No. 15-578

IN THE
Supreme Court of the United States

In re JUAN DESHANNON BUTLER,
Petitioner.

On Petition for a Writ of Habeas Corpus

MOTION FOR LEAVE TO FILE AND BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEPHEN I. VLADECK
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016

CATHERINE E. STETSON
Counsel of Record
KATHRYN MARSHALL ALI
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
**Admitted only in California*

BRENNA D. NELINSON
HOGAN LOVELLS US LLP
100 International Dr., Suite 2000
Baltimore, MD 21202

Counsel for Amici Curiae

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Amici curiae respectfully seek leave to file the accompanying brief under Supreme Court Rule 37.2(b). Counsel for Petitioner has consented to the filing of this brief, and written consent has been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

Amici curiae listed in the Appendix of the accompanying brief are law professors who have written extensively on the law and history of habeas corpus, including with respect to this Court's jurisdiction to issue "original" writs of habeas corpus under 28 U.S.C. § 2241(a). All have focused in particular on the constitutional function of an original writ of habeas corpus in this Court when a court of appeals concludes that the "gatekeeper" provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. §§ 2244(b), 2255(h), bar a prisoner from challenging his sentence by way of a second-or-successive post-conviction petition.

Amici submit this brief to underscore Petitioner's explanation of why an original writ is both appropriate and necessary in this extraordinary case. Not only would an original writ provide the only timely avenue for addressing a complex question of retroactivity law that has divided the circuits; the original writ must be available in these circumstances to avoid the serious constitutional questions with respect to AEDPA that would otherwise be presented.

For these reasons, *amici curiae* respectfully request that the Court grant leave to file this brief.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
KATHRYN MARSHALL ALI
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

STEPHEN I. VLADECK
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016

ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
**Admitted only in California*

BRENNA D. NELINSON
HOGAN LOVELLS US LLP
100 International Dr.,
Suite 2000
Baltimore, MD 21202

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who have written extensively on the law and history of habeas corpus, including with respect to this Court's jurisdiction to issue "original" writs of habeas corpus under 28 U.S.C. § 2241(a). All have focused in particular on the constitutional function of an original writ of habeas corpus in this Court when a court of appeals concludes that the "gatekeeper" provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. §§ 2244(b), 2255(h), bar a prisoner from challenging his conviction and/or sentence by way of a second or successive petition for post-conviction relief. *Amici* write to support the original writ's dual role in cases like this—as the only remaining vehicle for providing relief to prisoners otherwise required to serve prison terms imposed potentially in violation of due process, and for preserving the federal judiciary's constitutional responsibilities with regard to the Great Writ. *See Felker* v. *Turpin*, 518 U.S. 651 (1996).

SUMMARY OF ARGUMENT

This Court held in *Felker* that AEDPA's gatekeeping provisions did not raise constitutional questions because they left undisturbed the Court's jurisdiction

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

to issue "original" writs of habeas corpus. 518 U.S. at 661-662. To fulfill the promise of *Felker*, however, the Court *must* occasionally grant original habeas relief when confronted with an extraordinary successive-petition case—where relief is both appropriate and necessary to avoid a manifest injustice.

This Petition presents such an extraordinary case. The federal government itself concedes that *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), announced a new rule of substantive constitutional law that has been made retroactive to petitioner Butler's case—and that of all other prisoners in his position. If the government is correct, there is no question that retroactive application of *Johnson* would require Butler's immediate release, since he has already served more than ten years in prison—the maximum he could receive but for application of the invalidated "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B). But because Butler was tried and convicted in Oklahoma, instead of any of the states in the First, Second, Seventh, Eighth, or Ninth Circuits, he remains in prison—and cannot seek this Court's review through a petition for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

If the government is *not* correct about *Johnson*'s retroactive effect, then the First, Second, Seventh, Eighth, and Ninth Circuits all are releasing (or requiring the resentencing of) prisoners who are not

entitled to relief under AEDPA—and the government will not pursue review of those dispositions in this Court. Because of the combination of AEDPA's gatekeeping provisions and the government's position on *Johnson*'s retroactivity, then, this Court cannot resolve this division through the ordinary course. The only avenue is that which was reserved in *Felker* for precisely this circumstance: this Court's original habeas jurisdiction. And, because of AEDPA's one-year clock for enforcing new constitutional rules, that avenue is only open until June 26, 2016. *See* 28 U.S.C. § 2255(f)(3).

