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## COMMENT

# DOES “SECOND” MEAN SECOND?: EXAMINING THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS IN INTERPRETING AEDPA’S “SECOND OR SUCCESSIVE” LIMITATIONS ON HABEAS CORPUS PETITIONS

### I. INTRODUCTION

The writ of habeas corpus, known as the “Great Writ,”<sup>1</sup> allows an individual in custody under the judgment of a state or federal court conviction to challenge his conviction or custody in federal court on the basis that such violates the Constitution.<sup>2</sup> In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act<sup>3</sup> (AEDPA), which drastically limits the ability of federal courts to review and grant writs of habeas corpus.<sup>4</sup> One such limitation on habeas petitions introduced by AEDPA is the restriction on the ability of federal courts to hear claims presented in “second or successive” habeas corpus petitions.<sup>5</sup> AEDPA prohibits the filing of “second or

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<sup>1</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

<sup>2</sup> *See* 28 U.S.C. § 2254 (2000); 28 U.S.C. § 2255 (2000).

<sup>3</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

<sup>4</sup> For an overview of AEDPA and its changes to habeas corpus law, see 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 3.2 (5th ed. 2005); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *BUFF. L. REV.* 381 (1996).

<sup>5</sup> *See* 28 U.S.C. § 2244(b) (2000); 28 U.S.C. § 2255. Although the restrictions in § 2244(b) and § 2255 are similar, this Comment focuses on the limitations of § 2244(b), which govern habeas petitions filed under § 2254 by persons imprisoned under state court convictions. 28 U.S.C. § 2244(b) states:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

successive” habeas petitions unless the claims raised in the petition fall into one of two very narrow exceptions.<sup>6</sup> To enforce these limitations, AEDPA sets up a “gatekeeping”<sup>7</sup> function for circuit courts, which requires the courts to prescreen “second or successive” habeas petitions and grant an authorization before the inmate may file the petition in district court.<sup>8</sup> Despite the stringent new rules governing “second or successive” habeas petitions, AEDPA did not define what constitutes a “second or successive” habeas petition.<sup>9</sup>

Prior to AEDPA, the ability of a petitioner to file a subsequent application for a writ of habeas corpus was determined by the “abuse of the writ” standard.<sup>10</sup> This doctrine, “define[d] the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus.”<sup>11</sup> As the Supreme Court explained, “the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b). Both § 2244(b) and § 2255 contain limitations on “second or successive” habeas applications, and generally, courts have not viewed any distinction between § 2244(b)’s use of the phrase “second or successive” and § 2255’s use of that phrase. *See, e.g.*, *United States v. Orozco-Ramirez*, 211 F.3d 862, 864 n.4 (5th Cir. 2000) (“[A]lthough the application of ‘second or successive’ in section 2255 is in question in the case *sub judice*, we will refer to cases involving section 2254 as relevant to our analysis.”); *United States v. Flores*, 135 F.3d 1000, 1002 n.7 (5th Cir. 1998) (“Because of the similarity of the actions under sections 2254 and 2255, they have traditionally been read *in pari materia* where the context does not indicate that would be improper.”) (citing *McFarland v. Scott*, 512 U.S. 849, 856–58 (1994)). Thus, while this Comment focuses on the limitations of § 2244(b), some of the cases cited in this Comment involve discussions of § 2255’s “second or successive” limitations.

<sup>6</sup> *See* 28 U.S.C. § 2244(b).

<sup>7</sup> *Felker v. Turpin*, 518 U.S. 651, 657 (1996) (“[AEDPA] creates a “gatekeeping” mechanism for the consideration of second or successive applications in district court.”).

<sup>8</sup> *E.g.*, 28 U.S.C. § 2244(b)(3); 2 HERTZ & LIEBMAN, *supra* note 4, § 28.3a; Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 706–11 (2002).

<sup>9</sup> *E.g.*, *Benchoff v. Colleran*, 404 F.3d 812, 816 (3d Cir. 2005) (“Section 2244, however, does not define what constitutes a ‘second or successive’ petition.”); David R. Dow et al., *The Extraordinary Execution of Billy Vickers, the Banality of Death, and the Demise of Post-Conviction Review*, 13 WM. & MARY BILL RTS. J. 521, 560 (2004). (“The statute does not define that phrase.”).

<sup>10</sup> 2 HERTZ & LIEBMAN, *supra* note 4, § 28.2b; Stevenson, *supra*, note 8, at 706–11.

<sup>11</sup> *McCleskey v. Zant*, 499 U.S. 467, 470 (1991).

informed and controlled by historical usage, statutory developments, and judicial decisions."<sup>12</sup>

In 1996, however, Congress changed habeas law with the passage of AEDPA and its new limitations on "second or successive" habeas corpus applications.<sup>13</sup> Two months after the law was enacted, in *Felker v. Turpin*<sup>14</sup> the Supreme Court rejected a facial challenge to constitutionality of AEDPA's restrictions on successive habeas petitions.<sup>15</sup> The Supreme Court, however, did not interpret AEDPA's "second or successive" language codified in 28 U.S.C. § 2244(b) or determine what constitutes a "second or successive" habeas application.<sup>16</sup>

As a result of AEDPA not defining "second or successive"<sup>17</sup> and the Supreme Court not providing a clear interpretation of the phrase,<sup>18</sup> the circuit courts have applied different interpretations of the phrase and reached different results in determining which habeas petitions are "second or successive" under AEDPA.<sup>19</sup> Some circuits interpret "second or successive" as a term of art that incorporates the pre-AEDPA abuse of the writ standard,<sup>20</sup> while other circuits reject this interpretation and interpret "second or successive" according to the plain meaning of those terms.<sup>21</sup> Moreover, the case law is replete with different and inconsistent interpretations of AEDPA's "second or successive" limitations.<sup>22</sup> These differences and inconsistencies exist not only among the different circuits but also among different decisions within certain individual circuits.<sup>23</sup> Most courts and commentators, however, have not recognized these divergent interpretations of "second or successive."

This Comment reviews these conflicting decisions to reveal the split among the circuits and the inconsistency within certain

<sup>12</sup> *Id.* at 489.

<sup>13</sup> 2 HERTZ & LIEBMAN, *supra* note 4, § 28.2b; Stevenson, *supra*, note 8, at 706–11.

<sup>14</sup> 518 U.S. 651 (1996).

<sup>15</sup> *Id.* at 664 (noting that the "new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ'").

<sup>16</sup> *See id.* at 662–64.

<sup>17</sup> *See* Benchoff v. Colleran, 404 F.3d 812, 816 (3d Cir. 2005) ("Section 2244, however, does not define what constitutes a 'second or successive' petition.").

<sup>18</sup> *See infra* Part II.

<sup>19</sup> *See infra* Part III.

<sup>20</sup> *See, e.g.,* James v. Walsh, 308 F.3d 162, 167 (2d Cir. 2002) ("To interpret the term 'second or successive,' courts look to the pre-AEDPA abuse-of-the-writ doctrine.").

<sup>21</sup> *See, e.g., In re* Page, 179 F.3d 1024, 1025 (7th Cir. 1999) (holding that the abuse of the writ standard "was replaced by the new criteria [under AEDPA] and passed out of the law . . . . 'The doctrine of abuse of the writ is defunct.'" (quoting *Burris v. Parke*, 95 F.3d 465, 469 (7th Cir. 1996) (en banc))).

<sup>22</sup> *See infra* Part III.

<sup>23</sup> *See infra* Part III.

individual circuits regarding the interpretation of “second or successive” under AEDPA. Part II of this Comment reviews the Supreme Court decisions that offer insight into a proper interpretation of “second or successive” contained in § 2244(b). Part III reviews the decisions of the courts of appeals, highlighting the two different interpretations of “second or successive” followed by different circuits. Part III also reveals the inconsistency within the decisions of individual circuits regarding the interpretation of “second or successive.” Finally, Part IV explains why the interpretation of “second or successive” adopted by some circuits is an improper interpretation of AEDPA’s “second or successive” limitations and provides support for interpreting AEDPA’s “second or successive” language as a term of art that incorporates the pre-AEDPA abuse of the writ doctrine.

