostic standards are materially akin to changes in the law—and nothing like changes in (or discovery of) facts about the petitioner or his offense. Indeed, under *Atkins*, the medical community's standards form part of the legally required analysis. From Mr. Johnson's perspective, a change in those standards is no different from a change in the legal standard itself: Both are objective changes in authority external to himself and unrelated to his factual showing at trial or on his previous petition. *Hall*, 572 U.S. at 720 ("The clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*."); cf. *Brumfield* v. *Cain*, 576 U.S. 305, 338 (2015) (Thomas, J., dissenting) ("No one can dispute Brumfield's IQ score, adaptive skills, and antisocial personality disorder are facts"; "whether Brumfield has met the legal standard for relief on . . . his *Atkins* claim requires the application of law to those facts.").

II. Requiring a new, retroactive rule significantly limits the scope of claims that could be brought in a successive petition.

Mr. Johnson also satisfies the statutory requirement that his claim rely on a new, retroactive constitutional rule. A "new rule" is ordinarily understood as a rule that broke new ground, which *Atkins* did. And while *Atkins* is retroactive, very few other rules qualify, meaning this case raises no floodgates concerns. The Director's attempt to shoehorn the *Teague* v. *Lane*, 489 U.S. 288, 301 (1989) framework into § 2244(b)(2)(B) lacks merit because it conflates an opinion of this Court that determines what rules are retroactive with § 2244(b)(2)(A)'s requirement that the rule must *already be* retroactive. See *Tyler* v. *Cain*, 533 U.S. 656, 667–68 (2001). Likewise, because any retroactivity assessment first requires determining whether the rule in question is new, this Court will already have determined that question for any rule it has made retroactive. So, the assessment of whether a rule is new and retroactive is already decided based on what this Court has or hasn't yet done, largely leaving only an assessment of whether the rule was previously unavailable at the authorization stage. This confirms the Director's position that "[t]his case turns on the meaning of 'previously unavailable.'" Pet. Br. 16.

A. A "new" constitutional rule is one that announces a novel legal standard.

Subparagraph 2244(b)(2)(A) does not define the term "new rule." Thus, the Court should look to ordinary meaning—under which "new rule" refers to a rule that established a new constitutional principle when it was announced.

New "denote[s] novelty, o[f] the condition of being previously unknown." *New*, Black's Law Dictionary (6th ed. 1990); see also *New*, Webster's Dictionary (Nickel Press 1996) ("Not used before; unaccustomed, unfamiliar"). A rule is "an established standard, guide, or regulation" or a "[p]recept attaching a definite detailed legal consequence to a definite detailed state of facts." *Rule*, Black's Law Dictionary (6th ed. 1990). A "new rule" is thus a novel or previously unknown constitutional standard. Put differently, as a matter of plain meaning, § 2244(b)(2)(A) requires a successor petition to rely on the narrow category of cases that announced a "new principle of law." *Harper* v. *Va. Dep't of Tax'n*, 509 U.S. 86, 94 (1993) (citation omitted).

Nothing in § 2244(b)(2)(A) shifts the temporal focus from the moment of the rule's announcement. Rather, the unadorned phrase "new rule" leaves the focus on the novelty (or lack thereof) of *the rule itself*. Both the Fifth Circuit and the district court interpreted the statute in this way. Pet. App. 23a, 57a. This Court has used similar framing. *Tyler*, 533 U.S. at 662 ("[R]espondent does not dispute that *Cage* [v. *Louisiana*, 498 U.S. 39 (1990)] created a 'new rule' that was 'previously unavailable.'"). The statute does not ask whether the rule was "new" in relation to any other event. And, in contrast, the function of a *Teague* analysis is to determine the threshold question of retroactivity itself before the statute can even be invoked.

B. The retroactivity requirement sharply limits the universe of qualifying rules and shows Congress's purpose.

Only new rules "made retroactive to cases on collateral review" by this Court satisfy § 2244(b)(2)(A). While *Atkins* happens to meet that requirement, most rules won't. And the retroactivity requirement is important because it (i) sharply limits the number of new rules that qualify and (ii) shows that Congress intended to provide a narrow gateway for petitioners to invoke substantive rules like *Atkins* that were previously unavailable to them.