If this Court will not exercise its original habeas jurisdiction when presented with this extraordinary constellation of factors—an uncontested claim for relief, a sharp circuit split on whether the lower courts can provide such relief, and a lack of alternative means of bringing this issue to the Court—then *Felker*, and the Suspension Clause and Exceptions Clause concerns underlying it, would be all but meaningless. An original writ of habeas corpus is therefore necessary, both to ensure that Butler is not kept in prison under an unconstitutional sentence while similarly situated prisoners in twenty-six other states (and three federal territories) go free (or, at the least, receive new sentencing hearings), and to quell the serious constitutional questions that would arise if AEDPA truly had the effect of eliminating the power of the federal courts to provide relief in

this and other extraordinary cases.

ARGUMENT

I. THIS PETITION PRESENTS THE VERY CIRCUMSTANCES REQUIRING AN ORIGINAL WRIT THAT THIS COURT FORESAW IN *FELKER*.

In *Felker*, this Court held that, although AEDPA's gatekeeping provisions placed limits on lower courts' power to entertain second-or-successive habeas petitions, and divested this Court of its power to review gatekeeping decisions through the ordinary certiorari process, AEDPA did not raise constitutional concerns. This was so, Chief Justice Rehnquist explained, because AEDPA did not disturb the Court's power to provide relief in appropriate cases through an "original" writ of habeas corpus. 518 U.S. at 660-662.[2]

The Court then denied Felker relief. As is true in many cases, none of his claims "satisfie[d] the requirements of the relevant provisions of the

[2] Such a petition is commonly understood to be "original" in the sense of being filed in the first instance in the Supreme Court, but it is "nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction." *Felker*, 518 U.S. at 667 n.1 (Souter, J., concurring) (citation omitted).

[AEDPA], let alone the requirement that there be 'exceptional circumstances' justifying the issuance of the writ." *Id.* at 665; *see also id.* at 667 (Souter, J., concurring).

If *Felker* is to mean anything, however, the Court must be willing to exercise its habeas jurisdiction when—as here—such exceptional circumstances *are* presented. This Court's power to entertain such petitions is a crucial component of AEDPA's regime, wherein Congress preserved the Court's power, when appropriate and necessary, to avoid manifest injustice. *Id.* at 666 (Stevens, J., concurring); *see also McCleskey* v. *Zant*, 499 U.S. 467, 494-496 (1991) (explaining the need for courts to entertain successive petitions where "a fundamental miscarriage of justice would result from a failure to entertain the claim"). As Justice Souter explained, "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open." *Felker*, 518 U.S. at 667 (Souter, J., concurring).

Accordingly, this Court's own rules state that it will grant an original writ where a petitioner can show that "adequate relief cannot be obtained in any other form or from any other court" and that there are "exceptional circumstances warrant[ing] the exercise

of the Court's discretionary powers." Sup. Ct. R. 20.4; *see also Felker*, 518 U.S. at 665. That standard is satisfied here.

A. The Exercise of Original Habeas Jurisdiction is Necessary and Appropriate Because No Other Relief is Available.

An original writ is necessary here because no other relief is available to Butler. Not only is the door to certiorari closed, *see* 28 U.S.C. §§ 2255(h), 2244(b)(3)(E),[3] but even the alternative avenues identified by the concurrences in *Felker*—certified questions under § 1254(2) or writs of mandamus under 28 U.S.C. § 1651—are, respectively, unavailable and inappropriate. *See* 518 U.S. at 666 (Stevens, J., concurring). As Butler explains in his Petition, lower courts have declined requests to certify the question presented to this Court under 28 U.S.C. § 1254(2), concluding that they lack jurisdiction to do so. *See* Pet. 28 n.14.

---

[3] The government theoretically could seek certiorari from a grant of relief in a second-or-successive § 2255 motion in one of the circuits that have allowed such claims after *Johnson*. But the government has declined to do so—presumably because it *agrees* that *Johnson* has retroactive effect in such cases. *See infra*. at pp. 12-13.