## II. THE SUPREME COURT’S DECISIONS INTERPRETING AEDPA’S “SECOND OR SUCCESSIVE” LIMITATIONS

Since AEDPA’s passage, the Supreme Court has considered whether a particular habeas application is “second or successive” under section 2244(b) in three cases.<sup>24</sup> In each of those decisions, however, the Court does not supply an interpretation of “second or successive” that provides clear guidance to aid lower courts in determining whether other habeas applications are “second or successive” under section 2244(b). This section reviews these Supreme Court decisions and details how each case provides only limited guidance for the circuit courts to interpret AEDPA’s “second or successive” limitations.

The Supreme Court first considered whether a particular habeas petition was “second or successive” under AEDPA in *Stewart v. Martinez-Villareal*.<sup>25</sup> Prior to AEDPA’s passage, Martinez-Villareal filed a habeas petition that included a claim under *Ford v. Wainwright*<sup>26</sup> that he was incompetent to be executed.<sup>27</sup> His *Ford* claim was dismissed as premature and his other claims were eventually denied on the merits.<sup>28</sup> The State then obtained a warrant

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<sup>24</sup> See *Burton v. Stewart*, 127 S. Ct. 793 (2007); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

<sup>25</sup> 523 U.S. 637.

<sup>26</sup> 477 U.S. 399 (1986). In *Ford*, the Supreme Court held that the Eighth Amendment prohibits a state from executing an inmate who is insane. *Id.* at 410. Accordingly, claims by inmates that they cannot be executed because they are insane or incompetent are frequently referred to as *Ford* claims. See, e.g., *Stevenson, supra*, note 8, at 740–42.

<sup>27</sup> *Martinez-Villareal*, 523 U.S. at 640.

<sup>28</sup> The district court initially granted Martinez-Villareal a writ of habeas corpus, but the Ninth Circuit reversed the district court’s granting of the writ. *Id.*; *Martinez-Villareal v. Lewis*,

for his execution after AEDPA became effective, and Martinez-Villareal filed another habeas petition reasserting his *Ford* claim.<sup>29</sup>

The State argued that Martinez-Villareal's subsequent habeas petition was "second or successive" under the plain meaning of § 2244(b) because he had already fully litigated a habeas petition in federal court.<sup>30</sup> The Supreme Court, however, rejected this argument.<sup>31</sup> The Court noted that if the state's "interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse."<sup>32</sup> Instead of adopting the state's interpretation, the Court held Mr. Martinez-Villareal's *Ford* claim was not a "second or successive" petition under § 2244(b) because the claim "would not be barred under any form of res judicata."<sup>33</sup> "To hold otherwise," the Court stated, "would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review."<sup>34</sup> Justices Scalia and Thomas both dissented and argued that the Court ignored the plain language of § 2244(b) in reaching its decision.<sup>35</sup>

The Court failed to provide a clear or comprehensive interpretation of what constitutes a "second or successive" habeas application under 28 U.S.C. § 2244(b) in *Martinez-Villareal*. Indeed, the Court left unresolved a question that would have provided more guidance to lower courts on what constitutes a "second or successive" habeas application.<sup>36</sup> Instead, the Court resolved the case based on the unique

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80 F.3d 1301 (9th Cir. 1996).

<sup>29</sup> *Martinez-Villareal*, 523 U.S. at 640.

<sup>30</sup> *Id.* at 643.

<sup>31</sup> *Id.* at 643–44.

<sup>32</sup> *Id.* at 644.

<sup>33</sup> *Id.* at 645.

<sup>34</sup> *Id.*

<sup>35</sup> Justice Scalia opined: "The Court today flouts the unmistakable language of the statute to avoid what it calls a 'perverse' result. There is nothing 'perverse' about the result that the statute commands, except that it contradicts pre-existing judge-made law, which it was precisely the purpose of the statute to change." *Id.* at 646 (Scalia, J., dissenting) (citations omitted). Justice Thomas reiterated the point, stating that the "reasons offered by the Court for disregarding the plain meaning of the statute are unpersuasive." *Id.* at 649 (Thomas, J., dissenting).

<sup>36</sup> In the only footnote in the opinion, the Court noted that it was not confronted with a situation where a habeas petitioner raises a claim for the first time in a petition after his initial petition is rejected. *Martinez-Villareal*, 523 U.S. at 645 n\*. Therefore, the court concluded: "we have no occasion to decide whether such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." *Id.* Answering this question would have required the Court to provide a clearer interpretation of "second or successive" under AEDPA. Instead, because the Court did not resolve this question, the circuit courts have split in

procedural history of the case.<sup>37</sup> As a result, the lower federal courts have differed in their understanding of *Martinez-Villareal*'s holding and have reached different interpretations of AEDPA's "second or successive" limitations as a result.<sup>38</sup>

Two years after *Martinez-Villareal*, the Supreme Court decided *Slack v. McDaniel*,<sup>39</sup> which provides further guidance into what constitutes a "second or successive" habeas petition. In *Slack*, the Court held that a "habeas petition filed in district court after an initial habeas petition was unadjudicated on its merits and dismissed [by the district court] for failure to exhaust state remedies [was] not a second or successive petition."<sup>40</sup> Although the Court's decision was governed by pre-AEDPA law, the majority made a point to note that the definition of second or successive would not be any different under AEDPA.<sup>41</sup> To support this proposition, the Court cited *Martinez-Villareal*, which it noted used "pre-AEDPA law to interpret AEDPA's provision governing 'second or successive habeas applications.'"<sup>42</sup> Justice Scalia again dissented from this portion of the Court's holding and restated his belief that "the Court produce[d] . . . a distortion of the natural meaning of the term 'second or successive.'"<sup>43</sup>

In *Burton v. Stewart*,<sup>44</sup> the Court once more addressed whether a particular habeas petition was "second or successive," but again, its holding does not provide much guidance for determining whether a habeas application that does not fit the unique factual circumstances presented in that case is "second or successive." In *Burton*, in a per curiam decision, the Court held that a habeas petitioner who raises exhausted and unexhausted claims in an initial habeas petition and

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answering this question and in interpreting "second or successive" under AEDPA. Compare, e.g., *Crouch v. Norris*, 251 F.3d 720 (8th Cir. 2001) (holding that a petitioner may raise a *Ford* claim in a numerically second habeas petition even if the *Ford* claim was not raised in his initial habeas petition), with *In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000) (barring a petitioner from raising a *Ford* claim in a numerically second petition because the petitioner did not raise the *Ford* claim in his initial habeas petition).

<sup>37</sup> See *Martinez-Villareal*, 523 U.S. at 643–45 (majority opinion) (basing its holding in part on the fact that *Martinez-Villareal* had raised his *Ford* claim in his first habeas petition but it was dismissed procedurally); see also *Stevenson*, *supra* note 8, at 747 ("The Court avoided deciding the broad issues in the case by, in essence, elevating an aspect of the procedural history into a ground for decision.").

<sup>38</sup> See *infra* notes 66–70, 78, 90–91, 105–06 and accompanying text.

<sup>39</sup> 529 U.S. 473 (2000).

<sup>40</sup> *Id.* at 485–86.

<sup>41</sup> *Id.* at 486.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 490–91 (Scalia, J., dissenting).

<sup>44</sup> 127 S. Ct. 793 (2007).

proceeds to adjudicate only the exhausted claims cannot "later assert that a subsequent petition is not 'second or successive' precisely because his new claims were unexhausted at the time he filed his first petition."<sup>45</sup> The Court delivered this narrow holding while passing on the opportunity to delineate the proper approach to determining whether a habeas petition is "second or successive" under § 2244(b). In *Burton*, the Ninth Circuit determined that Burton's habeas petition was not "second or successive" based on pre-AEDPA law.<sup>46</sup> Instead of deciding whether the Ninth Circuit was correct in looking to pre-AEDPA law to determine whether Burton's habeas petition was "second or successive" under AEDPA, the Supreme Court assumed this determination was correct without deciding the issue.<sup>47</sup> The Court stated: "We assume for purposes of this case, without deciding, that the Ninth Circuit's . . . approach to determining whether a petition is 'second or successive' is correct."<sup>48</sup> Thus, once again the Court expressly avoided a direct opportunity to delineate the proper approach to determining whether a habeas petition is "second or successive" under § 2244(b).