As was evident when AEDPA was enacted, few rules have retroactive effect on collateral review. *E.g.*, *Solem* v. *Stumes*, 465 U.S. 638, 644–45 (1984). *Teague* crystallized that retroactive application on collateral review is the exception, not the rule, and applies only to categorical exemptions based on class or conduct and "watershed rules of criminal procedure." 489 U.S. at 310–13. And of the two rule categories that *Teague* forecast *could* be applied retroactively on collateral review, only one remains; "no new rules of criminal procedure can satisfy [*Teague*'s] watershed exception." *Edwards* v. *Vannoy*, 593 U.S. 255, 271 (2021). Thus, only those substantive rules that "alter 'the range of conduct or the class of persons that the law punishes' . . . apply retroactively on federal collateral review." *Edwards*, 593 U.S. at 276 (citation omitted). Few new rules meet this requirement.

Far from the catastrophe the Director forecasts, § 2244(b)(2)(A)'s retroactivity requirement provides a significant limit to what new rules qualify for authorization in successive petitions. For example, though the Director argues "[a] prisoner who acquires evidence of a *Batson* [v. *Kentucky*, 476 U.S. 79 (1986)] claim" could avail himself of § 2244(b)(2)(A), this Court has held (and reaffirmed in *Teague*) that *Batson* is not retroactive. *Allen* v. *Hardy*, 478 U.S. 255, 261 (1986) (per curiam); *Teague*, 489 U.S. at 295–96. Similarly, Louisiana's amicus brief argues that novel American Bar Association (ABA) requirements could satisfy § 2244(b)(2)(A)'s requirements and create a path for previously unavailable ineffective-assistance claims. See La. Amicus Br. 22. That argument ignores that (1) this Court has never declared *Strickland* v. *Washington*, 466 U.S. 668 (1984), retroactive (2) *Strickland* is a procedural rule and (3) ineffectiveness claims do not rise and fall with ABA Guidelines. See *Bobby* v. *Van Hook*, 558 U.S. 4, 7 (2009) (per curiam). The Director's and Amici's efforts to show the breadth of § 2244(b)(2)(A) in fact show the provision's narrow application.

In addition to this significant limit, the text of the statute makes clear that Congress was intending to provide a narrow gateway for those constitutional rules that are so important that this Court has held them to be retroactive. When dealing with substantive rules of law, the State's legitimate interest in finality is at its weakest. *Welch* v. *United States*, 578 U.S. 120, 132 (2016) ("By extension, where the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest."). Substantive rules "cover not only rules forbidding criminal punishment of certain primary conduct [but also] new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). *Atkins* is a substantive rule that prohibits the execution of those with an intellectual disability. Thus, *Atkins* was plainly the type of retroactive rule under which Congress intended to permit authorization for successive petitions, when that rule was previously unavailable to a petitioner.

C. The Director's reliance on *Teague*'s finality-of-conviction framework is misplaced.

The Director does not try to interpret "new rule" based on ordinary meaning. Instead, he argues that "new rule" in § 2244(b)(2)(A) should be interpreted to mean a decision by this Court that "was not dictated by precedent existing at the time the defendant's conviction became final." Pet. Br. 34 (quoting *Teague*, 489 U.S. at 301). "[N]ot dictated by precedent" tracks the plain meaning of "new rule," as do other parts of *Teague*'s explanation of what it means to be new. See *id.* ("[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."). However, *Teague*'s finality-of-conviction framework does not. That portion of *Teague* is a policy consideration regarding which rules will be retroactive.

Nothing in § 2244(b)(2)(A)'s text supports this interpretation. The statute itself does not say "new as to the petitioner" or "announced after the petitioner's conviction became final." And the Director's fusion of *Teague* and § 2244 is unfounded. There is no reason to believe that § 2244(b)(2)(A) was meant to displace or adjust the *Teague* retroactivity criteria; the two have different lanes and purposes. See *Rodriguez* v. *Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 274 (1st Cir. 1998) ("AEDPA does not codify *Teague*."). Section 2244 supplies no criteria for determining retroactivity, and *Teague* says nothing about when a successive habeas application should be authorized.

The Director's suggested use of *Teague* here would mean that Congress intended to transfer a non-plain-meaning definition of "new rule" into a novel context (i.e., when a successive application should be permitted). Where Congress intends to adopt a judicially crafted or specialized meaning, it does so "expressly." *Learning Res., Inc.* v. *Trump*, 607 U.S. 229, 248–49 (2026); *Bostock* v. *Clayton Cnty., Ga.*, 590 U.S. 644, 658–59 (2020). The Director points only to extra-statutory sources in support of his argument that Congress adopted *Teague*. Pet. Br. 37–38. This Court should apply the plain meaning of "new rule" and not add common-law retroactivity standards onto the statute's text.