Moreover, in a case such as this, where the petitioner is entitled to immediate habeas relief under 28 U.S.C. § 2241(a) and *Felker*, resort to mandamus is unnecessary and, for that reason alone, inappropriate. *See Cheney* v. *U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-381 (2004) (observing that mandamus is appropriate only when there is no other adequate relief). Unlike the original habeas jurisdiction recognized in *Felker*, which provides this Court with an avenue for squarely addressing the retroactivity of *Johnson*, mandamus would pose the additional—and unnecessary—hurdles of whether there has been "a judicial usurpation of power or a clear abuse of discretion," *Cheney*, 542 U.S. at 371 (citation and quotation marks omitted), or whether the "right to issuance of the writ is clear and indisputable." *Id.* at 381 (quotation marks omitted).[4] The extraordinary circumstances presented by this case are more appropriately addressed through this Court's original habeas jurisdiction, which *Felker* understood to provide a safety valve in the precise circumstance of

[4] In other words, mandamus as an appellate remedy necessarily turns on the conclusion that the lower courts erred—in most cases, egregiously. But this Court need not hold that the Tenth Circuit's reading of 28 U.S.C. § 2255(h)(2) was incorrect at all in order to grant habeas relief, since this Court can simply confirm that *Johnson is* retroactive, whether or not it was "made" so by this Court's prior decisions.

a circuit split over the applicability of the gatekeeper provisions. *See* 518 U.S. at 667 (Souter, J., concurring) ("The question could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard.").

Finally, although this Court could conceivably reach the question whether *Johnson* announced a new rule of substantive constitutional law (and is therefore retroactively enforceable through § 2255(h)(2)) at some future time by granting a petition for certiorari from a *first* § 2255 motion in the Fifth Circuit, *amici* are unaware of any pending petition meeting those criteria. *Cf. In re Williams*, No. 15-30731, 2015 WL 7074261, at *2-*3 (5th Cir. Nov. 12, 2015) (holding, in denying a certificate to file a second-or-successive § 2255 motion, that *Johnson* is not a new rule of substantive constitutional law).

The absence of a pending petition is critical, because § 2255(f)(3) imposes a rigid one-year statute of limitations for § 2255(h) motions, which runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." In other words, for prisoners like Butler to benefit from *Johnson*, this Court must confirm that *Johnson* announced a new rule of substantive consti-

tutional law by June 26, 2016—one year from the date of the decision in *Johnson*. Absent such clarification from this Court, Butler cannot obtain "adequate relief * * * in any other form or from any other court." Sup. Ct. R. 20.4(a).

B. Exceptional Circumstances, Including the Split Among the Circuits and the Government's Position that *Johnson* Applies Retroactively, Warrant the Writ.

If the perfect storm of factors present in this case—the strength of Butler's *Johnson* claim, a deep circuit split, and the government's litigating position—does not present the sort of "exceptional circumstances" contemplated by Rule 20.4 and *Felker*, it is hard to imagine what case would.[5]

For starters, unlike in *Felker*, Butler has a clear constitutional claim on the merits with no substantive or procedural impediments to relief in this

[5] "[T]he Rule 20.4(a) exceptional circumstances standard has historically been a screen for cases in which more conventional Supreme Court review *was* available—not for lower court decisions, such as orders denying authorization under Section 2244(b) [or Section 2255(h)], which are otherwise unreviewable." Lee Kovarsky, *Original Habeas Redux*, 97 Va. L. Rev. 61, 111 (2011) (emphasis added)

Court: Butler's sentence is based on three predicate convictions, one of which would not have qualified absent application of ACCA's unconstitutionally vague residual clause. Without that third conviction, the maximum sentence Butler could have received is 10 years' imprisonment—less than the time he has already served. Thus, if *Johnson* is applied retroactively to his case, he is entitled to immediate relief (and release).

Moreover, the importance of granting the writ is not limited to Butler's case. The questions raised by the Petition have deeply divided the federal courts of appeals. To date, five circuits have authorized second-or-successive § 2255 motions based upon *Johnson*. *See Pakala* v. *United States*, 804 F.3d 139 (1st Cir. 2015) (per curiam); *Rivera* v. *United States*, No. 13-4654 (2d Cir. Oct. 5, 2015) (mem.); *Price* v. *United States*, 795 F.3d 731 (7th Cir. 2015); *Reliford* v. *United States*, No. 15-3224 (8th Cir. Oct. 16, 2015) (mem.); *United States* v. *Striet*, No. 15-72506 (9th Cir. Aug. 25, 2015) (mem.). Those courts have concluded that *Johnson* "announced a new substantive rule" within the settled meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989), *Saffle* v. *Parks*, 494 U.S. 484 (1990), *Bousley* v. *United States*, 523 U.S. 614 (1998), and *Schriro* v. *Summerlin*, 542 U.S. 348 (2004), which means that *Johnson* is "categorically retroactive to cases on collateral review." *Price*, 795 F.3d at 734.