Reviewing *Martinez-Villareal*, *Slack*, and *Burton*, it is clear that the Court did not provide a broad or conclusive interpretation of "second or successive" under AEDPA in any of those decisions. Instead, the decisions provide a definitive determination of whether a particular habeas application is "second or successive" only if that habeas application fits squarely into one of the unique factual scenarios before the Court in those three cases. Accordingly, these decisions do not provide a clear interpretation regarding what constitutes a "second or successive" habeas application under 28 U.S.C. § 2244(b).

### III. THE TWO APPROACHES OF THE CIRCUIT COURTS OF APPEALS TO INTERPRETING AEDPA'S "SECOND OR SUCCESSIVE" LIMITATIONS

As discussed in the previous section, the Supreme Court has not provided a clear interpretation of what constitutes a "second or successive" habeas application under 28 U.S.C. § 2244(b). Moreover, AEDPA does not define what constitutes a "second or successive" habeas petition.<sup>49</sup> As a result, the circuit courts, left to interpret the

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<sup>45</sup> *Id.* at 797.

<sup>46</sup> *Id.* at 796–97. The Ninth Circuit relied on *McClesky v. Zant*, 499 U.S. 467 (1991), in holding that "Burton had a 'legitimate excuse for failing to raise' his [unexhausted claims] in the [initial] petition." *Id.* at 797.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *supra* note 9.



phrase individually, have split on the proper interpretation of the phrase and reached different results in determining which habeas petitions are “second or successive.”<sup>50</sup> Following the guidance provided by *Martinez-Villareal* and *Slack*, some circuits interpret “second or successive” as a term of art that incorporates the pre-AEDPA abuse of the writ standard,<sup>51</sup> while other circuits reject this interpretation and interpret “second or successive” according to the plain meaning of the terms.<sup>52</sup> Additionally, other circuits have interpreted “second or successive” differently in different cases, sometimes interpreting it to incorporate the pre-AEDPA standard, and other times interpreting it literally.<sup>53</sup> This section reviews the various decisions of the courts of appeals concerning what constitutes a “second or successive” habeas petition.

#### *A. Circuits That Interpret “Second or Successive” as a Term of Art That Incorporates the Pre-AEDPA Abuse of the Writ Doctrine*

The majority of circuits, when faced with the issue, reject a literal reading of “second or successive” in § 2244(b), and instead hold that AEDPA’s “second or successive” language is a term of art that incorporates the pre-AEDPA abuse of the writ principles. The First,<sup>54</sup> Second,<sup>55</sup> Third,<sup>56</sup> Eighth,<sup>57</sup> Ninth,<sup>58</sup> and Tenth Circuits<sup>59</sup> have all

<sup>50</sup> See *infra* notes 56–65, 76–88 and accompanying text.

<sup>51</sup> See, e.g., *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002) (“To interpret the term ‘second or successive,’ courts look to the pre-AEDPA abuse-of-the-writ doctrine.”).

<sup>52</sup> See, e.g., *In re Page*, 179 F.3d 1024, 1025 (7th Cir. 1999) (holding that the abuse of the writ standard “was replaced by the new criteria [under AEDPA] and passed out of the law . . . . ‘The doctrine of abuse of the writ is defunct.’” (quoting *Burris v. Parke*, 95 F.3d 465, 469 (7th Cir. 1996) (en banc))).

<sup>53</sup> See *infra* notes 90–113 and accompanying text.

<sup>54</sup> See, e.g., *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000) (“‘The phrase ‘second or successive petition’ is a term of art,’ designed to avoid abuse of the writ.” (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000))).

<sup>55</sup> See, e.g., *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002) (“AEDPA does not define what constitutes a ‘second or successive’ petition. Courts have uniformly rejected a literal reading of Section 2244, concluding that a numerically second petition does not necessarily constitute a ‘second’ petition for purposes of AEDPA. To interpret the term ‘second or successive,’ courts look to the pre-AEDPA abuse-of-the-writ doctrine.”) (internal citations omitted).

<sup>56</sup> See, e.g., *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005) (“[W]e find that the abuse of the writ doctrine retains viability as a means of determining when a petition should be deemed ‘second or successive’ under the [AEDPA] statute. We are supported in this view by the fact that, notwithstanding the AEDPA’s passage, our sister circuits uniformly have continued to interpret ‘second or successive’ with reference to the pre-AEDPA ‘abuse of the writ’ doctrine. . . . The abuse of the writ doctrine dictates that we should treat the term ‘second or successive’ as a term of art, which is not to be read literally.”).

<sup>57</sup> See, e.g., *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001) (“[I]t is generally acknowledged that the interpretation of ‘second or successive’ involves the application of pre-AEDPA abuse-of-the-writ principles.”).

<sup>58</sup> See, e.g., *Hill v. Alaska*, 297 F.3d 895, 897–98 (9th Cir. 2002) (“AEDPA does not

uniformly and consistently followed this interpretation. The Second Circuit's holding in *James v. Walsh*<sup>60</sup> captures the general view of these circuits:

AEDPA does not define what constitutes a 'second or successive' petition. Courts have uniformly rejected a literal reading of Section 2244, concluding that a numerically second petition does not necessarily constitute a 'second' petition for purposes of AEDPA. To interpret the term 'second or successive,' courts look to the pre-AEDPA abuse-of-the-writ doctrine.<sup>61</sup>

Under this interpretation a habeas "application is not second or successive simply because it follows an earlier federal petition."<sup>62</sup> Instead, a later petition is "second or successive," and thus subject to AEDPA's gatekeeping provisions, only if that petition: "1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes and abuse of the writ."<sup>63</sup>

In interpreting "second or successive" in § 2244(b) as a term of art that incorporates the pre-AEDPA abuse of the writ principles, these circuits rely on the Supreme Court's decisions of *Slack v. McDaniel* and *Stewart v. Martinez-Villareal* to support their interpretation.<sup>64</sup> Although neither *Slack* nor *Martinez-Villareal* expressly adopted this interpretation of "second or successive," these circuits rely on the rationale and the language used by the Supreme Court in those decisions to support their interpretation of "second or successive" as a term of art under AEDPA.<sup>65</sup> The Eighth Circuit, for instance, noted

define the terms 'second or successive.' The Supreme Court, the Ninth Circuit, and our sister circuits have interpreted the concept incorporated in this term of art as derivative of the 'abuse of the writ' doctrine developed in pre-AEDPA cases.").

<sup>59</sup> See, e.g., *Reeves v. Little*, 120 F.3d 1136, 1140 (10th Cir. 1997) ("In determining what is a 'second or successive' motion under the statute, the circuits which have reviewed this question use the 'abuse of the writ' standard in effect before AEDPA was enacted.").

<sup>60</sup> 308 F.3d 162 (2d Cir. 2002).

<sup>61</sup> *Id.* at 167 (internal citations omitted).

<sup>62</sup> *Benchoff v. Collieran*, 404 F.3d 812, 817 (3d Cir. 2005) (quoting *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)).

<sup>63</sup> *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998).

<sup>64</sup> See, e.g., *Benchoff*, 404 F.3d at 817 (citing *Slack*); *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002) (citing *Martinez-Villareal*); *Hill v. Alaska*, 297 F.3d 895, 897-98 (9th Cir. 2002) (citing *Martinez-Villareal*); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001) (citing *Martinez-Villareal*); *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000) (quoting *Slack*); *United States v. Barrett*, 178 F.3d 34, 44 (1st Cir. 1999) (citing *Martinez-Villareal*).