III. *Atkins* is a new, retroactive rule that was previously unavailable to Mr. Johnson.

Under the correct framework, *Atkins* was not available to Mr. Johnson until after his first federal habeas proceeding ended.

A. *Atkins* was unavailable to Mr. Johnson under the pre-DSM-5 framework.

Atkins was not available to Mr. Johnson before the DSM-5 was published. Mr. Johnson's conviction became final in 2007. At the time, *Atkins* claims were governed by settled clinical understanding of intellectual disability—then termed "mental retardation"—reflected in the definitions of the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association. See *Atkins*, 536 U.S. at 308; *id.* at n.3, 5. Those clinical definitions, and the state standards modeled on them, required proof of three concurrent elements: significantly subaverage intellectual functioning, significant deficits in adaptive functioning, and onset of both before the age of 18. *Hall*, 572 U.S. at 710 (citing *Atkins*, 536 U.S. at 318).

The first element was measured principally by a numerical IQ score, and—critically for Mr. Johnson—the framework then prevailing treated that score as a threshold. A criminal defendant whose IQ exceeded 70 points (or sometimes 75, factoring in the standard error of measurement) was deemed not intellectually disabled, often without any inquiry into adaptive functioning at all.

For a state prisoner like Mr. Johnson, Texas law inappropriately imposed its own burdens on *Atkins* claims. Texas courts applied the unconstitutional standard adopted in *Ex parte Briseno*, 135 S.W.3d at 1. *Briseno* relied on the 1992 edition of the AAMR manual and required that a defendant's adaptive deficits be "related" to his intellectual-functioning deficits, layering on seven evidentiary factors of the court's own devising. *Id.* at 7–9; see also *Moore*, 581 U.S. at 9–10 (2017). The *Briseno* factors compounded the difficulty of establishing the adaptive functioning prong. This Court did not hold the *Briseno* factors incompatible with prevailing medical standards until years after Mr. Johnson's first federal petition was denied. *Id.* at 19–21.

The standard in-effect at Mr. Johnson's trial and at the time he filed his first federal habeas petition meant an *Atkins* claim was unavailable to him. Mr. Johnson's trial expert obtained scores above the diagnostic threshold (an IQ of 70) then in use. On that basis, the expert treated the intellectual disability question as closed before reaching the adaptive functioning inquiry. Mr. Johnson's IQ scores of 78 and 88 were an absolute bar to an *Atkins* claim under the diagnostic criteria in place at the time. Under that framework, Mr. Johnson's scores required Dr. Watson to find that he was not intellectually disabled, without needing to assess his level of adaptive functioning. JA 233, n.2.

The DSM-5 materially altered that methodology. Published in 2013—six years after Mr. Johnson's conviction became final and while his initial habeas petition was pending—the DSM-5 "included significant changes in the diagnosis of intellectual disability, which changed the focus from specific IQ scores to clinical judgment." *In re Johnson*, 935 F.3d at 293. That change displaced the numerical threshold that had rendered Mr. Johnson's claim a "dead end" in his initial petition. *Ross*, 578 U.S. at 643 (a "dead end" remedy is not available).

Under the DSM-5, Dr. Watson withdrew the premise that his earlier scores foreclosed a diagnosis of intellectual disability, and two evaluators independently concluded that Mr. Johnson meets the prevailing diagnostic criteria. Dr. Watson explains that his prior testing "would not automatically preclude" an intellectual-disability diagnosis under the DSM-5 and that he would no longer testify that Mr. Johnson is not intellectually disabled. JA 130. Dr. Greg Hupp administered the WAIS-IV, obtained a full-scale IQ score of 70, assessed adaptive functioning, and concluded that Mr. Johnson satisfies the DSM-5 criteria for intellectual disability. JA 189. Dr. Daniel Martell likewise identified frontal lobe impairment, right hemisphere dysfunction, and verbal learning and memory "at or below the bottom 2-percent of the population," and reached the same diagnostic conclusion. JA 192.