In contrast, three circuits, including the Tenth Circuit below in this case, have held that *Johnson* cannot form the basis for a second-or-successive § 2255 motion. *See Williams*, 2015 WL 7074261, at *3; *In re Gieswein*, 802 F.3d 1143 (10th Cir. 2015) (per curiam); *In re Rivero*, 797 F.3d 986 (11th Cir. 2015) (2-1 decision). Even those courts, however, took different paths to reach that conclusion. In *Rivero*, the Eleventh Circuit majority determined (over a dissent) that *Johnson* did not fall within the meaning of *Teague* and its progeny because "[n]othing in *Johnson* suggests that certain kinds of primary, private individual conduct are beyond the power of Congress to proscribe," 797 F.3d at 990 (brackets and quotation marks omitted), *i.e.*, that, under *Teague* and its progeny, *Johnson* is not substantive *at all*. The Fifth Circuit recently applied similar reasoning in *Williams*. *See Williams*, 2015 WL 7074261, at *3.

In *Gieswein*, on the other hand, the Tenth Circuit rejected altogether the idea that a court of appeals should determine, in the first instance, whether a new rule like the one announced in *Johnson* constitutes a new substantive rule as described in *Teague*. The court concluded, instead, that to satisfy § 2255(h)(2), *this* Court must itself *expressly* hold either that a new rule applies retroactively or that the rule "is of a particular type the Court previously held applies retroactively." *Gieswein*, 802 F.3d at

1147. *Compare Tyler* v. *Cain*, 533 U.S. 656, 663 (2001), *with id*. at 668 (O'Connor, J., concurring). In other words, except when decisions of this Court articulate new rules of constitutional law that are unambiguously substantive, the Tenth Circuit would require this Court to expressly so hold in a subsequent case—notwithstanding the one-year statute of limitations that runs from the initial decision.

But regardless of whether this Court agrees with the majority of circuits that *Johnson* should apply retroactively, the existence and nature of this circuit split is important for two reasons. First, it guarantees that, absent this Court's intervention, a fundamental injustice will persist, in which some prisoners obtain relief from the exact same sentences pursuant to which others remain locked up without either resentencing or release.

This inequity could not be more blatant. While Butler sits in prison, a prisoner in the Second Circuit who qualified under ACCA based upon the very same predicate conviction as Butler (escape) has been released from custody. *See* Order Granting Mot. to Vacate/Set Aside/Correct Sentence, *Rivera* v. *United States*, No. 3:13-cv-1742 (D. Conn. Oct. 6, 2015), ECF No. 11.

Second, this case is even more extraordinary because the government agrees with Butler on the merits that *Johnson* ought to be made retroactive to

successive petitions under § 2255(h)(2). Not only does that mean that there is no party adverse to Butler's substantive entitlement to release, but it also means that there is thus no likelihood that this question will reach the Court outside the context of an original habeas petition. In addition to compounding the manifest injustice of barring only some prisoners from invoking *Johnson*, the government's position makes it exceedingly unlikely that the circuits' divergent interpretations will be resolved through any other avenue[6]—and, given the merits of

[6] The line of cases beginning with *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), and ending with *Tyler*, illustrates this point. *Cage* announced a new constitutional rule governing how trial courts must define "reasonable doubt" for juries. 498 U.S. at 40. The petitioner in *Felker* later sought to invoke *Cage* on a successive habeas claim, but the Eleventh Circuit denied certification under § 2244(b)(2). *See Felker*, 518 U.S. at 658. He then petitioned for an original writ, or, in the alternative, a writ of certiorari, both of which this Court denied, leaving open the question of *Cage*'s retroactivity. *See id.* at 665; *see also* Brief for the United States as Amicus Curiae, *In re Smith*, 526 U.S. 1157 (1999) (mem.) (No. 98-5804) (supporting a later petition for an original writ based upon *Cage*). This Court ultimately considered the retroactivity of *Cage* in *Tyler*, which came before the Court after the petitioner *obtained* certification under § 2244(b)(3) and the State of Louisiana defended against his claim on the merits, leading the petitioner to obtain a writ of certiorari after losing in the Fifth Circuit. *See Tyler*, 533 U.S. at 660-61.

the government's position, that countless prisoners will thus not receive the relief to which they are constitutionally entitled under *Johnson*.