<sup>65</sup> See, e.g., *Benchoff*, 404 F.3d at 817 (noting that *Slack* "suggest[ed] that the definition of second or successive would be same under AEDPA as under pre-AEDPA law"); *Crouch*, 251

that “[t]he lesson of *Slack* and *Martinez-Villareal* . . . is that “second or successive” remains a term of art that must be given meaning by reference to both the body of case law developed before the enactment of AEDPA and the policies that prompted AEDPA’s enactment.”<sup>66</sup>

Even though the Supreme Court did not expressly hold AEDPA’s “second or successive” language incorporates the abuse of the writ principles, its reasoning in *Martinez-Villareal* and *Slack* has been viewed by many circuit courts and commentators as endorsing this interpretation.<sup>67</sup> One commentator noted:

[The] majority [in *Martinez-Villareal*] essentially acknowledged [that] a literal reading of the words of the statute . . . would have compelled the conclusion that the restrictions applied to *Martinez-Villareal*’s numerically “second” petition. [Therefore,] the Court read the statute to incorporate the not-entirely-numerical definition of . . . multiple petitions that federal courts had developed under pre-AEDPA law.<sup>68</sup>

Moreover, as demonstrated above, a majority of the circuits have relied upon the Supreme Court’s reasoning in *Slack* and *Martinez-Villareal* in interpreting “second or successive” under AEDPA to incorporate the pre-AEDPA abuse of the writ standards.

Most of these circuits have generally stated that their sister circuits are “uniform” in interpreting “second or successive” under AEDPA to incorporate pre-AEDPA principles.<sup>69</sup> None of these circuits have

F.3d at 723 (noting that *Martinez-Villareal* “look[ed] to pre-AEDPA law to determine” a post-AEDPA § 2244(b) “second or successive” issue).

<sup>66</sup> *Crouch*, 251 F.3d at 725 (holding that, in light of *Slack* and *Martinez-Villareal*, a petitioner’s numerically second habeas petition is not “second or successive” under AEDPA if it could not have been raised in an earlier petition or does not otherwise constitute an abuse of the writ).

<sup>67</sup> See, e.g., *supra* notes 66–68 and accompanying text; Dow et al., *supra* note 9, at 560 (“Consequently, the Court has interpreted the AEDPA’s provisions governing ‘second or successive’ habeas application by looking to the pre-AEDPA abuse-of-the-writ doctrine.” (citing *Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Felker v. Turpin*, 518 U.S. 651 (1996))).

<sup>68</sup> 1 HERTZ & LIEBMAN, *supra* note 4, § 3.2, at 120–21 n.37.

<sup>69</sup> See, e.g., *Benchoff*, 404 F.3d at 817 (“[O]ur sister circuits *uniformly* have continued to interpret ‘second or successive’ with reference to the pre-AEDPA ‘abuse of the writ’ doctrine.”) (emphasis added); *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002) (“Courts have *uniformly* rejected a literal reading of Section 2244 . . .”) (emphasis added); *Hill v. Alaska*, 297 F.3d 895, 897–98 (9th Cir. 2002) (noting that the Supreme Court, the Ninth Circuit, and its sister circuits are *uniform* in this interpretation); *Crouch*, 251 F.3d at 723 (“Courts considering the construction of § 2244(b) have *uniformly* rejected a literal reading.”) (emphasis added).

recognized any contrary interpretations of "second or successive" by other circuits.<sup>70</sup> The other circuit courts, however, have not uniformly accepted or applied the interpretation of "second or successive" adopted by the majority of the circuits. To the contrary, the Seventh Circuit has flatly rejected the interpretation of "second or successive" adopted by the majority of circuits,<sup>71</sup> and the Fourth, Fifth, Sixth, and Eleventh Circuits have each applied varying interpretations of "second or successive."<sup>72</sup>

*B. Seventh Circuit Interprets "Second or Successive" According to the Plain Meaning of the Terms*

Far from being uniform with the majority interpretation of "second or successive" as a term of art that incorporates the pre-AEDPA abuse of the writ doctrine, the Seventh Circuit has expressly rejected this interpretation. Soon after the passage of AEDPA, the Seventh Circuit, sitting *en banc*, stated its view that "[t]he doctrine of abuse of the writ is defunct" in light of AEDPA's change in the law.<sup>73</sup> This statement shows a clear split among the circuits.

The Seventh Circuit reaffirmed this statement in *In re Page*,<sup>74</sup> and expressly rejected the interpretation of "second or successive" taken by the majority of circuits. In *In re Page* the Seventh Circuit held that a habeas petition was "second or successive" under AEDPA even though the claim raised in the petition could not have been included in the petitioner's first habeas petition.<sup>75</sup> The opinion adheres to the view advocated by the dissenters in *Martinez-Villareal* and *Slack* that "second or successive" should be read literally according to the natural meaning of the terms.<sup>76</sup> The court rejected the petitioner's argument that his numerically second petition should be treated as a first petition so long as it is not an abuse of the writ.<sup>77</sup> Instead, the court held that the concept of abuse of the writ "was replaced by the new criteria [under AEDPA] and passed out of the law."<sup>78</sup> The court reiterated:

The doctrine of abuse of the writ is defunct. The term derives from section 2244(b), now wholly superseded by the new law

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<sup>70</sup> See cases cited *supra* note 71.

<sup>71</sup> See *infra* notes 76–88 and accompanying text.

<sup>72</sup> See *infra* notes 90–113 and accompanying text.

<sup>73</sup> *Burris v. Parke*, 95 F.3d 465, 469 (7th Cir. 1996) (*en banc*).

<sup>74</sup> 179 F.3d 1024.

<sup>75</sup> *Id.* at 1025.

<sup>76</sup> See *supra* notes 36, 45 and accompanying text.

<sup>77</sup> *In re Page*, 179 F.3d at 1025.

<sup>78</sup> *Id.*

[i.e., AEDPA], which nowhere uses the term. There is no longer any statutory handle for the doctrine, and in any event its role seems wholly preempted by the detailed provisions of the new statute concerning successive petitions.<sup>79</sup>

The court also expressed its disagreement with the result that would occur if it adopted the “dicta” of the other circuits, which the petitioner argued supported his argument that AEDPA’s “second or successive” language incorporated pre-AEDPA abuse of the writ principles.<sup>80</sup> The court noted this interpretation would allow a habeas petitioner “to choose between the old abuse of the writ concept and the new statutory concept [of AEDPA].”<sup>81</sup> As the court stated:

Under the old law, a petition found to be an abuse of the writ was barred. Period. Under the dicta, a petition that would have been an abuse of the writ under the old law is, under AEDPA, a second or successive petition—which means that it is not automatically barred, that the prisoner can file it even though it is by definition an abuse of the writ, if he can fit it into one of the categories of the new statute.<sup>82</sup>

The court found that this interpretation of AEDPA “is a slap in the face of Congress.”<sup>83</sup>

Moreover, the Seventh Circuit recently reaffirmed *In re Page in Lambert v. Davis*,<sup>84</sup> despite the dissent’s view that the “Supreme Court’s decision in *Slack v. McDaniel* calls into question the reasoning of this court in *In re Page*.”<sup>85</sup>

Therefore, while a majority of circuits are “uniform” in interpreting “second or successive” to incorporate the pre-AEDPA abuse of the writ principles, the Seventh Circuit has unequivocally rejected this interpretation of “second or successive” under AEDPA. There is a clear split among the circuits regarding the proper interpretation of “second or successive” in 28 U.S.C. § 2244(b).

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<sup>79</sup> *Id.* (quoting *Burris v. Parke*, 95 F.3d 465, 469 (7th Cir. 1996) (en banc)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1026.

<sup>82</sup> *Id.* at 1025–26.

<sup>83</sup> *Id.* at 1026.

<sup>84</sup> 449 F.3d 774 (7th Cir. 2006).

<sup>85</sup> *Lambert v. Davis*, 449 F.3d at 780 n.1 (Ripple, J., dissenting) (internal citations omitted), *reh’g en banc denied*, No. 05-2610, 2006 U.S. App. LEXIS 21329 (7th Cir. Aug. 14, 2006), *cert. denied*, 75 U.S.L.W. 3497 (2007).