The DSM-5's publication effectively altered the criteria for analyzing intellectual disability claims. *Hall*, 572 U.S. at 720 ("The clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*."); see also *id.* at 721 (*Atkins* determinations must be "informed by the medical community's diagnostic framework."). Of course, the DSM-5 uncovered no previously unknown facts; Mr. Johnson's intellectual and adaptive characteristics were what they had always been. What changed was the framework through which courts analyze those facts.

That distinction answers the Director's *Batson* hypothetical. Setting aside that *Batson* does not apply retroactively to convictions already final, see *Allen*, 478 U.S. at 261, a petitioner who later discovers that a prosecutor struck jurors for a discriminatory reason has discovered a new fact *about his own trial*—a discriminatory motive that existed, undetected, at the time of his first petition. See *Batson*, 476 U.S. at 79. Uncovering that fact does not alter the legal framework for evaluating a *Batson* claim; it merely supplies proof under a framework that was fully operative, and fully accessible, from the moment of trial forward. The effect of the DSM-5 on *Atkins* claims is nothing like a hidden fact waiting to be found; it was a wholesale revision of the analytical criteria used to classify every individual evaluated thereafter, Mr. Johnson included.

Nor do Mr. Johnson's citations to this Court's decisions in *Hall* and *Moore*, 581 U.S. at 4–5, convert his claim into something other than an *Atkins* claim. The Director's argument that Mr. Johnson's claim is actually a *Moore* claim, not an *Atkins* claim—and thus fails because *Moore* has not itself been made retroactive—is wrong. Cert. Pet. 31–32 (citing *In re Bowles*, 935 F.3d at 1219). *Atkins* alone supplies the constitutional rule at issue—that the Eighth Amendment forbids executing the intellectually disabled—and *Atkins* alone is the rule Mr. Johnson invokes and on which his claim depends.

Here, Mr. Johnson brings his successive petition because his *Atkins* claim now has a possibility of merit, where it had none before. Mr. Johnson cites *Hall* and *Moore* because they illuminate what *Atkins* means, not because his claim relies on an independent retroactive rule from either decision. *Hall*, 572 U.S. at 721; *Moore*, 581 U.S. at 4–5. The Director's argument, at its core, is that Mr. Johnson's citation to precedent interpreting a retroactive rule brings a claim outside its scope. Courts routinely discern the meaning of precedent by reading the decisions that later apply it, and doing so here confirms that the operative rule is *Atkins*'s prohibition on executing persons with intellectual disability. Cf. *Cartwright* v. *United States*, 12 F.4th 572, 579 (6th Cir. 2021) (a sentencing challenge relies on a retroactive constitutional rule even where the challenge incorporates later precedents of that rule); see Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 32.3, p. 1585, n.10 (5th ed. 2005).

B. *Atkins* was not available to Mr. Johnson in his first federal proceeding.

By the time the DSM-5 was published on May 18, 2013, Mr. Johnson's first federal petition had been pending for nearly two years. He filed that petition in

June 2011. Pet. App. 234c. The case was fully briefed and awaiting decision when the governing diagnostic framework shifted. Mr. Johnson's motion to amend his initial habeas petition was denied shortly afterward—both because reopening the litigation at that late stage would have caused substantial delay and because serious procedural obstacles, including a failure to exhaust, stood in the way. *Johnson* v. *Stephens*, No. CIV.A. H-11-2466, 2013 WL 4482865, at *6–*8 (S.D. Tex. Aug. 19, 2013).

An *Atkins* claim would have confronted the same obstacles in even greater measure. Litigating intellectual disability under the new framework required fresh neuropsychological evaluation and an adaptive functioning assessment—precisely the development later undertaken by Drs. Hupp and Martell. JA 130, 189. And because he presented no such claim to the Texas courts, it was unexhausted. The district court found that the same barriers that defeated amendment on other grounds would equally have defeated any attempt to inject an *Atkins* claim into the pending proceeding. JA 254–255.

This conclusion follows even on the Director's own view of the statute. The Director concedes that when a qualifying rule emerges mid-proceeding, unavailability turns on "whether, practically, the [petitioner] could have amended the pending application to assert a claim relying on the rule." Pet. Br. 17; *supra* I.B. That concession defeats the Director's categorical position: even measured from the DSM-5's mid-litigation publication, Mr. Johnson could not practically have amended his petition—on the eve of decision, and without exhaustion—to add an *Atkins* claim. On the Director's own standard, *Atkins* was not available to Mr. Johnson in his first federal proceeding.