The Court, of course, need not resolve each of the complex legal questions raised by the Petition. If this Court agrees with the government that *Johnson* applies retroactively to cases on collateral review, it can simply hold as much, which would moot the extant circuit split while leaving to future decisions the scope of *Teague* and *Tyler* as applied to *other* new rules.[7] But an original writ appears to provide the only avenue for enforcing *Johnson*—and making it available on collateral review to unlawfully sentenced prisoners if this Court concludes that it should be—before AEDPA's one-year clock expires next June. Butler is therefore entitled to that relief.

Finally, entertaining (and potentially granting) an original writ here would not open the door to scores of successive petitions. Even putting aside the fortuitous circumstances presented by the strength

[7] Of course, clarifying the circumstances in which lower courts may infer that a decision of this Court announced a new rule of substantive constitutional law will only help to *prevent* similar circuit splits (that might also require an original writ of habeas corpus to resolve) from recurring in the future. But this Court need not reach that question to resolve, or at least moot, the current circuit split over *Johnson*.

of Butler's *Johnson* claim, the circuit split, and the government's litigating position, new constitutional rules that could satisfy § 2255(h)(2) are few and far between—and lower court decisions disagreeing on that point are even more rare. Further, unlike in *Felker* or other high-profile cases in which this Court's original habeas jurisdiction has been sought, the legal question presented in this case is one on which no deference is owed to factual findings or legal conclusions of a lower court. *Cf. In re Hill*, 134 S. Ct. 118 (2013) (mem.); *In re Davis*, 557 U.S. 952 (2009) (mem.). Indeed, by only allowing enforcement of decisions "made retroactive * * * by the Supreme Court," 28 U.S.C. §§ 2244(b)(2)(A), 2255(h)(2), AEDPA expressly contemplates that the question presented here will be decided de novo by this Court, such that it would not "usurp th[e] power" of criminal trial courts by granting an original writ in these circumstances. *Felker*, 518 U.S. at 663 (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 194 (1830)) (quotation mark omitted).

As the government has recognized in a prior proceeding before this Court, "[t]he rare exercise of this Court's [original] habeas jurisdiction in a case like this, * * * far from interfering with the accomplishment of Congress's objectives in * * * AEDPA, would assist in effectuating in a sensible fashion the system of collateral review Congress created." Brief for the United States as Amicus Curiae, *In re Smith*, 526

U.S. 1157 (1999) (mem.) (No. 98-5804). To accomplish the goals of AEDPA, then, as well as the goals of *Johnson*, this Court should grant the Petition.

II. DENYING AN ORIGINAL WRIT IN THIS INSTANCE WOULD REVIVE THE TROUBLING CONSTITUTIONAL QUESTIONS THIS COURT AVOIDED IN *FELKER*.

If the Court nevertheless declines to issue an original writ in these circumstances, then it can no longer avoid the serious questions raised in *Felker* about the constitutionality of AEDPA's gatekeeping provisions. *Felker* approved those provisions with the understanding that they left open the Court's jurisdiction to grant original writs, a "functional equivalent of direct review." *Felker*, 518 U.S. at 666 (Stevens, J., concurring). Otherwise, as the Court recognized, the Suspension Clause and Exceptions Clause implications of foreclosing review in the federal courts for a certain class of prisoners would have warranted a more exacting analysis of AEDPA's gatekeeping provisions. *See id.* at 661-662 (majority opinion).

Indeed, AEDPA *would* raise serious constitutional questions if it had the effect of precluding *all* review of a court of appeals' conclusion that a new substantive constitutional rule does not apply retroactively, since it would simultaneously

(1) foreclose a prisoner from challenging the legality of his continuing detention; and (2) prevent this Court from reviewing such foreclosure. Yet that would be the result if this Court's original habeas jurisdiction proved illusory, and not just elusive. If this Court does not exercise its original habeas jurisdiction where appropriate and necessary, as it indicated it would in *Felker*, then AEDPA will have had the effect of preventing both lower federal courts and this Court from hearing claims like Butler's *Johnson* claim. Without any kind of "adequate substitute" for review, that result would raise serious constitutional questions. *INS* v. *St. Cyr*, 533 U.S. 289, 305 (2001); *see also id.* at 301 n.13 ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.").[8]

This is hardly a new concept. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868), this

---

[8] *Cf. Boumediene* v. *Bush*, 553 U.S. 723, 787 (2008) ("[W]hen the judicial power to issue habeas corpus properly is invoked[,] the judicial officer must have adequate authority to [1] make a determination in light of the relevant law and facts and [2] to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.").