*C. Circuits That Are Inconsistent in Interpreting "Second or Successive"*

Not only is there a split among the circuits regarding the proper interpretation of "second or successive," but there is also inconsistency among the panel decisions within certain individual circuits regarding the interpretation of "second or successive." Different panels within the Fourth, Fifth, Sixth, and Eleventh Circuits have each applied various interpretations of "second or successive" in different cases.<sup>86</sup>

The Fourth Circuit has yet to expressly adopt or reject the majority interpretation of "second or successive" in § 2244(b). The Fourth Circuit generally rejects the majority approach and interprets "second or successive" according to the plain meaning of those terms when determining if a subsequent habeas petition falls under the gatekeeping provisions of § 2244(b).<sup>87</sup> Likewise, it also has rejected the majority of circuits' expansive reading of *Slack* and *Martinez-Villereal* and the holdings that a subsequent habeas petition is not "second or successive" if it raises a claim that could not have been raised in the previous petition.<sup>88</sup> The Fourth Circuit, however, has not been uniform in this interpretation. In at least one panel decision the Fourth Circuit rejected a literal reading of "second or successive" to hold that a numerically second habeas petition under § 2255 is not "second or successive" when the first habeas petition was used only to reinstate the petitioner's direct appeal.<sup>89</sup>

Like the Fourth Circuit, the Sixth Circuit has not been uniform in its interpretation of "second or successive." An early Sixth Circuit decision, issued soon after the passage of AEDPA, distinguished the "old law" of abuse of the writ from the "new law" implemented by AEDPA and seemingly adopted a literal or plain meaning interpretation of AEDPA's "second or successive" limitations similar to the Seventh Circuits'.<sup>90</sup> In the more recent decision of *In re*

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<sup>86</sup> See *infra* notes 90–113 and accompanying text.

<sup>87</sup> See, e.g., *Evans v. Smith*, 220 F.3d 306, 322–23 (4th Cir. 2000).

<sup>88</sup> See *id.* (rejecting petitioner's expansive reading of *Slack* and *Martinez-Villereal* and rejecting the petitioner's argument that his habeas petition was not a "second or successive" petition under § 2244(b) because he could not have raised the claim in his previous habeas petition). In contrast, the majority of circuits hold that a petition is not "second or successive" if it raises a claim that could not have been raised at the time of a prior petition. See, e.g., *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005) ("[A] subsequent petition . . . is clearly not a 'second or successive' petition within the meaning of § 2244 if the claim [raised in the petition] had not arisen or could not have been raised at the time of the prior petition.").

<sup>89</sup> *In re Goddard*, 170 F.3d 435 (4th Cir. 1999).

<sup>90</sup> *In re Hanserd*, 123 F.3d 922, 928–29 (6th Cir. 1997). In *In re Hanserd*, the Sixth Circuit noted that while the petitioner would have been permitted to file his subsequent habeas

*Bowen*,<sup>91</sup> however, instead of following a plain meaning interpretation of “second or successive,” a different panel of the Sixth Circuit interpreted “second or successive” as a term of art that incorporates pre-AEDPA abuse of the writ principles.<sup>92</sup> Since *In re Bowen*, two different panels of the Sixth Circuit have espoused two different interpretations of “second or successive” under AEDPA. One panel limited the holding of *In re Bowen* and strictly applied § 2244(b)’s limitations to hold that a subsequent petition was “second or successive” even though it raised a claim that could not have been raised at the time the petitioner filed his initial habeas petition.<sup>93</sup> Thus, that panel decision split from the majority of circuits that hold that a claim raised in a subsequent petition is not “second or successive” under AEDPA if that claim could not have been raised in the petitioner’s previous habeas petition.<sup>94</sup> A different panel decision, however, relied on *In re Bowen* to expressly reject a plain meaning interpretation of “second or successive” under § 2244(b).<sup>95</sup> The court noted that “[c]ourts have not, however, construed ‘second or successive’ to encompass all . . . habeas petitions that are ‘numerically’ second in the sense that they are literally the second motion filed.”<sup>96</sup> Therefore, like the Fourth Circuit, the Sixth Circuit has not been consistent in its interpretation of “second or successive” under AEDPA.

In the same manner, the Fifth and Eleventh Circuits have also been inconsistent in their interpretation of “second or successive” under AEDPA. Like the Fourth Circuit, the Eleventh Circuit has generally strictly interpreted “second or successive” according to the plain meaning of the words in the phrase;<sup>97</sup> it has not followed the holdings of the majority of circuits that a subsequent habeas petition is not “second or successive,” under pre-AEDPA abuse of the writ

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petition under the “old abuse-of-the-writ standard,” under AEDPA, the petitioner could not file the petition because it was a “second or successive” habeas petition. *Id.*

<sup>91</sup> 436 F.3d 699 (6th Cir. 2006).

<sup>92</sup> *In re Bowen*, 436 F.3d at 704 (asserting that “not every numerically second petition is ‘second or successive’ for purposes of AEDPA,” and that “courts defining ‘second or successive’ generally apply abuse of the writ decisions, including those decisions that predated AEDPA”).

<sup>93</sup> *In re White*, No. 06-3306, slip op. at 3–4 (6th Cir. June 19, 2006).

<sup>94</sup> *See, e.g.,* *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005) (“[A] subsequent petition . . . is clearly *not* a ‘second or successive’ petition within the meaning of § 2244 if the claim [raised in the petition] had not arisen or could not have been raised at the time of the prior petition.”).

<sup>95</sup> *Lang v. United States*, 474 F.3d 348, 351 (6th Cir. 2007).

<sup>96</sup> *Id.*

<sup>97</sup> *See, e.g., In re Medina*, 109 F.3d 1556, 1565 (11th Cir. 1997) (noting that the “plain terms” of § 2244(b) applied to bar a successive habeas petition).

principles, if it raises a claim that could not have been raised in a previous petition.<sup>98</sup> Despite the fact that Eleventh Circuit generally recognizes a distinction between the pre- and post-AEDPA standards,<sup>99</sup> one panel decision has followed the majority of circuits in holding that "second or successive" is a term of art that incorporates the pre-AEDPA abuse of the writ principles.<sup>100</sup> That decision stated: "We agree with the decisions issued by many of our sister circuits that a petition . . . would not be second or successive where the claim could not have been raised in an earlier petition and does not otherwise constitute an abuse of the writ."<sup>101</sup> This decision, adopting the majority rule that is based upon a broad reading of *Slack* and *Martinez-Villareal's* holding,<sup>102</sup> is at odds with the Eleventh Circuit's other decisions that have expressly rejected a broad reading of *Martinez-Villareal's* holding.<sup>103</sup>

Unlike the Eleventh Circuit, the Fifth Circuit has generally interpreted "second or successive," in accordance with the majority of the other circuits, as a term of art that incorporates the pre-AEDPA abuse of the writ standards.<sup>104</sup> Like the Eleventh Circuit, however, the Fifth Circuit has rejected this interpretation of "second or successive" when a numerically second petition raises a *Ford* claim.<sup>105</sup> In these

<sup>98</sup> See, e.g., *In re Provenzano*, 215 F.3d 1233, 1235–36 (11th Cir. 2000) (holding that the petitioner failed to meet the requirements of § 2244(b) to permit the filing of his subsequent habeas petition even though "the factual basis . . . of th[e] claim was not available to Provenzano at the time he filed his first federal habeas petition . . .").

<sup>99</sup> See, e.g., *Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253, 1269 (11th Cir. 2004) (en banc) ("The evolution has been toward greater finality of judgments through increasingly tight restrictions on second or successive petitions. We have gone from the days of the more permissive ends of justice and abuse of the writ standards . . . to the present post-AEDPA times, with a total ban on claims that were presented in a prior petition, § 2244(b)(1), and a near total ban on those that were not, see § 2244(b)(2).").

<sup>100</sup> *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003) ("The term 'second or successive' remains a term of art that must be given meaning by reference to both the body of case law developed before the enactment of AEDPA and the policies that prompted AEDPA's enactment.").

<sup>101</sup> *Id.*

<sup>102</sup> See *supra* notes 69–70 and accompanying text.