IV. The Fifth Circuit's narrow rule does not implicate the Director's finality and comity concerns.

The Director overstates the scope of *Cathey* and *Johnson*, arguing that they permit authorization whenever the petitioner points to new facts to show that his claim would not have been a "winning one" if raised earlier. See Pet. Br. 21, 26, 30 (quoting *In re Bowles*, 935 F.3d at 1218). But the Fifth Circuit has expressly rejected the argument that "newly discovered evidence can support a claim under subsection (b)(2)(A)." *In re Halprin*, 788 F. App'x 941, 944 (5th Cir. 2019) (per curiam). Unlike a claim based solely on new facts, "both *Cathey* and *Johnson* involved changes in diagnostic standards for intellectual disabilities which then altered the *legal* standards for granting relief on *Atkins* intellectual disability claims." *Id.* In other words, the changes in diagnostic standards rendered the *Atkins* claim available—*i.e.*, potentially available to the petitioner—when it had not been so previously.

Nor is it sufficient for a petitioner to show merely that his claim would not have been a "winning one" if raised before. Pet. Br. 21, 26 (quoting *In re Bowles*, 935 F.3d at 1218). Rather, the claim must have had no "possibility of merit" during the earlier federal proceedings to be "previously unavailable" under § 2244(b)(2)(A). Pet. App. 6a (quoting *In re Cathey*, 857 F.3d at 232); see also *In re Milam*, 838 F. App'x 796, 799 (5th Cir. 2020) (per curiam) (under *Cathey* and *Johnson*, the petitioner must show that "[he] could not have been previously deemed intellectually disabled"). For example, where a legal change would merely strengthen an *Atkins* claim, the Fifth Circuit has denied authorization because it would have been "feasible" for the petitioner to raise an *Atkins* claim earlier. See *id.* (denying authorization under *Cathey* and *Johnson* because the petitioner could have brought a claim under Texas courts' pre-*Moore* framework, albeit a less persuasive one). That is not the situation here because without the framework of the DSM-5 there was not a claim with possibility of merit. See *Rodriguez*, 139 F.3d at 274 (claim is not available where it would be uniformly rejected prior to publication of decision). Moreover, the petitioner must also have been unable to amend his original petition to add the claim. *In re Soliz*, 938 F.3d 200, 203–04 (5th Cir. 2019) (denying authorization because the initial federal petition could have been amended after publication of DSM-5).

The petitioners in *Cathey* and *Johnson* remain the only ones to have their successive petitions authorized under the Fifth Circuit's standard—and because this is not a merits decision, neither have yet been granted relief. Given the narrow scope of those decisions, the Fifth Circuit's interpretation of § 2244(b)(2)(A) is fully consistent with AEDPA's general goals of comity and finality. And those are not the only policies underlying AEDPA. Congress also sought to "promote[] judicial efficiency and conserv[e] . . . judicial resources." *Day* v. *McDonough*, 547 U.S. 198, 205–06 (2006). The Director's contrary suggestion, that Johnson and other petitioners should raise plainly meritless claims in earlier proceedings, is the kind of "counterintuitive approach" and "empty formality" that this Court has rejected as inconsistent with AEDPA's policy objectives. *Panetti*, 551 U.S. at 943, 946. The Director's suggestion "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Id.* at 943.

V. This Court should dismiss the writ as improvidently granted.

Mr. Johnson recognizes that this Court granted the petition despite his arguments against review. He nevertheless renews those arguments because the Director's merits brief has *again* modified his arguments and the question he wants this Court to answer. The Director's continually evolving positions underscore why this interlocutory appeal should be dismissed.

First, whereas the Director now focuses on what the term "previously unavailable" means, Pet. Br. 16, that was not the issue on which the Director sought certification in this interlocutory appeal. Rather, the focus of the litigation below was whether the Fifth Circuit had created equitable exceptions to a jurisdictional statute.

Following the district court's determination that Mr. Johnson satisfied the requirements of § 2244(b), the Director moved for certification under 28 U.S.C. § 1292(b). The district court certified one question: "Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)?"