Court held that no constitutional questions arose from Congress's repeal of the Court's appellate jurisdiction under the Habeas Corpus Act of 1867 because the Court's original habeas jurisdiction remained intact. Even before *McCardle*, in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court relied on its original habeas jurisdiction to review a prisoner's indictment because, it maintained, it was effectively reviewing a lower court decision as an appellate court, and there were no other avenues for relief. Together, *Bollman*, *McCardle*, and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), established the premise upon which *Felker* relied to defend AEDPA: Statutory limits on both habeas review in the lower federal courts and this Court's certiorari jurisdiction are permissible entirely because of the Court's original habeas jurisdiction. *See Yerger*, 75 U.S. (8 Wall.) at 106.[9]

Assuming the government is correct that *Johnson* both (1) is substantive and (2) has been "made retroactive" to cases on collateral review, then an original writ is necessary to avoid severe Suspension Clause concerns with denying Butler *any* forum in which to

[9] As such, "the continued exercise of original habeas jurisdiction [is] not 'repugnant' to a prohibition on review by appeal of circuit court habeas judgments." *Felker*, 518 U.S. at 660 (citing *Yerger*, 75 U.S. (8 Wall.) at 105).

challenge his unconstitutionally imposed sentence (and, as of *Johnson*, his unlawful continuing imprisonment).

And regardless of whether *Johnson* is substantive and has been "made retroactive," an original writ is nevertheless necessary to avoid Exceptions Clause concerns. As Justice Souter wrote in his *Felker* concurrence, "[i]f it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open." 518 U.S. at 667 (Souter, J., concurring). Those concerns are particularly potent here in light of the split among the circuits. *See id.* (cautioning that Exceptions Clause questions "could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard").

Thus, if *Felker* meant what it said, and in order to avoid serious constitutional questions about AEDPA's restrictions on both lower-court jurisdiction and this Court's certiorari authority, this Court should grant original writs where a second-or-successive habeas petitioner meets the requirements of Supreme Court Rule 20.4, as Butler does here.

Simply put, the Petition presents the precise situation *Felker* anticipated: one where AEDPA's gatekeeping provisions have the effect of preventing the

lower courts (or this Court, by way of certiorari) from providing relief to which, if the government is correct, Butler is clearly entitled, and may thereby violate the Suspension Clause. And the division in the courts of appeals presents the precise situation Justice Souter warned against—where a failure to entertain (and issue) original habeas relief would raise serious constitutional questions under the Exceptions Clause. The more this Court's original habeas jurisdiction proves to be a fiction in cases otherwise satisfying Rule 20.4, the more serious the constitutional problems with AEDPA become.

CONCLUSION

For the foregoing reasons, and those in the Petition, the Petition should be granted, or at a minimum, set for full briefing and argument on its merits.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
KATHRYN MARSHALL ALI
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

STEPHEN I. VLADECK
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016

ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
**Admitted only in California*

BRENNA D. NELINSON
HOGAN LOVELLS US LLP
100 International Dr., Suite 2000
Baltimore, MD 21202

Counsel for Amici Curiae

APPENDIX

AMICI CURIAE LAW PROFESSORS

(institutional affiliations are provided
for identification purposes only)

DOUGLAS A. BERMAN

Robert J. Watkins / Proctor & Gamble
Professor of Law

The Ohio State University Moritz College of Law

ERIC M. FREEDMAN

Siggi B. Wilzig Distinguished Professor of Constitutional Rights

Maurice A. Deane School of Law, Hofstra University

BRANDON L. GARRETT

Justice Thurgood Marshall Distinguished
Professor of Law

University of Virginia School of Law

RANDY A. HERTZ

Vice Dean, Professor of Clinical Law,
and Director, Clinical and Advocacy Programs

New York University School of Law

LEE KOVARSKY

Professor of Law

University of Maryland
Francis King Carey School of Law

JAMES S. LIEBMAN
Simon H. Rifkind Professor of Law
Columbia Law School

JUSTIN MARCEAU
Animal Legal Defense Fund Professor of Law
University of Denver, Sturm College of Law

IRA P. ROBBINS
Professor of Law and Justice and
Barnard T. Walsh Scholar
American University Washington College of Law

JORDAN STEIKER
Judge Robert M. Parker Endowed Chair in Law
University of Texas School of Law

STEPHEN I. VLADECK
Professor of Law
American University Washington College of Law

LARRY W. YACKLE
Basil Yanakakis Faculty Research Scholar
and Professor of Law
Boston University School of Law