<sup>103</sup> See, e.g., *In re Provenzano*, 215 F.3d 1233, 1235–36 (11th Cir. 2000) (rejecting broad interpretation of *Martinez-Villareal* in holding that *Martinez-Villareal* did not conflict with *In re Medina*, 109 F.3d 1556 (11th Cir. 1997), which held a petitioner could not raise a *Ford* claim in a numerically second habeas petition).

<sup>104</sup> See, e.g., *Crone v. Cockrell*, 324 F.3d 833, 837 (5th Cir. 2003) ("[W]e look to pre-AEDPA abuse of the writ principles in determining whether Crone's petition is successive."); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998) (holding a later habeas petition is "second or successive" when it: "1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes and abuse of the writ.").

<sup>105</sup> See, e.g., *Richardson v. Johnson*, 256 F.3d 257, 259 (5th Cir. 2001) (holding that the petitioner could not raise a *Ford* claim in a numerically second habeas petition even though "the factual basis for the *Ford* claim could not have been discovered at the time of the [petitioner's] first federal habeas [petition]").



cases, the Fifth Circuit follows the “plain wording of § 2244(b)”<sup>106</sup> and holds such petitions are “second or successive” even if those petitions would not constitute an abuse of the writ.<sup>107</sup> Therefore, both the Fifth and Eleventh Circuits, in some panel decisions, have followed the majority of circuits in interpreting “second or successive” as a term of art that incorporates the abuse of the writ standards.<sup>108</sup> In other panel decisions, however, particularly when a petitioner’s subsequent habeas petition raises an incompetency-to-be-executed claim under *Ford v. Wainwright*, these same circuits have rejected this interpretation.<sup>109</sup> Instead, in these cases, they interpret the phrase “second or successive” strictly, according to the plain meaning of the terms.<sup>110</sup>

In reviewing the decisions of the courts of appeals then, three points become apparent: First, the First, Second, Third, Eighth, Ninth, and Tenth Circuits interpret the term “second or successive” as a term of art to incorporate the pre-AEDPA abuse of the writ doctrine.<sup>111</sup> These circuits also mistakenly state that their sister circuits are “uniform” in reaching this result.<sup>112</sup> Second, far from being uniform, the Seventh Circuit has expressly rejected the interpretation of “second or successive” adopted by the majority of other circuits.<sup>113</sup> Instead, it has declared that the abuse of the writ doctrine is “defunct,” and interpreted the phrase “second or successive” according to the plain meaning of those words.<sup>114</sup> Finally, also far from being uniform, the decisions of the Fourth, Fifth, Sixth, and Eleventh Circuits are not consistent with other decisions issued within their respective circuits. Different panel decisions in each of these circuits have interpreted the phrase “second or successive” under AEDPA in a way that is different from and in conflict with decisions by other panels within the same circuit.<sup>115</sup>

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<sup>106</sup> *In re Davis*, 121 F.3d 952, 956 (5th Cir. 1997).

<sup>107</sup> *See, e.g., id.* (“Although we agree that § 2244(b) is designed to prevent abuse of the writ, and will assume that [the petitioner] is seeking to assert his *Ford* claim at the first properly available opportunity, we cannot disregard the plain wording of § 2244(b) in order to create such an equitable exception.”).

<sup>108</sup> *See, e.g., Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998).

<sup>109</sup> *See, e.g., In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000); *Richardson v. Johnson*, 256 F.3d 257 (5th Cir. 2001).

<sup>110</sup> *See, e.g., In re Davis*, 121 F.3d at 956 (“[W]e cannot disregard the plain wording of § 2244(b) . . . .”); *In re Medina*, 109 F.3d 1556, 1565 (11th Cir. 1997) (noting that the “plain terms” of § 2244(b) applied to bar a successive habeas petition).

<sup>111</sup> *See supra* notes 56–65 and accompanying text.

<sup>112</sup> *See supra* notes 71–75 and accompanying text.

<sup>113</sup> *See supra* notes 76–88 and accompanying text.

<sup>114</sup> *See supra* notes 76–82 and accompanying text.

<sup>115</sup> *See supra* notes 90–113 and accompanying text.

#### IV. JUSTIFICATIONS FOR INTERPRETING "SECOND OR SUCCESSIVE" UNDER AEDPA TO INCORPORATE THE PRE-AEDPA ABUSE OF THE WRIT PRINCIPLES

The foregoing review of the circuit court decisions displays the conflict among the circuits in interpreting and applying "second or successive" under AEDPA. Accordingly, the Supreme Court needs to provide the courts of appeals with a clear, definitive interpretation of "second or successive." The Court should definitively define what constitutes a "second or successive" petition under § 2244(b) in order to resolve the split among the circuits, to curb the inconsistent decisions within individual circuits, and to ensure that the circuits uniformly interpret "second or successive" in the future.

If the Court decides to settle this issue—providing a clear, definitive interpretation of "second or successive" for the circuits to apply—it should endorse the prevailing view in the circuit courts: that the phrase "second or successive" in § 2244(b) is a term of art that incorporates the pre-AEDPA abuse of the writ doctrine. This interpretation of "second or successive" is more consistent with the Court's decisions in *Martinez-Villareal* and *Slack* than is a plain meaning interpretation of the phrase.<sup>116</sup> Indeed, both courts and commentators have noted that this interpretation "has been strongly suggested"<sup>117</sup> by the Court's prior decisions.<sup>118</sup>

Moreover, there are three additional reasons why the interpretation of "second or successive" as a term of art should be adopted over a literal reading of that phrase. First, interpreting "second or successive" to incorporate the abuse of the writ principles permits federal courts to hear claims of constitutional violations that would otherwise be barred by § 2244(b) if "second or successive" were read literally. The purpose of AEDPA's gatekeeping provisions, codified in 28 U.S.C. § 2244, was "to restrict habeas petitions from taking multiple bites at the apple."<sup>119</sup> In adopting a literal reading of "second

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<sup>116</sup> See *Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); see also *supra* notes 69–70 and accompanying text.

<sup>117</sup> *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005) ("Moreover, the abuse of the writ doctrine's ongoing validity as a means of interpreting 'second or successive' has been strongly suggested by the Supreme Court, which has implied that § 2244 is a statutory extension and codification of the equitable principles of the doctrine.").

<sup>118</sup> See, e.g., *id.*; 1 HERTZ & LIEBMAN, *supra* note 4, § 3.2, at 120–21 n.37 (noting that the Court interpreted "second or successive" by looking to the pre-AEDPA abuse of the writ doctrine); Dow et al., *supra* note 9, at 560.

<sup>119</sup> *Dunn v. Singletary*, 168 F.3d 440, 442 (11th Cir. 1999); cf. *Stevenson, supra*, note 8, at 771 ("[A] dominant metaphor in the debates over . . . AEDPA was that of 'successive bites of the apple.'"); Sarah A. Sulkowski, Comment, *The AEDPA and the Incompetent Death-Row Prisoner: Why Ford Claims Should Be Exempt from the One-Year and One-Bite Rules*, 6 LOY.

or successive” in § 2244(b), the Seventh Circuit stated that adopting the alternate interpretation of that phrase, as a term of art that incorporates pre-AEDPA principles, would give habeas petitioners “two bites at the apple.”<sup>120</sup>

On the contrary, the opposite conclusion is true. Instead of providing petitioners with multiple bites at the “apple,” interpreting “second or successive” to incorporate the abuse of the writ principles provides habeas petitioners with the opportunity to fully present all their claims in a habeas petition. This interpretation ensures that claims that are not available to a habeas petitioner at the time of their first habeas petition, because the claims are not known or do not yet exist, can be heard in a subsequent habeas petition if raising the claim does not abuse the writ of habeas corpus. In short, it ensures that habeas petitioners get one *full* bite at the apple.