The Director described this question as the successiveness question, not once mentioning the term "previously unavailable." See ROA.1081–82. Rather, as the question indicated, the Director focused on whether the Fifth Circuit had created a "futility exception" or a "judicially-created exception" to the jurisdictional requirements of § 2244(b)(2)(A) and whether in doing so the Fifth Circuit's jurisprudence ran afoul of *Shinn* v. *Martinez Ramirez*, 596 U.S. 366 (2022). ROA.1081–82, 1089–91. The Fifth Circuit granted the Director's motion for leave to appeal the district court's order. ROA.1128.

Following oral argument, the Fifth Circuit affirmed the district court's order. Pet. App. 6a. After reviewing the holdings in *Cathey* and *Johnson*, the court "turn[ed] to the certified question: 'Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)?'" and held "The answer is no." Pet. App. 5a. The Fifth Circuit further explained:

> Despite the label given by the State and the district court, this court did not create any exceptions to the requirements of Section 2244(b)(2)(A) in *Cathey*. Instead, we interpreted the phrase "previously unavailable" in light of our precedents that allowed for "a gray area of previous unavailability despite technical availability.

Pet. App. 5a (quoting *Cathey*, 857 F.3d at 230).

Thus, the Director did not ask the Fifth Circuit to consider the question he now asks this Court to decide. This failure is particularly acute given that it was the Director who framed the question in the interlocutory appeal. Nothing prevented the Director from posing the precise question he posed to this Court to the Fifth Circuit. Cf. *Margolin* v. *Nat'l Ass'n of Immigr. Judges*, 146 S. Ct. 1285, 1288 (2026) (per curiam) (emphasizing importance of principle of party presentation for "our adversarial system of justice"); *Clark* v. *Sweeney*, 607 U.S. 7, 9 (2025) (per curiam). This Court should decline to decide matters not presented to the courts below. See, *e.g., Moody* v. *NetChoice, LLC*, 603 U.S. 707, 726 (2024) ("[W]e are a court of review, not of first view.") (alteration in original) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); see also *F. Hoffmann–La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004) (declining to address an argument not presented to the court of appeals).

Second, the question on which the Director now seeks review is not the question on which the Director sought certiorari. The Director's petition presented the following question: "Whether a claim relies on a 'new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable' when the habeas petitioner could have asserted a claim based on the rule in a prior federal habeas petition." Cert. Pet. i. It was through this lens—whether a petitioner seeking authorization of a second or successive habeas application could have previously raised a claim in federal proceedings—that the Director urged this Court to grant certiorari. Indeed, the vast majority of the Director's petition for certiorari focused on a purported circuit split over how to interpret "previously unavailable" and whether or not a claim had to have a possibility of merit to be considered "available." Cert. Pet. 12–21. The Director further argued that this issue—the "issue of the standard for authorizing successive petitions"—was the "important" issue that supported the Court granting certiorari. Cert. Pet. 22.

Now the Director asks the Court to consider an entirely different question. The Director does not ask whether an appeals court may authorize a second or successive petition when a petitioner "could have asserted a claim," Cert. Pet. i, but rather, when "[the] Court announced the rule before the filing of the prisoner's prior federal habeas petition." Pet. Br. i ("Whether a claim relies on a 'new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable' when this Court announced the rule before the filing of the prisoner's prior federal habeas petition."). The brief therefore placed a heavy focus on the Court's publication of a decision as opposed to whether the petitioner could have raised a claim in a prior habeas petition. See, *e.g.*, Pet. Br. 13.

The Director has continually altered the scope of judicial resolution he seeks. This Court should decline to allow the Director further alteration and refuse to consider a different question than that on which certiorari was granted. See, *e.g.*, *Arizona* v. *Hicks*, 480 U.S. 321, 329 (1987) (declining to address a contention made by the State when that "was not the question on which certiorari was granted").

CONCLUSION

For these reasons, the judgment should be affirmed.

Respectfully submitted,

TOBIAS S. LOSS-EATON
JEFFREY D. DAVIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

TAYLOR A. MARCUSSON
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603

JEFFREY T. GREEN
THE CARTER G. PHILLIPS/
SIDLEY AUSTIN LLP
SUPREME COURT CLINIC
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611

JASON HAWKINS
Federal Public Defender
JEREMY SCHEPERS
Counsel of Record
JOE HAMRICK
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR
THE NORTHERN
DISTRICT OF TEXAS
525 South Griffin Street
Dallas, TX 75202
(214) 767-2746
jeremy_schepers@fd.org

Counsel for Respondent

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