In contrast, a literal reading or plain meaning interpretation of “second or successive” forecloses federal review of all constitutional claims that could not have been raised in a petitioner’s initial habeas petition.<sup>121</sup> Consider, for example, *In re Provenzano*.<sup>122</sup> Provenzano, a Florida death row inmate, sought authorization from the Eleventh Circuit to file a second or successive habeas application under 28 U.S.C. § 2244(b)(3)(A).<sup>123</sup> Provenzano’s habeas application raised, among other things, a claim that his imminent execution would violate the Eighth Amendment because Florida’s administration of lethal injection constituted cruel and unusual punishment.<sup>124</sup> The Eleventh Circuit recognized that Provenzano could not have raised this claim “at the time he filed his first federal habeas petition, because at that time Florida did not use lethal injection as the means of execution.”<sup>125</sup> Despite the fact that he could not have raised this constitutional claim earlier, however, the Eleventh Circuit, reading § 2244(b) literally, held that this claim was “second or successive” and

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J. PUB. INT. L. 57, 59 (2004) (“[AEDPA] limited second or successive petitions by instituting a ‘one bite at the apple’ regime . . .”).

<sup>120</sup> *In re Page*, 179 F.3d 1024, 1025 (7th Cir. 1999).

<sup>121</sup> *See, e.g., In re Davis*, 121 F.3d 952, 956 (5th Cir. 1997) (holding that a habeas petition is “second or successive” under the “plain wording of § 2244(b)” even though the petitioner sought “to assert his *Ford* claim at the first properly available opportunity . . .”); *see also* Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Anti-Terrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43, 71–72 (noting the problems with a literal reading of the 28 U.S.C. § 2244(b) and advocating for a nonliteral reading of the statute).

<sup>122</sup> 215 F.3d 1233 (11th Cir. 2000).

<sup>123</sup> *Id.* at 1234–35.

<sup>124</sup> *Id.* at 1235.

<sup>125</sup> *Id.* at 1235–36.

barred because it did not fit within either of the two narrow statutory exceptions in that section.<sup>126</sup> Accordingly, Provenzano was never able to raise his potentially meritorious<sup>127</sup> Eighth Amendment challenge to the method of his execution in federal court because of the Eleventh Circuit's literal interpretation of AEDPA.

Similarly, both the Fifth and Eleventh Circuits, interpreting "second or successive" according to the plain meaning of the words, have refused to allow petitioners to raise *Ford* claims in numerically second habeas petitions even though they could not have raised the claims in their initial habeas petitions or at any earlier time.<sup>128</sup> Indeed the Fifth Circuit held § 2244(b) barred a habeas petition, even though the petitioner "asserted[ed] his *Ford* claim at the first properly available opportunity" because, the court noted, "we cannot disregard the plain wording of § 2244(b)."<sup>129</sup> In each of these cases, following a literal reading of "second or successive" results in the conclusion that federal courts are without authority to consider or hear claims asserting constitutional violations even though those claims could not have been asserted at any other time.<sup>130</sup> It is evident then, as the Supreme Court stated in *Martinez-Villareal*, that the implications of a literal reading of "second or successive" under AEDPA are "far reaching and seemingly perverse."<sup>131</sup>

Therefore, instead of preventing two bites at the apple, a literal reading of "second or successive" actually prevents a petitioner from receiving one full bite of the apple by shutting the door of the federal courts on constitutional claims that cannot be raised in the petitioner's initial habeas application.<sup>132</sup> This result does not fit with the purpose of AEDPA, which was to limit only multiple, abusive bites at the apple and not to prevent one full bite.<sup>133</sup> As one commentator has noted:

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<sup>126</sup> *Id.* at 1236.

<sup>127</sup> *Id.* at 1235. On December 15, 2006, Governor Jeb Bush instituted a moratorium on all executions in Florida because of concerns regarding the "humanity and constitutionality of lethal injections." Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, N.Y. TIMES, Dec. 16, 2006, at A11.

<sup>128</sup> See *In re Medina* 109 F.3d 1556 (11th Cir. 1997); *In re Davis*, 121 F.3d 952 (5th Cir. 1997).

<sup>129</sup> *In re Davis*, 121 F.3d at 956.

<sup>130</sup> The particular problems for *Ford* claims under a strict interpretation of AEDPA's second or successive limitations have been well documented. See, e.g., Stevenson, *supra* note 8, at 740-51; Sulkowski, *supra* note 119.

<sup>131</sup> *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998).

<sup>132</sup> See Stevenson, *supra*, note 8, at 772 ("AEDPA's successive petition rules can operate to foreclose federal habeas corpus review of claims that could not have been litigated at the time of the first habeas corpus petition.").

<sup>133</sup> *Id.* ("[B]oth the language of the provisions and the underlying legislative history strongly suggest that Congress intended to ensure that petitioners would have at least one full,

Applying the no-second-bite rule makes no sense when a prior petition gave the prisoner what amounts to *no* bite at the apple—because the prior petition involved a different apple, because no bite was taken when the apple previously was before the court, or because no bite *could have been taken* at that time because the claim had not yet come into existence or would not have been cognizable at the time of the earlier petition.<sup>134</sup>

Thus, “[i]f a claim cannot be raised at the time of the first [habeas] petition because of legal or factual unavailability, the concept of ‘one bite’ requires that the prisoner be permitted to raise that claim once it becomes available.”<sup>135</sup> Interpreting “second or successive” to incorporate the pre-AEDPA abuse of the writ principles ensures that habeas petitioners get one full bite at the apple by permitting numerically second petitions to raise constitutional claims that could not have been raised in prior habeas applications.

The second reason why “second or successive” should be interpreted as incorporating the abuse of the writ principles is because a literal reading of the phrase creates illogical requirements for the filing of initial habeas petitions. Under the Supreme Court’s holding in *Martinez-Villareal*, a claim raised in a numerically second petition is not “second or successive” under AEDPA if the claim was raised in the petitioner’s initial habeas petition but dismissed for procedural reasons.<sup>136</sup> Some claims, however, such as *Ford* incompetency-to-be-executed claims, generally cannot be raised in a petitioner’s initial habeas application because they are not procedurally proper.<sup>137</sup> Under a literal reading of § 2244(b), however, any claims raised for the first time in a numerically second petition are always barred as “second or successive.”<sup>138</sup> Therefore, in jurisdictions that read § 2244(b) literally, habeas petitioners must raise *Ford* and other such claims in their

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fair opportunity to raise each meritorious claim at each of the levels of federal court habeas corpus review.”).

<sup>134</sup> 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.3a, at 275 (2d ed. Supp. 1997) (emphasis in original).

<sup>135</sup> Stevenson, *supra* note 8, at 772.

<sup>136</sup> See *Stewart*, 523 U.S. at 637.

<sup>137</sup> Stevenson, *supra* note 8, at 750.

<sup>138</sup> See *In re Davis*, 121 F.3d 952, 956 (5th Cir. 1997) (holding a habeas petition is “second or successive” under the “plain wording of § 2244(b)” even though the petitioner sought “to assert his *Ford* claim at the first properly available opportunity . . .”); *In re Medina*, 109 F.3d 1556, 1565 (11th Cir. 1997) (same).

initial habeas applications even though the court cannot hear the claim at that time.<sup>139</sup>

Petitioners must then waste time and resources "needlessly litigating a *Ford* [or other similar] claim at the wrong time" in their initial habeas application in order to preserve the claim so that it can be raised, if warranted, at the proper time in a subsequent habeas petition.<sup>140</sup> One district court judge noted this problem that results from a plain meaning interpretation of "second or successive" in light of *Martinez-Villareal*'s holding: the judge stated that if "second or successive" was interpreted literally, "[p]etitioners might then attempt to raise multiple unripe and unexhausted claims (claims with only a potential of ever arising) in first petitions, if only to preserve a right to bring such claims later."<sup>141</sup> This potential result has caused several lower federal courts to reject a literal reading of "second or successive" because "[t]hat reading of § 2244(b) would surely create a powerful and strange incentive to raise a claim at a time when it must be dismissed."<sup>142</sup> Interpreting "second or successive" as a term of art, however, avoids this illogical result.

Finally, the third reason why "second or successive" must be interpreted as a term of art that incorporates pre-AEDPA standards is because a literal reading of the phrase would raise serious constitutional issues. The Suspension Clause of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>143</sup> Courts and commentators have both recognized that a literal reading of § 2244(b) might violate the Suspension Clause by foreclosing all possibility of federal habeas review of constitutional claims raised by petitioners in certain situations.<sup>144</sup> In *James v. Walsh*,<sup>145</sup> for instance, the Second Circuit noted that "[d]enial of habeas relief in the present case may implicate the Suspension Clause, because it would constitute a complete denial of any collateral review of a claim that arose only after [the

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<sup>139</sup> Stevenson, *supra* note 8, at 750–51.

<sup>140</sup> *Id.*

<sup>141</sup> Poland v. Stewart, 41 F. Supp. 2d 1037, 1039 n.3 (D. Ariz. 1999).

<sup>142</sup> Schornhorst v. Anderson, 77 F. Supp. 2d 944, 949 (S.D. Ind. 1999); *see also* Poland, 41 F. Supp. 2d at 1039 n.3.

<sup>143</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>144</sup> *E.g.*, James v. Walsh, 308 F.3d 162 (2d Cir. 2002); *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997); 2 HERTZ & LIEBMAN, *supra* note 4, § 28.4a, at 1464; Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1128–36 (1998).

<sup>145</sup> 308 F.3d 162 (2d Cir. 2002).

petitioner] filed [his initial habeas petition].”<sup>146</sup> Because a literal reading of “second or successive” would have denied the petitioner habeas review, the court rejected a literal reading of the statute and interpreted “second or successive” according to pre-AEDPA standards.<sup>147</sup>

Because of these constitutional concerns, AEDPA’s “second or successive” language should be interpreted as a term of art that incorporates the pre-AEDPA abuse of the writ standards. One well-established canon of statutory construction provides that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>148</sup> The Supreme Court has already applied this rule of statutory construction to reject a literal reading of a different section of AEDPA.<sup>149</sup> Similarly, in the context of § 2244(b), a literal interpretation of “second or successive” raises serious constitutional problems by barring any federal habeas review of some constitutional claims.<sup>150</sup> Under the rules of statutory construction then, the statute should be construed to adopt the pre-AEDPA abuse of the writ principles. This interpretation of “second or successive” is proper because it avoids the constitutional problems raised by a literal interpretation and it is not contrary to the intent of Congress.<sup>151</sup> Therefore, interpreting “second or successive” to incorporate pre-AEDPA principles is a proper construction of the statute.

Accordingly, the interpretation of “second or successive” adopted by a majority of the circuits is the proper interpretation of that phrase. The alternate interpretation of that phrase, applying the plain meaning of the words “second or successive,” closes the doors of the federal

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<sup>146</sup> *Id.* at 168.

<sup>147</sup> *Id.*

<sup>148</sup> *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

<sup>149</sup> *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289 (2001) (holding that, even though statutory language precluded judicial review, AEDPA did not deprive federal courts of jurisdiction to review the habeas petition of an alien who was found to be deportable).

<sup>150</sup> *See, e.g.*, *supra* notes 78, 91, 96, 108–110 and accompanying text.

<sup>151</sup> As one commentator has noted, “[t]here is no indication that Congress intended to supersede [the] established meaning [of what constitutes a successive petition under pre-AEDPA law] rather than incorporate it into its undefined term ‘second or successive.’” Jeffrey, *supra* note 124, at 71. This lack of indication of congressional intent is likely the result of the poor statutory drafting of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (“All we can say is that in a world of silk purses and pigs’ ears, [AEDPA] is not a silk purse of statutory drafting.”); Stevenson, *supra*, note 8, at 705 (“As the courts and commentators have pointed out, AEDPA is replete with ambiguities and apparent inconsistencies.”); Anthony G. Amsterdam, *Forward to the Fifth Edition of 1 HERTZ & LIEBMAN*, *supra* note 4, at v (“[AEDPA’s] new rules are still being laboriously disentangled . . . . The statutory language teems with problems and non-obvious alternative interpretations that need to be identified and worked out . . . .”).

courts to review some constitutional claims raised in habeas corpus petitions, creates illogical incentives for habeas petitioners to raise claims at a time when they must be procedurally dismissed, and raises serious constitutional questions under the Suspension Clause.

## V. CONCLUSION

"It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."<sup>152</sup> Indeed, the Founders considered the writ "the highest safeguard of liberty."<sup>153</sup> An improper interpretation of AEDPA's limitations on "second or successive" habeas petitions, however, jeopardizes the availability of the writ of habeas corpus to redress constitutional violations. Indeed, the case law is replete with examples of federal courts shutting their doors and refusing to hear viable claims of constitutional violations brought by petitioners who raised their claims properly at the first available opportunity because they followed a literal reading of 28 U.S.C. § 2244(b).<sup>154</sup> Moreover, there are other significant problems that are raised by a plain meaning interpretation of "second or successive."<sup>155</sup>

The interpretation of "second or successive" adopted by a majority of the circuits avoids these problems by interpreting that phrase in § 2244(b) as a term of art that incorporates the pre-AEDPA abuse of the writ principles. A minority of the circuit courts, however, have continued to read § 2244(b) literally and interpret the phrase "second or successive" according to the plain meaning of those terms. One circuit court has flatly rejected the interpretation of "second or successive" in § 2244(b) adopted by a majority of the circuits creating a clear split among the circuits. Other circuits have been inconsistent in their interpretation of that phrase, interpreting it as a term of art in some cases but interpreting it literally in others. Accordingly, the Supreme Court needs to resolve this split among the circuits.<sup>156</sup>

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<sup>152</sup> Bowen v. Johnston, 306 U.S. 19, 26 (1939) (citing *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873)).

<sup>153</sup> Smith v. Bennett, 365 U.S. 708, 712 (1961).

<sup>154</sup> See, e.g., *supra* notes 78, 91, 96, 108–110 and accompanying text.

<sup>155</sup> See *supra* notes 137–154 and accompanying text.

<sup>156</sup> After this Comment was prepared for publication, the Court requested supplemental briefing on the issue of whether a habeas petitioner's application is "second or successive" under AEDPA in a case set for argument before the Court on April 18, 2007. See Panetti v. Quarterman, 75 U.S.L.W. 3530 (2007) ("The parties are directed to file supplemental briefs addressing the following question: Must petitioner's habeas application be dismissed as 'second or successive' pursuant to 28 U.S.C. § 2244?").

Previously during the October 2006 Term, however, the Court denied two petitions for a writ of certiorari that directly raised this issue as the primary question to the Court. See Lambert v. Buss, 75 U.S.L.W. 3497 (2007); White v. Houk, 127 S. Ct. 1263 (2007). The questions



Although the Court's prior decisions imply its approval of the majority interpretation, the Court needs to clearly decide the matter so that habeas petitioner's are no longer subjected to varying interpretations of AEDPA's restriction on "second or successive" petitions. When the Court decides the matter, it should adopt the majority interpretation of "second or successive" as a term of art that incorporates the pre-AEDPA abuse of the writ principles. This interpretation of 28 U.S.C. § 2244(b) is proper because it provides habeas petitioners with one full "bite at the apple" as intended under AEDPA.

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presented in the petitions for a writ of certiorari in both *White* and *Lambert* centered on the proper interpretation of "second or successive" in 28 U.S.C. § 2244(b). The first question presented in *White*'s certiorari petition was:

Is a petition for writ of habeas corpus that raises a claim that could not have been raised in a previous petition a second in time first petition under the abuse of the writ doctrine and an extension of the principles enunciated in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), or a 'second or successive' petition under 28 U.S.C. § 2244(b)?

Petition for Writ of Certiorari at 1, *White v. Houk*, 127 S. Ct. 1263 (2007) (No. 06-7858). The first question presented in *Lambert*'s certiorari petition was:

Where a prisoner raises a previously unripened constitutional claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application, is the 'second-in-time' petition considered a 'first petition' or would such a filing be a 'second or successive habeas corpus application' within the meaning of AEDPA?

Petition for Writ of Certiorari at i, *Lambert v. Buss*, 75 U.S.L.W. 3497 (2007) (No. 06-7758). The second question presented was: "Does the 'second or successive' language of 28 U.S.C. 2244(b)(2) incorporate this Court's abuse of the writ doctrine?" *Id.*

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